Ukie response to BIS call for evidence on Draft Directive on the Online Sale of Digital Content

Summary and recommendations

Ukie considers the Draft Directive should not proceed due to its impact on business models in the video games industry. It does not meet the de-regulatory objective of the Digital Single Market strategy and conflicts with existing and planned EU and Member State consumer law, causing confusion to consumers and businesses. As currently drafted the Draft Directive represents a significant departure from existing law and does not appreciate or take sufficient account of:

- **how video games and other digital content are developed and made available to the public,**
- **what the consumer expects when purchasing such digital content,**
- **the different types of data that are generated when such digital content is accessed,**
- **how that data is used by the developers and suppliers of such digital content, and**
- **the importance of the availability of such data to the digital economy.**

We recommend:

1. **The REFIT process and upcoming review of the Consumer Rights Directive should be undertaken to assess consumer law holistically before introducing a new directive such as this.**
2. **If the directive does proceed:**
   - **i) Digital content provided without a monetary price being paid should not be in scope of the directive. Defects in such content would, in most cases, not have an impact on the economic interests of consumers. If digital content provided without a monetary price being paid remains in scope, significant redrafting is required to avoid confusion for businesses and consumers.**
   - **ii) The proposals to restrict how content can be modified after consumers have purchased access would result in reduced digital innovation in the video games industry. Redrafting is required to clarify when modifications will justify remedies for consumers, or offering such updates will become too risky for businesses.**
   - **iii) Requirements to return data and content to consumers after they terminate a contract to access digital content do not reflect the realities of the market or consumer expectations. It would be unreasonably costly, or in certain cases technologically infeasible, for video games companies to comply. Furthermore, the directive contradicts existing data protection law which allows for the return of data to consumers.**

About Ukie

UK Interactive Entertainment (Ukie) is the trade body that represents over 250 businesses and organisations involved in the games and interactive entertainment industry in the UK.

Ukie exists to make the UK the best place in the world to make and sell games and interactive entertainment. In part, that relies on the UK having a balanced regulatory regime for consumer protection which is workable for industry. Ukie's membership includes games publishers, developers, console manufacturers and the academic institutions that support the industry.

Background

Ukie's *Blueprint for Growth* recommended that the UK should take an active role in negotiations across the Digital Single Market portfolio to champion the digital creative industries in which it leads the continent:

> "The strong, competitive market that already exists for games across the EU must be protected against unintended consequences from reforms to consumer law, copyright, geo-blocking and other areas."

Ukie worked closely with BIS throughout the development of what became the UK Consumer Rights Act 2015 (CRA) to ensure that the final law would achieve its aim: clarifying consumers' rights when purchasing digital content, without increasing regulatory burdens on businesses offering that content. Notably we were opposed to the inclusion of 'free' digital content, due to the confusion this would cause for businesses and consumers. We maintain that position in reference to the draft Directive.

Regulatory Burden of a New Directive

One of the Commission's stated aims in the Digital Single Market strategy is to *reduce* regulation on digital commerce, making the rules simpler and clearer for both consumers and businesses, in order to raise confidence and so increase trade flows across Member State borders.

Several proposals in the draft Directive directly contradict the existing position under the CRA, and the 2011 Directive on which it is based, to an extent that will cause significant regulatory confusion. The EU should be looking to build on the experience of those member states who have already tackled the issue of rights over digital content, under the existing Directive, rather than taking such a different approach. The difficulties caused are compounded in some instances by contradictions between the Recitals and the Articles in the draft Directive itself. We question the

need for a new Directive when reviews are already underway or due this year into existing EU consumer law.

The Commission is currently carrying out a REFIT Fitness Check of EU Consumer Law, to be completed by 2017. In addition, the Commission is scheduled to review the Consumer Rights Directive (CRD) whereby an evaluation of the provisions regarding digital content will be carried out. This process is due to be completed by December 2016 and its results will feed into the REFIT Fitness Check. In light of this, we strongly believe that it would make more sense for the Commission to first:

1. Bring the CRD review forward;
2. Deal with any perceived gaps; and
3. Only then look at new areas of legislation.

In the spirit of the EC's Better Regulation agenda, the EU should review existing regulatory burdens in this area and streamline the existing instruments before proposing new rules and red tape.

We recommend that the UK government propose this new approach in discussion of the Commission's draft Directive. If this proves impossible, we raise below the most significant problems with the current draft that will cause difficulties for our industry.

Scope – digital services and 'free' digital content

The draft Directive's definition of digital content, contained in Article 2.1, is extremely broad. It encompasses "a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer" and "a service allowing sharing of and any other interaction with data in digital form provided by other users of the service". Combined with the inclusion in scope of 'free' content, which is currently unclear in the breadth of its application, this definition potentially opens up any number of free services, including basic websites, to the provisions of the directive.

The inclusion of both digital content and services presents risks. Services and content are enjoyed in different ways by consumers and understood to be different offerings. This has resulted in Member State and EU law traditionally separating services from other offerings, as was the case when the UK passed the 2015 Consumer Rights Act.

Conflating digital content and services as proposed in the draft Directive directly contradicts the Consumer Rights Directive and its implementation at a national level. This in itself is relatively new law, careful transposition of which has created balanced positions in those member states which have adopted it.

If there is found to be a need to classify certain digital offerings as services, then consumers should be given the rights and remedies relevant to services as under existing legislation. It is notable that the draft Directive uses the term "service" in

Article 2.1 but does not appear to use that term anywhere else. At minimum there should be a clarification of the Commission's meaning of 'service' in this context.

We point to the CRA's treatment of multiplayer functionality of games as an example of how the CRD has allowed for a balanced position to be found. Under Section 39, the CRA treats this aspect of digital content as "continued transmission", without the need to classify it as a service (see also BIS guidance on the CRA "Digital Content: Guidance for Business" (September 2015) at p.23, section 6). This allows proportionate remedies to be offered to consumers where necessary, without the significant regulatory change that the draft directive would appear to require.

The draft Directive does reference contracts for digital content to be "supplied over a period of time" in Article 6(3), which could be similar to the concept of "continued transmission" in the CRA. However, it is not clear whether this expression refers to contracts for the supply of services as defined in Article 2(1), the supply of digital data or both. Clarification should be provided on what is meant by "supplied over a period of time" in this context, how it interacts with the provisions on digital services and digital content, and how this differs from the provisions already in place under the CRD.

'Free' Digital Content

We have significant concerns about the treatment of digital content (or services) provided for a counter-performance other than money in the draft Directive. The drafting of this provision and the several exceptions to it suffer from unclear and overlapping definitions, fail to understand business models that are central to the modern digital economy, and would cause significant uncertainty for the games industry and many other digital sectors.

Under Recitals 13 and 14 and Article 3, several different definitions are introduced to determine whether free digital content is in scope of the directive. These include whether the consumer "actively" provided data; whether the data is used for "commercial purposes" and whether the data is "necessary for the digital content to function". These definitions are insufficiently clear and often overlapping, and as currently drafted will cause significant confusion for both businesses and consumers.

For example, no definition is given in Article 3(1) of what constitutes the 'active' provision of 'counter-performance' by consumers, as opposed to 'inactive' provision. Recital 14 is intended to assist in understanding active vs inactive, however it states that access to photos by contractual agreement is 'active' provision, but access to or storage of data (such as a cookie) on a device would be 'inactive' even though the Directive on privacy and electronic communications require a user to actively agree to such access or storage. This leaves confusion as to whether a particular supply of digital content not for money is in scope or not.

It is also not made clear in Article 3(4) how to identify (i) when personal data would be considered to be processed in a way that is "incompatible" with the purposes of

performance of contract or for meeting legal requirements or (ii) when use of other data would be considered to be for commercial purposes. It seems particularly important to provide greater clarity on what is meant by "commercial purpose". Merely analysing data obtained from an app about, for example, how many times it has been played, and benchmarking this against other apps to evaluate success might be said to be for a 'commercial purpose'. It is not clear whether such activity is intended to be covered. There would seem therefore to be significant ambiguity about when the exception in Article 3(4) applies.

Depending on how these varying definitions are interpreted, it could mean:

- the directive is intended to cover almost any digital content, service or website currently offered without charge.
- the directive is only intended to narrowly cover content provided either for money or for personal data provided by the consumer, unrelated to the nature of the content, that the supplier will then sell on to a third party for direct commercial gain.

Freemium games and use of data

The most pertinent example in considering the impact of the draft directive is that of the freemium, or free-to-play, business model that is increasingly prevalent in online and mobile games. This business model, as demonstrated by recent research conducted by Deloitte for ISFE (attached with this submission), has provided significant economic and cultural benefit for European citizens and economies, and is a vital component of the modern digital economy.

Under this model, consumers can download and play apps or games for free and are then given the choice to pay for extra features or content through optional in-app purchases. As demonstrated by Deloitte's research, the vast majority of players – over 95% in many cases – will spend nothing, and the game is funded entirely by that small percentage who do choose to spend.

Data is collected by such games for a variety of purposes, and it is unclear which of these the Commission intends would qualify as 'commercial purposes' under the Directive. In March 2015 we provided a submission to the Competition and Markets Authority for their "Call for Information on the Commercial Use of Consumer Data", setting out how the games industry collects and uses consumer data. We include here an excerpt from that submission, which is also attached in full with this document:

Data Collection

The collection of data is determined to a large extent by the platform on which the game is offered, as it is often through the platform that the data is obtained.

The collection of data for games that are purely or temporarily (such as when on an airplane) played offline is limited. Social interactions such as chat, ranking, sharing achievement or

live multiplayer modes of gameplay aren't possible in these scenarios. Nevertheless some data, such as user name and game progression, remain stored on the device to enable the player to be able to continue playing a game from the stage reached in their last gaming session. This information is not collected by the games companies unless an online connection of the game is activated and even then what may be collected is dependent on other factors as discussed further below.

Conversely, games that are played online collect different categories of data. Data is collected for the proper operation of the game and to otherwise provide an excellent gaming experience, or to prevent cheating, and/or to comply with law or regulations. In some games, games companies may collect information such as username, date of birth and email address as part of the set-up of a player account. This information may be used by a player to manage inter alia, their generic account settings, their games' library, facilitate a purchase, and for customer support purposes.

When a game is played online, further non-personal information may be collected as discussed further below. The interaction and associated data flow between players, game and/or platform is more intrinsic and serves various purposes. At its most fundamental level, for connected games, the associated game servers may collect and send various types of data purely to provide the correct connection to the game for the relevant player's device or platform.

Other data may be collected to improve the game and player experience.

Analytical Data

Games typically collect and use metrics and metadata for use in an aggregated anonymous manner to get a deeper understanding of the gameplay and player behaviour within the game.

Data on in-game behaviour can be used to assess how players interact with different parts of the game; which characters are more popular with different types of player; how different level designs lead to different player behaviour; how many attempts players will make at a task before becoming frustrated; or whether there is the right balance between different characters, character types, features and other factors in multiplayer games. Meaningful conclusions can only be drawn by examining how thousands (if not millions) of players are acting, not how individuals act thereby facilitating market research and product development decisions.

Data could also be collected to provide bug reports to improve the game as well as any challenges arising from the complexity of the gameplay itself.

Many companies have developed their own analytical tools to perform these functions, others use third-party analytic tools. Individual game analytical data in an anonymised and aggregate form may be combined with equivalent data from other games, allowing for market data to be published against which companies can compare their respective performance. This will cover a wide range of metrics, such as average session time spent playing a game, user acquisition and retention rates, and conversion of players into paying customers.

A Personalised Gaming Experience

Games may collect the age or location of the user to provide a safe or appropriate version of the game. For example, this information may determine if advertisements will be displayed in a game or whether to provide access to social interactions, such as chat sessions or social network connections. Where a player is able to enable social interaction they can share their achievements and performance in a game on their social networks, maintain a friend's list

and ranking for a game, invite and challenge friends to play a game, and communicate with their friends in-game.

Considering the undue burden created by the proposed remedies – addressed in detail below under “Termination of Contract” - this will cause significant difficulties for businesses offering what is now the predominant business model in this section of our industry.

If it is decided to continue with this course, we recommend that both the recitals and articles be re-drafted to make it clear precisely which interactions between consumers and suppliers will be considered to be in scope. Ideally this should be focused only on those interactions where the consumer understands that they are providing personal data, unrelated to the content they wish to enjoy, which the supplier will then use for further commercial gain unrelated to the content itself.

Modification of digital content

The recognition in Recital 45 that modifications made to digital content are “often to the advantage of the consumer as they improve the digital content” is welcome. However, the wording of the rest of the recital, particularly when considered in combination with Article 15, creates uncertainty as to how suppliers of digital content will be allowed to make such modifications.

In particular, it is unclear whether the language of Article 15 only applies where the changes being implemented “adversely affect access to or use of the digital content by the consumer” or whether they apply with respect to any modification made to the content.

If this uncertainty remains in the Directive, there is a risk of a chilling effect: the common practice of games providing regular updates and new content for consumers will become riskier for businesses, again restricting innovation and punishing a business model which has proven extremely popular with consumers. Furthermore, requiring notification to the consumer in advance, on a ‘durable medium’ (assuming an email is the minimum sufficient to meet this description), would result in a large volume of communication with consumers which they would find mostly irrelevant.

Requiring notification on a durable medium, particularly email, increases the risk of the notification not being brought to the consumer’s attention. ‘Spam’ filters will often block such notifications, and consumers will often use secondary email accounts to access digital content in order to reduce the number of such notifications they receive to their primary account. Consumers decreasingly use email, and requiring its use, or other durable media, for notifications would be to the consumer’s detriment.

To reduce the risk from this proposal, it should be made clear that:

- This only applies to modifications which could reasonably be said to be significant changes to the core functionality of the content (e.g. the removal of a form of gameplay from a game), as opposed to the addition of content or minor changes to functionality/performance.

- Platform-relevant notifications (e.g. in-game pop-ups) directing consumers to information in a permanent online location qualify as sufficient notification.

Allowing consumers to automatically terminate the contract on receipt of such a notification is particularly likely to inhibit innovation, as it raises the possibility of any game update causing significant financial loss to a publisher. This provision makes it all the more important that it is only applicable to modifications making significant and intentional changes to the core functionality of the content.

The UK CRA reflected industry practice in recognising that the online aspect of digital content (e.g. online player mode within a videogame) is not provided on an open-ended perpetual basis and can be withdrawn after a reasonable time. This is also recognised in the BIS "Digital Content: Guidance for Business" (September 2015) at p.23, section 6:

> "Some types of digital content may be sold on a disk but then accessed in an online environment for their full functionality (e.g. a massively multi-user online game, or MMO). Other types of digital content are accessed entirely online such as an online newspaper subscription. In these cases you must provide the online aspect of the digital content for the time period stated in the contract, or if there is none, for a reasonable period of time. The digital content must also meet the quality standards (satisfactory quality, fit for a particular purpose, as described) for that period of time."

The draft Directive should reflect industry practice, consumer expectation and the current legal position that online gameplay, and other digital content provided on an ongoing basis, is not provided on a perpetual basis and can be withdrawn after a reasonable period of time.

Termination of contract

We agree with BIS's concern, from the call for views document, that the proposed rules on the return of data to the consumer in the event the contract is terminated are "very broad and potentially onerous for business". The proposals are unclear and potentially damaging to online games.

Article 13(b) and (c) use 'data' and 'content' as interchangeable terms. It seems to require that any data *or* content generated by a consumer's use of digital content should be made available to them to retrieve "without significant inconvenience, in reasonable time, and in a commonly used data format". This is, as BIS note,

extremely broad, and does not appear to take into account common practices in many areas of digital content, including games.

Large amounts of the data generated by a player of a game will have no future relevance to the player and will be impossible to return to them, particularly in any "commonly used data format" as required by the draft directive. For example, data will often be collected, for aggregate use, on the choices made by players, their success and failure at different parts of the game, their interactions with other players, and many other aspects of play. This information will be used to modify the game and how it is presented to players on an ongoing basis, such as by changing the difficulty of different challenges it poses. There is no technological method in place, nor any demand from players, to 'return' such data to them should they choose to terminate their contract. Yet the directive as currently drafted would require suppliers to make sure this was possible for all games.

This is similarly applicable to content generated by players, as well as data. Many games heavily feature user generated content, allowing players to create and manipulate everything from character clothing to entire planets. These creations are entirely dependent on the context of the game in which they are presented, not least the software on which the game relies. There is no technologically feasible manner in which, for example, a fully three-dimensional castle designed by a player in Minecraft can be made possible for them to 'retrieve' from the game should they terminate their contract to play it. They would have no software other than the Minecraft application itself, which they had just terminated their right to use, with which to view or interact with the content they had created.

The provision will also contradict existing intellectual property law. In many cases the consumer will have paid for a licence to access the game, and it will be stipulated that creations within the game remain the intellectual property of the publisher. This is a settled and accepted situation in existing law, which the Commission is seeking to change through consumer rights legislation.

The proposed approach under the draft Directive is also unworkable where the consumer retains ownership over creative content, but provides a broad licence to other consumers and the publisher to use that content without restriction. In an interactive entertainment context, it is likely that the consumer's creations are based on software tools, assets, tools etc. owned by the publisher and thus, it is extremely difficult to split out the intellectual property rights between the consumer and the publisher from a legal perspective. It is also technologically unworkable from a practical perspective without rendering the content functionally useless. The approach proposed by the draft Directive is therefore not only unworkable but would also be detrimental to consumers.

With regards to the return of data, data that is personal may already be obtained by the consumer as a subject access request under the Data Protection Directive. This right is further increased and a new right of portability is included in the soon to be approved General Data Protection Regulation. As a result there is already sufficient

protection for consumers in this area that has been the subject of significant negotiation. To the extent data is not personal, i.e. does not relate to an identified or identifiable individual and is anonymised, then it will be impossible to return the data to the individual as the supplier will simply not know which individual(s) the data relates to.

The draft directive does make an exception for "content which has been generated jointly by the consumer and others who continue to make use of the content". However this would capture only a small proportion of the content in question. It would seem to place a distinction between multi-player and single-player games into law, for no benefit to the consumer.

Right to Terminate Long Term Contracts

A further significant change from the status quo is presented in Article 16. After 12 months of any contract, consumers would have the right to give notice *at any time and by any means* to terminate the contract, with termination taking effect 14 days after the receipt of the notice.

This is concerning for two reasons. Firstly, allowing notice to be given "by any means" is exceptionally broad and ill-defined. It introduces an unacceptable degree of uncertainty for businesses, who would have to monitor all possible means of communication for notices from long-term consumers.

Furthermore, the 14-day notice period for termination after 12 months gives businesses no incentive to provide consumers with a longer term deal in exchange for lower costs. This can be illustrated in the following example based on a payment model where a consumer pays *in advance* for a subscription period where the *cost is tailored to the consumer's level of commitment.*

Subscription period	**Amount to pay in advance**	**Monthly equivalent**
1 month	£5	£5
3 months	£12	£4
12 months	£40	£3.33

After the expiry of the chosen subscription period, the consumer rolls on for an equivalent period and pays the appropriate subscription fee in advance.

Under the draft Directive, a consumer who chooses a 12-month subscription period could terminate at any point after the initial 12-month period. If they chose to terminate at month 15 (i.e. 3 months into the second 12-month period), the supplier would refund them for the unused 9-month period on a pro-rata basis.

The net result is that the customer would have paid the monthly equivalent of £3.33 for those 3 months (a reduced cost based on a 12-month commitment), even though

the commitment was actually for 3 months only – which would otherwise have attracted a monthly cost of £4.

The position could be alleviated by allowing consumers to cancel *with effect from the next billing date* (rather than at any time after the initial 12-month period). Thus, a consumer in the above example with a 12-month subscription period could opt to cancel a *third* 12-month term, but could not cancel on a pro-rata basis once the second 12-month term had commenced. In addition to the point highlighted above, the position under the draft Directive may also introduce logistical difficulties for providing refunds to customers in forward-looking billing arrangements.

The Directive has been drafted without consideration to this and other business models, which have evolved in response to consumer demand. It will reduce consumer choice and increase the regulatory burden on businesses.

Definition of 'Supplier'

For the purposes of the Directive a Supplier is defined as "any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession." (Article 2).

When combined with the Recitals as well as Articles 5, 10 and 15, there is not a clear enough definition to determine who is the Supplier. Not having a clearly identified Supplier will generate significant uncertainty, particularly within an industry as international as games.

Recital 47 introduces the concept of a "final supplier" and implies that this is the entity that consumers should be seeking remedies from, however this concept of "final supplier" is not mentioned anywhere else in the text. It reads as follows:

> "The lack of conformity with the contract of the final digital content as supplied to the consumer is often due to one of the transactions in a chain, from the original designer to the final supplier. While the final supplier should be liable towards the consumer in case of lack of conformity with the contract between these two parties, it is important to ensure that the supplier has appropriate rights vis-a-vis different members of the chain of transactions in order to be able to cover his liability towards the consumer. *However, it should be for the applicable national law to identify the members of the chains of transactions against which the final supplier can turn and the modalities and conditions of such actions."*

Article 5 introduces further uncertainty:

> "(1) When performing the contract for the supply of digital content, the supplier shall supply the digital content to:
> (a) the consumer; or
> (b) a third party which operates a physical or virtual facility making the digital content available to the consumer or allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content.

(2) The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise. The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier."

This implies that the entity which put the digital content onto the market (e.g. the publisher) is the Supplier for the purposes of the Directive and that other actors in the supply chain are third parties.

This seems to reverse the position under existing EU and UK law, in which the party to whom the consumer pays their money – typically the platform or store – is seen as the supplier, and is the party from whom the consumer can seek remedies. This is also the common understanding among consumers: they will seek redress from the business from which they bought the goods, services or content.

It is not clear from the Recitals and Articles whether this is the intention of the Commission. As currently drafted however the Directive would introduce this confusion, again increasing the regulatory burden on both businesses and consumers.

Timing of Supply

Article 5(2) requires the supplier to "supply the digital content ***immediately after the conclusion of the contract***, unless the parties have agreed otherwise".

This is at odds with the framework under Article 16 of the Consumer Rights Directive, where a consumer loses the right to cancel as soon as performance of the contract begins, provided the consumer has given express consent and acknowledged the loss of rights, which mitigates *against* immediate supply.

Clarification is needed on how this is to be interpreted. As it stands, it would appear that this new Directive directly contradicts the existing CRD. The CRD, in its application in the UK, requires businesses to wait for two weeks before supplying the content to consumers, unless they give express consent. The draft Directive requires content to be supplied immediately to consumers, again unless they give express consent otherwise.

Once more the draft Directive would, by directly contradicting existing well-understood law, create significant confusion and increase regulatory burdens.

Conformity and legacy packaged goods

Article 6(4) requires that the digital content be provided "in conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract". Many games will be offered in digital form online, as well as in physical form as packaged goods. While the former will almost always be offered as

the most up-to-date version, or with updates available to download, packaged versions available in stores at the same time will not include any updates released since the time they were manufactured. These updates may not be available if the consumer does not have internet access.

It is not clear whether the supplier of the physical version – which under the definitions in the Directive would be classified as digital content – would be breaching this conformity rule by not including updates that have been released online since it was manufactured.

This is another area of possible confusion which should be clarified to avoid business detriment.

Conformity and other persons in the supply chain

Article 6(2) requires that the content conform to "any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that (i) he was not, and could not reasonably have been, aware of the statement in question."

This is an extremely broad provision, creating the potential for many situations in which the supplier would have no control over statements being made that would require conformity. It is particularly onerous as it would require the supplier to prove a negative, that he "could not reasonably have been aware" of the statement.

Significant business confusion would be caused by this provision, again increasing the regulatory burden for no evident improvement for consumers.

Conclusion

Ukie members have very strong concerns about the draft Directive. As it is currently proposed, the draft Directive on the Online Sale of Digital Content poses real risks to the regulatory, business and consumer environment that has enabled digital innovation to flourish.