

A PRACTICAL VIDEO GAMES INDUSTRY GUIDE TO THE UK'S CONSUMER RIGHTS ACT 2015

SUMMARY

1. UK consumers now have stronger consumer protection rights regarding digital content including video games.
2. By law, games must be (i) of “*satisfactory quality*”, (ii) “*fit for purpose*” and (iii) “*as described*”.
3. If a game does not meet these standards at the time of sale, a consumer will be entitled to a repair, replacement or reduction in price.
4. These obligations apply to both UK and non-UK games companies (although any enforcement attention will likely focus on UK companies).
5. How these new legal requirements will be applied in practice is largely uncertain right now – at present what partial guidance we do have seems to set the compliance threshold quite low (which is good for games companies). Nonetheless, over time these new consumer rights are likely to make their presence felt in the UK video games industry.

INTRODUCTION

On October 1st 2015 the UK's [Consumer Rights Act 2015](#) (the “**Act**”) came into force, which grants consumers stronger rights than ever before. This is particularly true in relation to ‘digital content’ products, including video games of all kinds.

What is covered by the Act? Importantly, the Act only applies to transactions between a business and a consumer, which normally (but not always) means an individual buying a game for personal use. The types of transactions covered by the Act include (i) selling or giving away for free physical copies of a game, and (ii) selling digital copies of a game. Some examples:

- When physical or digital copies of a game are sold from a brick-and-mortar store
- When physical copies of a game are given away for free
- When digital copies of a game are sold online via a website or service such as Steam, the App Store, PlayStation network or Xbox marketplace
- Where a free to download game contains in-app-purchases (IAPs)
- Where a digital game is sold as early access
- Where a digital game is given away for free when the consumer buys some other physical product (e.g. a free demo disc provided with a magazine)

What is not covered by the Act? It seems that free digital content is not covered.

What does it mean if the Act applies? If the Act applies to a transaction then the consumer is entitled to expect their game will meet certain quality standards; if it does not, they have various remedies against the seller (see below).

My business is not based in the UK – does this still affect me? Technically the Act applies to transactions whenever the consumer is located in the UK, regardless of where the seller is located. It remains to be seen exactly how strictly the UK authorities will apply these new requirements to non-UK sellers. In our experience it is likely any regulatory focus will be on UK companies or international companies with a UK establishment. We cannot exclude entirely the potential for non-UK companies to face regulatory action under the Act, although past experience suggests that this is likely to happen fairly rarely. The reality is that games companies (e.g. distribution platforms) using international consumer legal agreements are probably unlikely to make substantial amendments to them due to legal changes in any one EU member state (at least in the short-

medium term). However, if a games company has created UK-localised consumer legal documents then it certainly should update them accordingly.

I don't make the games, I just sell them – is this relevant to me? Yes – if you are selling games to consumers, the Act applies and consumers will have direct remedies against you for faulty games.

Can I exclude these consumer rights in the sales contract? No – by law these cannot be excluded.

QUALITY STANDARDS

To comply with the Act, a digital game would have to be: (i) of satisfactory quality, (ii) fit for purpose, and (iii) as described. If it is not, buyers can exercise their consumer rights of repair, replacements and refund (explained further below).

Satisfactory Quality

Basically, **at the time of sale** a game must meet the standards of an objective, reasonable person taking account of all the relevant circumstances, such as the price and description of the game given to consumers.

Does this mean if someone doesn't like the game they can return it? No – subjective / personal opinion is irrelevant when considering what an objective, reasonable person would consider satisfactory quality.

Does this mean my game has to be completely bug free on release? No – The UK Department for Business, Innovation and Skill (BIS), which gives [guidance](#) on how the Act is *likely* to be interpreted, states that an objective and reasonable consumer is likely to expect a certain amount of minor bugs / defects in complex products like video games. This means a game can still be of satisfactory quality, even if it has small problems.

What counts as a minor problem? We do not exactly know yet, but [BIS guidance](#) seems to set the bar pretty low, commenting that a game with a “*minor defect that does not affect gameplay but very occasionally causes the background to momentarily freeze*” could still be of satisfactory quality. A major defect is likely one that severely impacts core gameplay, or prevents the entire game or a part of it from operating at all.

What if my game only costs 69p or £12 – are lower standards applied to cheaper games? Possibly, yes; the price paid for a game is a relevant factor when deciding if it is of satisfactory quality and [BIS guidance](#) states “*the higher the price, the higher standard that would be considered satisfactory.*” However, even very cheap games must still function at their core.

Does a general disclaimer stating the game is not bug free protect me? No – Sellers *may* be able to protect themselves by bringing the problem to the consumer's attention before buying the game via a *problem-specific* disclaimer, but a general disclaimer that the game will contain bugs will not be sufficient.

How will early access games be judged? This is a new and untested concept, but the standards to be applied will be the same as for finished products – what would the objective, ordinary person consider reasonable in the circumstances? It is likely that a lower standard of quality will be judged reasonable but the description of the game given to consumers before purchasing is likely going to be highly relevant.

What if the game itself is compliant but the online servers aren't working properly and users cannot log in? We do not know for sure yet, but [BIS guidance](#) seems to suggest that if consumers are prevented from playing the game due to problems with servers, the game itself will probably not be considered of satisfactory quality.

What about IAPs? The core free game itself does not seem to be covered by the Act since it only applies to sales of digital content. However, it would capture IAPs bought with real money or using a virtual currency (e.g. gold, jewels) which are bought for real money. This means that while a consumer would have no remedy if the free game itself is broken, they may if things like extra levels or items they bought were broken or inaccessible.

Do I have to continuously update my game to work on all future operating systems? Probably not - while most developers will want to do this anyway, it is unclear whether this will be considered a legal requirement

or simply best practice. An element of satisfactory quality is durability, which could arguably include ensuring the game works on operating system updates. However, as the determination of quality is determined at the point of sale, if your game works on the operating systems you have described as being appropriate in the game description, this will likely be of satisfactory quality.

Fit for a Particular Purpose

This criteria is perhaps less relevant to games than other digital content created for specific users. However, this test requires that if a consumer makes known to a seller that they intend to use a game for a particular purpose (e.g. teaching maths to their children) and the seller confirms it is suitable, then the game must indeed be fit for that purpose.

As Described

The basic idea here is that a game must match any description of it that is provided by the developer to consumers (e.g. game descriptions and promotional materials).

Are there certain things I must tell the consumer about before selling the game? Yes – this is required under wider EU law and includes information about the main characteristics of the game as well as any known hardware / software compatibility issues. Again, exactly how this is meant to work in relation to games has not yet been fully legally established.

What if I want to update the game – does it still have to match the original description? Yes – you are allowed to update, fix, develop and expand on the game’s original features (as long as the contract between yourself and the consumer explicitly permits you to perform updates) so long as the game still complies with the original description. This seems to mean that you could add a new feature (like online multiplayer), but you could not completely remove it if that was in the original description. It is also important to note that every time you update a game, it must continue to satisfy these 3 quality standards tests.

If a consumer complains about a game, do I have to prove it meets the statutory requirements? No – it is for the consumer to prove that the game fails to meet these standards at the time the consumer bought it.

REMEDIES (DIGITAL CONTENT ONLY)

What are the consumer’s potential remedies? (i) 14 day right to return, (ii) Repair or replacement, and (iii) Price reduction.

14 day right to return

If you sell games to consumers online, by law they have 14 days to change their mind and cancel the contract, even if nothing is wrong with the game. Sellers can include a term in the sale contract though that consumers lose this right once they have started to stream or download the game (though exactly how this works has not yet been fully tested).

Repair and Replacement

Before consumers can request a price reduction they must request a repair or replacement of the game, which a seller must provide in “a reasonable time”, covering all costs and without “significant inconvenience” to the consumer (though exactly what that means has not yet been legally established).

Repair or replacement – which one applies? This will be up to the consumer. However, a consumer cannot demand one option over the other if it would be impossible or disproportionate for the seller to do.

What would replacement be? This would be useful where the problem is within a specific copy of the game or a problem occurred during the original download, which could be resolved through downloading a new copy. Clearly though it may not always be so clear-cut for digital games.

Would a patch count as a repair? Yes, in our view (though this has not been fully legally established yet).

What is a reasonable amount of time? This will vary in each case and will likely be judged against industry standards; how long would it normally take for a similar developer to write and distribute a patch to correct similar problems in a similar game. It is reasonable to assume this would be interpreted bearing in mind the intricate nature of game development and how difficult it can be to remedy some bugs.

Price Reduction

A price reduction is only available where repair or replacement is impossible, unreasonable, or has failed.

What is an appropriate price reduction? There is no legal guidance yet and it will likely depend on evolving industry practice. Clearly it will depend heavily on the state of the game at the time of the request and could even be the full price paid by the consumer. The consumer cannot recover more than he/she originally paid.

What if the consumer does not agree with my offered price reduction? While it would always be best to try and resolve issues amicably with consumers, next steps would involve discussing alternative dispute resolution methods with the consumer, or even possibly court action.

When do I have to make this payment? Within 14 days of agreeing an appropriate reduction.

Time Limits

How long do these remedies remain open for consumers? Generally, 6 years from the date of original sale in England and Wales and 5 years in Scotland (as long as the consumer can show the game was faulty at the time of sale). Regarding updates (which must also meet the above quality standards), this time period starts running from the date of the original game's sale, not the date of the update itself.

REMEDIES (PHYSICAL GAMES/MIXED CONTENT)

Where a game is sold on a physical format such as a disc, USB or cartridge, this would be considered a "mixed contract" under the Act as it is a combination of both digital and physical goods. The quality standards described above would still apply here, and if the game failed to meet these the consumer would usually also gain additional protections. As an example, if the game constitutes a "faulty good" then the consumer gains a full mandatory refund right without question within 6 months of purchase.

UNFAIR CONTRACT TERMS (BRIEFLY)

Another major aspect of the Act is that it replaces and supplements the existing UK rules concerning unfair contract terms in consumer and business contracts. The Act supersedes the UK's Unfair Terms in Consumer Contracts Regulations 1999 and the Unfair Contract Terms Act 1977, but the rules remain largely similar. Going forwards the relevant laws can be found in particular in:

- (i) the Act, which will cover unfair terms in consumer contracts and notices themselves;
- (ii) the Consumer Protection from Unfair Trading Regulations 2008, which in part cover marketing activity before the consumer enters a contract; and
- (iii) the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which outlines certain information that must be provided to customers before contracting.

A very brief summary of the Act's rules on unfair contract terms follows.

Always unfair and unenforceable – clauses excluding or restricting statutory rights and remedies or liability for death or personal injury through negligence.

Sometimes unfair and sometimes enforceable – Part 1 of Schedule 2 (known as the 'Grey List') of the Act details many clauses that may be unenforceable if they fail the 'fairness test'. A clause on the Grey List will fail this test if it (i) is not in plain and intelligible language, and (ii) creates a significant imbalance between the parties to the detriment of the consumer. As such, the following examples *may* be deemed unfair in consumer contracts (and therefore unenforceable):

- Using legal jargon like “consequential” or “indirect” loss – non-lawyers are unlikely to understand how this impacts them and could be unfair
- Reducing time periods for complaints or remedies to unreasonably low levels
- A clause requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation

How do these rules apply to games? Any games contract with consumers (for example, distribution agreements, End User Licence Agreements and Terms of Service) are subject to these rules. In appropriate cases some of these rules may even apply to certain B2B contracts, particularly where one party requires use of its standard terms.

Can consumers now bring class action lawsuits against sellers? While the Act does introduce the idea of class action suits to the UK, this is only in respect of claims brought before the Competition Appeal Tribunal for competition law infringement and not for breach of consumer rights. Although it is very early days, at present we do not anticipate this leading to a substantial rise of group or ‘class action’ lawsuits, certainly not on the US model. In practice therefore the enforcement mechanism for breach of these new rules is likely to be: (i) a direct threat of legal action by an affected consumer against the relevant company; and/or (ii) relatively rarely, a regulatory investigation by the UK consumer protection authorities.

How do I find out more? If there’s anything you would like to discuss further from this note, please feel free to contact **Jas Purewal** (jas@purewalandpartners.com) or **Peter Lewin** (peter@purewalandpartners.com) or visit www.purewalandpartners.com. Needless to say, please do not rely on this note as legal advice and always take advice specific to your facts and circumstances.

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