

ISFE contribution to the public consultation on the sustainable consumption of goods – promoting repair and reuse

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Introduction

1. ISFE shares the European Commission's conviction that addressing climate change is one of the most critical challenges of the 21st century and welcomes the opportunity to contribute to the public consultation on the sustainable consumption of goods.
2. The video games sector is committed to partake into the EU green transition, and launched in 2019 the UNEP-facilitated [Playing for the Planet Alliance](#) to encourage studios and players across the globe to learn more about the impacts of climate change through in-game content. Our members also developed [guidance](#) to support studios that are starting their environmental journey to reduce their impact.

Executive Summary:

Amendment to the legal guarantee framework under the Sales of Goods Directive (Directive (EU) 2019/771)

- **On pre-determining the consumer's remedy to favour repair over replacement (measures 1, 2 and 6 as per the consultation questionnaire)**

ISFE is concerned that measure 1 from the Commission, which would make repair always the preferred route, would lead to increased lengths in processing consumers' requests as well as an increase of repair costs for consumers, in turn incentivising them to buy new products instead of favouring repairs. Therefore, among the measures suggested by the European Commission, ISFE would favour measures 2 and 6 as these are measures that already have been proven successful by the repair and refurbishment activities of console manufacturers.

- **On extending the length of the legal guarantee period (measures 3 and 4 as per the consultation questionnaire)**

ISFE does not support measures 3 and 4 suggested by the European Commission. Extending the length of the legal guarantee would be beneficial only for a small minority of consumers, and does not outweigh the disadvantage which would apply to all consumers, being the higher cost of goods. However, should the Commission still decide to extend the legal guarantee period, any extension should respect a finite and reasonable period. The necessary safeguards should also be implemented to protect retailers from liability for repairs carried out by independent repairers.

New EU right to repair

- **On allowing sellers or independent repairers to perform repairs**

Providing independent repairers with too detailed information on repairability (such as diagnostic tools, detailed repair manuals) or on specific key parts of the product (e.g. proprietary components, internal batteries, etc...) would compromise the protection of video games developers' and games console manufacturers' intellectual property, and may hinder product quality and consumer safety. Therefore, ISFE recommends that the repair process should be managed by console manufacturers and that the European Commission includes similar safeguards in the future proposal to those included in Article 9(1)(e) of the Waste Framework Directive ([Directive \(EU\) 2018/851](#)).

- **On the scope and pricing of the new right to repair**

ISFE would recommend the Commission to clearly define situations in which a new right to repair would be applicable, and would favour a reasonable approach regarding pricing, the manufacturer being able to ask for a reasonable contribution in the case of defects that arise beyond the period of the commercial guarantee.

Background information

I- Amendment to the Sales of Goods Directive

On pre-determining the consumer's remedy to favour repair over replacement

3. Console manufacturers¹ recognise the importance for consumers to have access to durable goods that can easily be repaired. Under the [Games Consoles Voluntary Agreement](#), they offer consumers the possibility to repair and/or refurbish consoles in authorised repair centres during and beyond the commercial guarantee period, thus ensuring access to repair over the entire lifecycle of a console. For instance, it is still possible today to send an Xbox One to Microsoft's repair facilities, a console originally released in 2013 in Europe.
4. Game consoles are complex electronic products which often require thorough knowledge and skills to repair efficiently. Operators in authorised repair centres have access to the necessary information and are adequately trained to perform such repairs, meeting the required quality and safety standards expected by the consumer and required by European law². From the consumer's perspective, the high level of expertise of such repair centres also allows for faster processing of their defective products and out-of-warranty repairs, with a process lasting on average less than 14 working days³.
5. For a return within the manufacturer's commercial guarantee period, consumers are in some cases offered a replacement at the point-of-sale to ensure a quick resolution. The returned consoles are sent to authorised repair centres for assessment, where operators carry out diagnostic and refurbishment operations. Refurbished products are kept for consumer replacements for a console beyond economic repair or for resale. Alternatively, if the console is sent directly to the authorised repair centre, repair is attempted on the same unit and returned to the consumer. If repair is not possible, the pool of refurbished stock ensures there is a solution for every consumer. Any consoles beyond economic repair are harvested for reusable spare parts before sending to secure recycling facilities for disposal
6. The above ensures that consumers are offered repairs or refurbishment that are at a reasonable price, which would always be below the price required to buy a new product⁴. The whole process put in place by consoles manufacturers both prior to and under the Games Console Voluntary Agreement therefore favours repair and reuse over replacement by new products and contributes to a more circular economy, as it is substantially cheaper for consumers to get their consoles repaired rather than buying a new one.
7. ISFE is concerned that measure 1 from the Commission, which would make repair always the preferred route, would lead to delays in processing some consumers' requests, as they would no longer be able to get a replacement at the point-of-sale. In addition, some consoles may require difficult repairs which would as well mean longer waiting times for consumers to receive their repaired console.
8. Further, measure 1 could result in an increase to the cost of products contrary to the interests of consumers if manufacturers are required to repair in all cases instead of replacing with a refurbished

¹ Including Sony Interactive Entertainment, Microsoft Xbox, and Nintendo.

² [Directive 2001/95/EC](#) on general product safety

³ Depending on the repair performed and the country in which the repair has been requested, the length of the process can be further lowered to 6 to 7 working days.

⁴ Pricing can vary depending on the repair or refurbishment operations that must have been performed. The cost of such operations never exceeds 60% of the original price of the product, based on publicly available pricing at the time of writing.

console within the manufacturer's commercial guarantee period where it makes sense to do so.⁵ Measure 1 would also likely result in increasing the cost of out-of-warranty repairs, of extended service plans and of accidental damage plans that may be offered by manufacturers, thus leading to the unintended consequence of driving consumers to buy a new product instead of choosing these (more expensive) additional layers of protection.

9. **Therefore, and in line with the above, both measures 2 and 6⁶ as suggested by the European Commission would be approaches the sector would favour, as these are measures that already have been proven successful by the repair and refurbishment activities of console manufacturers, and which best achieve the circular economy objectives of the proposal.**

On extending the length of the legal guarantee period

10. ISFE considers that the recently revised Sales of Goods Directive which established a minimum two-year legal guarantee period for products with defects that existed at the time of delivery remains sufficient. Member States remain free to implement longer legal guarantee periods under national law at their election. There is insufficient evidence to require a change from the position then endorsed by the European Commission and other EU institutional bodies. The European Commission impact assessment in the review of that Directive found that 96% of problems with defective goods are discovered within the first two years from purchase.⁷ ISFE does not consider that capturing the remaining 4% by extending the legal guarantee period to the benefit of a small minority of consumers outweighs the disadvantage which would apply to all consumers, being the higher cost of goods. Retailers would need to plan for a potentially much longer time period for accepting returns and undergoing repair or replacement.
11. Should the Commission still decide to extend the legal guarantee period, it should refrain from aligning it with the concept of "average lifespan", as it is defined neither in EU law nor in European Commission guidance. ISFE is concerned that its application would be difficult, due to the fact that manufacturers may not be able to accurately assess the average lifespan of their product as this in part depends on a number of factors outside of their control, such as actual storage conditions, use and handling, in addition to the fact that they might not necessarily be able to assess the average lifespan of their product prior its commercialisation. Considering the difficulty for manufacturers to accurately assess the average lifespan of their own products, ISFE believes it will be equally, if not more, difficult for consumers to make such an assessment, and therefore to claim for the application of their rights under the legal guarantee.
12. Should the Commission still decide to extend the legal guarantee period, ISFE would rather encourage the European Commission to favour a specific, reasonable, and finite period. In particular, ISFE would recommend:
 - a. that any extension of the legal guarantee following a repair would be limited to an additional 6 months up to one year,
 - b. that the cumulative extension period for the legal guarantee following repair is limited in occurrences and time, and
 - c. to establish instead a harmonised approach regarding retention of spare parts by the manufacturer.

⁵ In such cases, consoles manufacturers currently favour refurbishment over repair, where most affected parts of the consoles would be sent to secure recycling facilities and replaced by new parts.

⁶ Measure 2: Determining the consumer's remedy when the repair cost is less than or equal to the replacement cost; Measure 6: Replacement of defective products with refurbished goods

⁷ European Commission (2017) [Impact assessment on the impacts of fully harmonised rules on contracts for the sales of goods](#)

13. Should the repair be performed by an independent repairer, the legal guarantee should either be transferred to the independent repairer, or cancelled as its application would apply liability on retailers for a repair they did not perform, and therefore cannot control regarding compliance with safety standards. It is therefore essential to add the necessary safeguards to the future proposal.
14. **ISFE does not support measures 3 and 4⁸ suggested by the European Commission. However, should the Commission still decide to extend the legal guarantee period, any extension should respect a finite and reasonable period. The necessary safeguards should also be implemented to protect retailers from liability for repairs carried out by independent repairers.**

II. On the new right to repair

On allowing sellers or independent repairers to perform repairs

15. The Waste Framework Directive ([Directive \(EU\) 2018/851](#)), which has been implemented in Member States on 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 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"**⁹. These three boundary conditions of accepted European law must be reflected in any future reparability proposals.
16. Games consoles are a complex environment in which many key internal components form part of a secure system relying on technological protection measures ("TPMs") and proprietary parts that are deployed to protect against intellectual property infringement. Importantly, the deployment of TPMs by the video games console manufacturers benefits all those who create and develop video games for consoles, and not just the platform holder. With a secure hardware system in which new titles can be created and published, developers (who are often SMEs) are more willing to make the financial investments necessary to support the development of new games because they have the assurance that their IP is protected. This in turn benefits the consumer who has more choice.
17. Authorised repair centres use proprietary diagnostic software that contains detailed proprietary blueprints to identify components within a console that require repair. Because most parts of a console form part of an encrypted system protected by TPMs to preserve the device against hacking and piracy of video games, console manufacturers cannot directly provide spare parts or similar diagnostic software to independent repair companies without compromising consoles systems and technology.
18. In 2019, the Joint Research Centre recognised that some repairs require "appropriate technical skills that most consumers do not have. If a product is not properly repaired, consumer safety could be compromised"¹⁰. 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, installing unauthorised components which does not meet the required technical specifications could lead a console to overheat and consume far more energy than usual.
19. In addition, third-party repair operator intervention could deteriorate the console beyond repair possibility, forcing players to invest in a new device if they wish to continue enjoying their games or, at

⁸ Measure 3: Re-starting the legal guarantee period after repair; Measure 4: Longer legal guarantee period

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

¹⁰ 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](#).

worst, cause damage or injury if the products' embedded safety or hardware security technologies are compromised. The cybersecurity of devices could also be compromised leading to privacy and fraud risks for manufacturers and consumers resulting in the loss of sensitive personal, financial or commercially sensitive information.

20. **Considering the above, ISFE:**

- **would recommend that manufacturers continue to manage the repair process of their devices and products, especially when the repair affects parts requiring access to proprietary information.**
- **is strongly concerned by the absence of any reference within the public consultation to the need to protect intellectual property, consumer safety and product quality as part of the establishment of such right to repair, and strongly encourages the European Commission to include similar safeguards to those included within the Waste Framework Directive (Article 9(e), Directive (EU) 2018/851)**

On the scope and pricing of the new right to repair

21. Under the current commercial guarantees, and according to EU law¹¹, consoles manufacturers already provide repairs through their authorised repair centres, and for free, for situations covered by the guarantee¹². The example provided in the questionnaire and the first option at Question Q6 suggest that manufacturers should bear the cost of repair for damage arising from accidental mishandling of the product. ISFE strongly opposes such a change to the current regime. Any new right of repair should be well defined to ensure that the commercial guarantee applies only to defects and does not cover cases where consumers damage their products (whether accidentally or deliberately), or when they do anything that could otherwise invalidate the commercial guarantee (through use of unauthorised software or accessories, modification of the device or failing to follow the manufacturer's instructions for instance).

22. Should the Commission decide to introduce a right to repair, and considering that console manufacturers provide repair services even several years after the end of the legal guarantee, ISFE believes it is fair to ask for consumers to pay for a price that at least cover the costs of the repair (e.g. labour costs, cost of spare parts) and includes a reasonable margin of profit.

23. **Considering the above, ISFE**

- **would recommend the Commission to clearly define situations in which a new right to repair would be applicable, while also including reasonable exemptions from its application.**
- **would favour a reasonable approach regarding pricing, the manufacturer being able to ask for a reasonable contribution in the case of defects that arise beyond the period of the commercial guarantee.**

¹¹ Sales of Goods Directive ([Directive \(EU\) 2019/771](#))

¹² See for instance SIE's [PlayStation 4 legal guarantee](#) and Nintendo of Europe GmbH's [24-Month Manufacturer's Warranty – Consoles in the Nintendo Switch Family](#)

About ISFE

ISFE represents the video games industry in Europe and is based in Brussels, Belgium. Our membership comprises of national trade associations in 15 countries across Europe which represent in turn thousands of developers and publishers in the member states. ISFE also has direct members, the leading console manufacturers and European and international video game companies, many of which have studios with a strong European footprint. They produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, mobile phones and tablets.

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, which enjoyed a growth in European revenues in 2020 of 22%, reaching a total market size of €23.3bn and employing some 90,000 people¹³. Today 51% of Europe's population plays videogames, which is approximately 250 million people, and 54 % of the players regularly play on consoles.

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¹³ ISFE Key Facts 2021 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/isfe-key-facts/>.