UKIE response to Ministry of Justice Call for Evidence on EU Data Protection Proposals

March 2012

THE ASSOCIATION FOR UK INTERACTIVE ENTERTAINMENT

Executive Summary

The Association for UK Interactive Entertainment (UKIE) is the trade association that represents a wide range of 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 develop and publish games and interactive entertainment. UKIE's membership includes games publishers, developers and the academic institutions that support the industry. We represent the majority of the UK video games industry; in 2011 UKIE members were responsible for 97% of the games sold as physical products in the UK and UKIE is the only trade body in the UK to represent all the major console manufacturers (Nintendo, Microsoft and Sony).

The video games industry provides a myriad of successful and sustainable business models many of them digital, which deliver consumers easy access to the products that they want – from £40 boxed products and cloud-based offerings to free to play apps, casual, and social games.

This all equates to one of the biggest, most agile, and most diverse creative industries in the UK. The UK has the biggest consumer market for video games in Europe, valued at close to £3 billion in 2011.

£30 billion

The global revenue from software sales

Our successful UK industry sits within a strong global video games and interactive entertainment market. Global revenues from software sales are reportedly $50 billion per annum (over £30 billion) and are expected to rise to $87 billion (£54 billion) by 2014. PricewaterhouseCoopers projects that the sector will grow at an average annual rate of 8% between 2010 and 2014 - faster than film, music and TV.

1. Summary of UKIE's Position

UKIE recognises the need for adequate Data Protection legislation in Europe. Many consumers play games that rely on the efficient transfer of data between territories. The games industry already has extremely robust measures in place to protect consumers' data and to transparently communicate when data is being gathered. The industry has also proven that it has measures in place to deal with major breaches should they occur and leads the way in use of 'the cloud' to transfer data safely, transparently and efficiently. We therefore welcome any approach that enshrines the best practices that the industry already has in place to protect consumer data.

We are broadly happy with the format of the law as a Regulation to deliver uniformity and therefore greater certainty to the data protection régimes which will apply at national level and that the EU proposal seeks to introduce new mechanisms to make the different member states adopt convergent rules. We welcome any recommendations that can make conducting business in Europe more predictable particularly those addressing consistent approaches to the transfer of data. Certainty in this important area is paramount if this key digital industry is to continue to grow. One data protection law that will apply to all EU Member States is better than the twenty seven different national systems which exist today.

However, UKIE has concerns that many of the proposals in the Regulation, particularly concerning the 'right to be forgotten', data breaches and data portability, will be difficult to implement in practice without further specific guidance and accurate definitions on the scope of how the recommendations are to be applied. Costs of implementation could be very high as existing data systems may have to be re-built to ensure compliance. As many stipulations are subject to delegated legal acts based on which the Commission can further specify criteria, conditions and requirements, substantial legal uncertainty is bound to follow. Such uncertainty is not good for business or growth.

In the video game industry the management of data and the development of tools required to do so can vary greatly depending on the specific platform used to deliver a game. The methodology required is best understood and implemented by the industry and does not lend itself to third party regulation. All successful games companies value their customers and already do much to protect customer data. They also already provide clear, concise information to consumers about how their data is used and do so in a non-disruptive manner.

We would also like to note that many of the proposals seem to be dealing with issues that relate mainly to social networks; there is concern that the wider effects of the proposals on other sectors and business models has not been properly considered by the Commission, especially regarding the issues of the 'Right to be Forgotten' and Data Portability.

2. Main UKIE Concerns

UKIE feels that many of the recommendations do not have a clearly defined scope and that the proposals introduce new concepts which are not clearly defined. This will make implementation extremely difficult, prohibitively expensive and also create legal uncertainty.

3. Data Breach Notification

The proposal requires all data controllers, in all sectors, to notify their Data Protection Authorities about all breaches – regardless of the risk that they pose or harm that they might cause. (For example, breach reporting is mandatory for unauthorized access to "personal data," which includes IP Addresses and other elements of data that have a low likelihood of causing harm to consumers). Reporting must be within 24 hours and applies broadly to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of or access to any personal data.

Whilst it is accepted that data breach notification is important as a principle, it will be very difficult to comply with the scope of the current proposals. It will not, for example, be possible to notify large scale data breaches with any accuracy within the 24 hour timescale stipulated in the Regulation. Increasing the time available to make a notification would mean the accuracy and usefulness of the notification to both regulators and consumers would be likely to increase. Data controllers will need time to assess the impact of data breaches as there are likely to be many cases where further analysis would reveal that no serious breach has occurred at all.

Imposing the requirement to notify all breaches within 24 hours, regardless of the severity, will also likely lead to Data Protection Authorities being overwhelmed by data breach notifications, meaning that they would be hampered in dealing with those that pose a real threat to consumers. Notification of every breach, no matter how minor, will also undermine the usefulness of the notification to consumers and regulators.

To ensure that the Regulation is able to be effectively implemented, the notification requirement should only apply to breaches over a specified level of severity or risk and the time for notification should take account of the severity or complexity of the breach involved.

4. Fines

There is real concern within UKIE membership about the proposal to fine companies up to 2% of their turnover in the event of a data breach. There does not seem to be any connection between the impact of a particular data breach on a consumer and the size of the fine. Whilst UKIE recognises that gross negligence might warrant a fine, most data breaches will occur due to events outside the control of even the most diligent company and most have little impact on consumers.

Companies with 1% of their business in the EU could risk 2% of their global turnover for a seemingly trivial violation, rendering small businesses less likely to engage in business in the EU. UKIE is also concerned about the risk of discriminatory application of the fines as a result of there being no objective criteria on how regulators should levy the penalties of up to 2% of global turnover.

The fine structure should be proportionate to the impact that a particular breach has on consumers

The fines therefore need to be more narrowly tailored to the impact of the violation in the EU and imposed for violations that are intentional rather than negligent.

UKIE therefore asks that any fine structure introduced be proportionate to the impact that a particular breach has on consumers, rather than applying a 'one-size-fits all' approach to what is clearly a complex area.

5. Right to be Forgotten

The proposed Regulation states that individuals have a 'right to be forgotten'. This calls on companies to erase personal data when instructed to do so by an individual data subject. The Regulation also proposes that, where the data is made public, the original company must inform all third parties that also process the data of the request for data to be deleted. Generally, UKIE is concerned that this proposal seems to be dealing with issues that relate mainly to social networks – we request that the wider effects of this proposal on other sectors and business models such as those of our member companies be properly considered.

Whilst the games industry understands the requirement to remove key data that could have an effect on consumers, UKIE sees the current proposal of removing all data relating to a consumer, regardless of any assessment of its effect on them, as too broad. UKIE also sees the current proposals as providing little benefit to the consumer, whilst putting unnecessary burdens on industry.

The proposals also do not take into account how data is transferred and the different types of data that are in use. Much of the data stored about individuals poses no threat to consumers should a data breach occur. In the case of the games industry this could be a virtual 'trophy' won for a certain level of achievement in a game.

By expecting companies to be able to delete all data for a given individual, the Regulation also over estimates the ability of a business to have oversight of the entire internet and the information available on it. Publicly available data is transferred prolifically across the internet (for example publicly available data is widely used to allow individuals to find information via search engines). This wide transfer of publicly available data makes it difficult if not impossible to remove all traces of an individual across the entire internet.

Imposing a single format for the transfer of data will stifle innovation and be extremely costly for business

UKIE therefore would like to see the Regulation provide more clarity on exactly what is expected of companies and third parties with regards to the right to be forgotten. The regulation should encourage companies to be responsible for deleting data that is within their control and that any expected measures are within the bounds of what is technically possible.

6. Retention of records and documentation

UKIE also has concerns around the documentation requirements outlined in the Regulation, particularly the stipulation that records must be kept of internal data and all documents that relate to data. Again, whilst the games industry is happy to keep records of data that pose a risk to data owners, much of the data held is meaningless and a requirement to keep all documentation places an unnecessary burden on industry with no real benefit to data owners.

7. Right Not to be Profiled

Like many digital businesses, some games industry business models rely on profiling to offer consumers a better service. Profiling is merely the aggregation and sorting of data in to patterns. It can have many benefits and allows web services to retain key information and improve the service that they offer individuals (for example linking suitably matched players to each other in online games). There is nothing inherently wrong with profiling, although it can sometimes be applied in less beneficial ways.

It therefore makes sense for the Regulation to focus on limiting how harmful profiling can be prevented, rather than limiting the beneficial use of it to improve legitimate online businesses.

UKIE is particularly concerned that by defining the circumstances where cookies can be used, the regulation will disrupt well established business models and hamper development of future business models. UKIE also requests that there be clarity concerning the methods and circumstances under which adults can waive their right to be profiled.

8. Data Portability and International Transfers

The games industry welcomes consumers being able to move their data between services and UKIE supports any recommendations that will make doing business as predictable as possible. However, we do have concerns around the scope of the Data Portability proposals – particularly regarding the Regulation's attempt to define the formats that would be used to transfer data between different digital services.

The Regulation calls for data to be transferred in a format that can be used across different platforms and services. As the range of digital businesses currently using data is increasing all the time, establishing a single data format would be extremely difficult and expensive. Of added concern is the proposal for the Commission to set formats, technical standards and procedures for data transfer should industry not be able to comply with the requirements introduced under the Regulation. Imposing a single format for the transfer of data will stifle innovation and be extremely costly for business. It should therefore be left to industry to define the format and technical details of how data should be transferred in an easy, consumer-friendly way.

UKIE also seeks assurances that the 'Safe Harbour' agreement, that allows international data transfers between the US and the EU, will continue to apply. The draft Regulation envisions binding corporate rules for processors, approval of additional standard data transfer clauses beyond the model clauses and flexibility for the Commission to determine jurisdictions' "adequacy" to receive international data transfers for particular industry sectors or territories within a country. This raises clear questions as to the continued viability of the 'Safe Harbour' program.

9. Consent

The regulation currently calls for consent to be given by consumers before data controllers can gather and use an individual's data.

Whilst the games industry fully recognises the need for consumers to have transparency regarding where their data is being gathered and used we are also concerned about the possibility of 'consent fatigue' when explicit consent will be required for the processing of all forms of information. (The potential for 'consent fatigue' has increased considerably with consent now being required to use cookies.) Too many 'pop-ups' requesting consent for each piece of data could lead to consumers not paying proper attention to critical notifications, such as those regarding sensitive data, and actually lessen the impact of having the principle of consent .

UKIE also welcomes European wide agreement on the age of parental consent being established at 13, which is consistent with the current COPPA Regulation in the US.

Too many 'pop-ups' requesting consent could lead to consent fatigue

10. Effect of the current proposals on intellectual property enforcement

UKIE also has concerns over how the current proposals and the definition of data, will affect the transfer of data in relation to intellectual property enforcement. UKIE would want assurance that the proposals contained in both the EU's Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, do not in any way prevent the effective implementation of any IP enforcement measures.

There is concern that the proposed regulation could have an impact on the effective implementation of IP enforcement measures operating in member states, including the notification sending process outlined in the UK's Digital Economy Act (DEA). UKIE would therefore like clarity of whether a legitimate interests exception would still apply to the processing of the data of an alleged copyright infringer, without the data subject's consent. UKIE believes that obtaining consent from individuals under investigation from enforcement bodies would likely compromise such operations.

Regarding the proposed definitions contained in article 4 of the proposed Regulation, UKIE agrees with the UK's Information Commissioners Office that it would be helpful to get greater clarity as to whether IP addresses are, without any other identifiers, personal data per se.

The definition of personal data remains "directly or indirectly identifiable data". UKIE therefore questions whether IP addresses collated by third party internet scanners (for example, in the context of the UK's DEA) should be regarded as personal data when the IP address will not be used to identify the individual.

In the UK there are already safeguards in place to ensure that data gathered for IP enforcement processes is used appropriately, making the definition of personal data unnecessary in this context. Under the DEA for example, the data controller would be required to issue legal proceedings seeking disclosure from the internet service provider to which the internet user has subscribed. So whilst the initial data harvested may be indirectly identifiable, UKIE would suggest that this is not personal data when a Court Order is required to identify the individual.

UKIE therefore suggests that the purpose of processing is considered when defining data gathered for IP enforcement, such as whether the data controller is gathering data for the purpose of identifying the individual. If this is not the purpose, then it should not be considered personal data.

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