



Beyond Brexit: TIGA's Priorities for a UK – EU Trade Deal

About TIGA

TIGA represents developers, digital publishers, service companies and education providers and is the trade association for the video games industry.

Our core purpose is to strengthen the games development and digital publishing sector. We achieve this by campaigning for the industry in the corridors of power, championing the industry in the media and helping our members commercially.

TIGA is intent on building an enduring organisation which continually improves; a business that will make a significant impact on the games industry and so benefit our membership and the wider economy. Since 2010, TIGA has won 28 business awards, an achievement which reflects TIGA's drive for improvement and to meet best practice.

About the UK video games industry

The UK video games industry is important economically and culturally. The UK video games sector is the largest in Europe.¹ Games development contributed over £1.8 billion towards GDP in the year to November 2018, as well as an estimated £747m in direct and indirect tax revenues to the Exchequer. Games companies are estimated to have invested £818m in development in the UK in the year to November 2018. The UK games development and digital publishing sector is a success story.

Introduction

The UK left the European Union on 31st January 2020. The UK remains in a Brexit Transition period until 31st December 2020. During this phase the UK and EU are endeavouring to reach a Free Trade Agreement. The UK committed in the [Political Declaration](#) that accompanied the Withdrawal Agreement that both the UK and the EU will work towards ensuring a zero-tariff, zero quota trade deal.

The trade deal negotiations during 2020 have encountered difficulties. The EU has argued that the UK should be subject to some EU rules, including those governing state-aid, fair and open competition² and environmental policy and workers' rights. Conversely, the UK has argued that the EU's demands are unfair, unprecedented and unacceptable. The UK claims that the EU has not required other countries with which it has a free trade agreement to accept a similar suite of commitments.

The UK and the EU ended their fourth round of negotiations on 5 June 2020, with Michel Barnier, the EU's chief Brexit negotiator, noting that "[no significant progress](#)" on a trade agreement had been made. This makes the prospect of a no-deal Brexit more likely. However, a no-deal Brexit is not the

¹Gibson, N., Gibson, R. and Wilson, R, Making Games in the UK 2019 (TIGA, 2019).

² Fair and open competition rules are a broad brush set of rules in place to ensure that everyone can compete against each other fairly within the EU. State aid is a specific form of this – state aid is rules to ensure that a country within the EU cannot pervert the single market by propping up domestic industry.

only possible outcome of failed negotiations.³ In a press conference held on 15 June 2020 between the Prime Minister, the Rt Hon Boris Johnson MP, and the presidents of the European Institutions (the Commission, the Council and the Parliament), the Prime Minister stated that his ambition is to agree a deal by the end of July 2020.

In March 2020, the UK entered a period of lockdown as a result of the COVID-19 pandemic. The Coronavirus induced economic downturn means that the UK could be heading for the worst economic downturn in over 300 years.⁴ The video games industry is one of the sectors that the UK should aim to promote over the coming months and years. The sector provides high skilled employment: over 80 per cent of the development workforce is qualified to degree level or above. The industry supports economic growth in clusters throughout the UK: 80 per cent of the workforce is based outside of London. Games development is export focused: over 95 per cent of games studios export at least some of their content. The video games industry is relatively resilient to Coronavirus engendered lockdowns: games development is a digital sector and work can be undertaken and delivered remotely.⁵ Finally, our video games studios operate in a growing industry: employment in the UK video games has grown by over 7 per cent per annum since 2014. The UK video games sector is an industry of the future.

TIGA's research demonstrates that the UK video games industry can continue to grow strongly over the next four years⁶ but the new UK – EU economic relationship must facilitate, not hamper this projected growth. This paper sets out TIGA's priorities for a UK – EU trade deal.

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1. Tariffs, quotas and barriers to trade

The UK should negotiate a trade deal with the EU that avoids quotas, tariffs and other barriers to trade.⁷ Free trade in video games already exists and this should be maintained (for example, the EU does not impose tariffs or quotas on the imports of video games from the USA, Japan and Canada).

The EU does not currently impose tariffs on computer games produced outside of the EU and the UK should aim to ensure that this remains the case.⁸ In fact, the UK could potentially trade with EU Member States and still avoid tariffs on games products because of the WTO Information Technology Agreement (ITA). This Agreement commits the participating countries to completely eliminate tariffs on IT products covered by the Agreement.⁹

³ A report by [the Institute for Government](#) outlines four potential alternative outcomes of failed trade negotiations in the current transition period. These options are:

- Amend the end date of the transition period in the Withdrawal Agreement

This could in theory be done at any point after June. But it would almost certainly require the European Court of Justice to give a legal opinion first.

- Create a new transition period to begin on 1 January 2021

This would mean striking a new, complex agreement and a lengthy ratification process, alongside future relationship negotiations.

- Include an implementation phase as part of the future relationship treaty

This would give businesses time to make investment decisions and adapt supply chains.

- Create an implementation phase to prepare for a potential no-deal exit

Agree a temporary deal to allow traders to adapt to a no-deal scenario in the event that talks break down.

⁴ <https://www.ft.com/content/734e604b-93d9-43a6-a6ec-19e8b22dad3c>

⁵ Having said that, TIGA research in March – May 2020 indicates that remote working can create some productivity challenges for games businesses.

⁶ TIGA, *Unlocking the Next Level: Growing the UK Games Industry. TIGA's Manifesto Proposals for the 2019 General Election, 2019*

⁷ The EU has an average tariff wall of 3-4 per cent, a tariff on cars of 10 per cent and an average tariff on agricultural products of 18 per cent. See Marshall Paul, "British trade can flourish without the shackles of Brussels", Financial Times, June 27th 2016.

⁸ See <https://www.gov.uk/guidance/classifying-computers-and-software>, <https://www.gov.uk/trade-tariff/commodities/8523494500>, <https://www.trade-tariff.service.gov.uk/headings/8523> and <https://www.trade-tariff.service.gov.uk/headings/9504>

⁹ WTO, General Council Declaration on the expansion of trade in information technology products - Communication from the European Union, [link](#) and https://www.wto.org/english/res_e/publications_e/ita20years2017_e.htm

2. Maintain and enhance Video Games Tax Relief.

Video Games Tax Relief (VGTR) is the most important factor in determining the favourability of the UK's tax environment as far as the video games sector is concerned. VGTR and to a lesser extent R&D Tax Relief have been crucial in enabling the UK video games industry to compete on a more level playing field against the UK's international competitors, particularly Canada.

Prior to the introduction of VGTR, the UK development sector was suffering from a major market distortion created by government aid for games companies in overseas territories such as Canada and the USA. This resulted in a loss of jobs, investment and a brain drain from UK to overseas studios. VGTR reduces the cost and risk of games development. VGTR has increased investment and employment, enabled more studios to self-publish their own IP and has enabled the UK games industry to compete more effectively.

According to HMRC, since the relief was introduced, 1075 video games have made claims, accounting for £2.6 billion of UK expenditure. A total of £324 million has been paid out to VGTR claims. In the year 2018-2019 alone, 345 claims were made for a total of £103 million, which represented 535 games.

There is a direct correlation between the surge in headcount growth and VGTR. The UK games industry declined by an annualised average of 3.1 per cent between 2008 and 2011 before returning to growth the year that VGTR was announced. Growth between the announcement and VGTR disbursement was 5.4 per cent. Growth from disbursement to 2017 has been 8.1 per cent. During the same period, there were no major positive growth factors beyond the launch of a new generation of consoles and some negative growth factors such as massive congestion¹⁰ and collapsing prices on mobile and PC.¹¹

In 2017, the European Commission approved the continuation of Video Games Tax Relief (VGTR) until 2023.¹² Our future trade deal with the EU must allow for the retainment of VGTR. The UK-EU trade deal should also provide the UK with flexibility to improve the Relief. For example, in the future the UK Government could consider increasing the rate of VGTR relief from 25 to 27.5 per cent, or even 30 per cent in order to stimulate further investment.

3. Access to finance

Difficulty accessing capital has consistently been the top factor holding back many games developers in the UK. In the current economic environment there is a reduced appetite for investment. Additionally, outside of the EU, the UK games industry will not be able to access schemes such as the Creative Europe and the Horizon 2020 programmes.

The UK Government should replace access to these schemes with alternative grant programmes and any trade deal must permit this form of initiative. TIGA is proposing a Video Games Investment Fund (VGIF) that would provide pound for pound match funding, up to a maximum of £500,000, for original game projects. The VGIF would also provide a commercial mentoring service for games companies that access its grants or loans.¹³

4. Access to talent

Games development requires a mix of high technology skills in programming, artificial intelligence, mathematics, internet, physics, graphics processing, user interface, audio, production and digital marketing skills, which are underpinned by STEM training; and animation, artistic, design and narrative skills, which are underpinned by arts training.

¹⁰ The number of games on the Apple App Store has increased from 67,000 in 2011 to 783,000 in 2017.

¹¹ <https://www.gamesindustry.biz/articles/2017-08-18-falling-indie-prices-undercut-the-market>

¹² European Commission, State Aid SA. 48362 (2017/N) – United Kingdom Video games tax relief – prolongation, 2017.

¹³ <https://tiga.org/policy-and-public-affairs/video-games-investment-fund>

An undersupply of skilled graduates, an undersupply of experienced specialists and the creation of new roles driven by technological and commercial developments for which relatively few people can fill, combine to create some skills shortages in the UK games industry. For certain roles there is a shortage of applicants with the required skills, experience or qualifications.

UK games businesses have taken steps to address this challenge. Studios have invested in training.¹⁴ Games businesses have developed relationships with universities to ensure that courses are industry relevant.¹⁵ TIGA has developed a higher education accreditation programme.¹⁶ Other steps taken by games businesses in response to skills shortages, include: new recruitment methods; outsourcing of work; internal promotions; redefining existing job roles; increased expenditure on recruitment; increased training; and use of work permits.¹⁷

These activities have minimised skills gaps (i.e. existing employees inside a business lacking the right skills), but have not eliminated skills shortages (i.e. a shortage of skills or experience the employer is looking for outside of a business).

TIGA research indicates that approximately 20 per cent of the games development workforce originates from other EU countries and 5 per cent come from other countries outside the EU.¹⁸ The games sector requires ready access to non-UK workers to fill high and medium skilled roles. If it cannot access them via the UK's future immigration system, or is prevented from doing so by high salary thresholds, then this would exacerbate skills shortages, which in turn would result in the loss of jobs and investment. A UK - EU free trade deal and UK Government migration policy¹⁹ must allow the games industry to continue to access highly-skilled EU workers.

The UK Government should ensure that our post-Brexit migration system does not impair the ability of UK universities to recruit academic staff and students from the EU. Our video games industry depends upon higher education for skilled graduates.

5. Permit the free flow of data between the UK and EU

Games development requires the use of a large amount of personal and non-personal data. This data includes personal data relating to players, business partners and staff and non-personal data such as coding, trade secrets and business planning. The free flow of this personal and non-personal data between the UK and EU is also essential to games publishing and to the operation of online games platforms. Different types of game require different levels of personal data. For example, single-player games may only require limited data about personal devices to implement anti-piracy solutions, anonymised information about errors and software bugs or perhaps credit card details where in-game purchases are permitted (such as virtual goods and downloadable content). Online games will inherently require more personal data, such as user identification information for players to create an online profile, in-game user input exchanged with the online server as data packets and in-game chat between players. Persistent online worlds created and maintained, usually in the form of "Massively Multiplayer Online" games, will require the greatest amount of user data, where players often develop structured clubs or groups (often known as clans or guilds) with their own subcultures and high levels of interaction.

¹⁴ Wilson, R., *Skills, Training and Education* (TIGA, 2016).

¹⁵ For example, 15 per cent of the entire Sumo Digital workforce are alumni of Sheffield Hallam.

¹⁶ Eyles, M. and Wilson, R., *Achieving Success: TIGA Accreditation Report* (TIGA, September 2017) and <http://tiga.org/education/tiga-university-accreditation>

¹⁷ Wilson, R., *Skills, Training and Education* (TIGA, 2016).

¹⁸ Wilson, R., *TIGA Business Opinion Survey 2019* (TIGA, 2019).

¹⁹ For information on the UK Government's Migration Bill, see: <https://tiga.org/news/the-governments-immigration-bill-passes-its-second-reading-in-the-house-of-commons>

Since 1984 the UK has had data protection laws that have facilitated both the largescale use of personal data and the transfer of personal data from the UK to Europe.²⁰ Recently games developers have invested significantly in compliance with the GDPR.²¹ Whilst the GDPR has come with significant compliance costs and obligations, crucially it and the Free Flow of Non-Personal Data Regulation²² have provided games developers with continuing guarantees permitting the free flow of data between the UK and EU.

The UK Government must retain a data protection law that facilitates game developers' use of personal data. In addition, to ensure the free flow of data protection between the UK and EU, the UK Government must reach a trade deal where the UK is treated by the EU as providing an adequate level of data protection.

Under the Political Declaration the EU has committed to beginning the adequacy process with a view to recognising the UK as adequate before the end of the transition period on 1 January 2021.²³ However, the criteria for adequacy in the GDPR is stringent and the Court of Justice of the EU has recently twice found the UK's data laws, specifically the Investigatory Powers Act 2016, to be incompatible with EU law.²⁴ The UK Parliament's Joint Committee on Human Rights has also raised questions about whether the UK's Data Protection Act 2018 provides the protections required by EU law.²⁵ In addition, the far-reaching powers to obtain information enjoyed by the UK's security and intelligence services and their close links to countries without adequacy decisions such as the USA and Australia may prove problematic. The EU is certainly only talking in terms of the 'possibility' of an adequacy decision at this stage.²⁶

If the UK Government fails to secure adequacy, games developers will have to implement safeguards or identify exemptions for the transfer of personal data from the EU to the UK. These measures could entail a significant administrative and cost burden in addition to the high GDPR compliance costs game developers have already incurred.

To ensure that games developers are not subjected to multiple, uncoordinated investigations in relation to personal data processed between the UK and the EU, as included in the Political Declaration, the UK Government should ensure the trade deal leads to close and effective cooperation between the UK Information Commissioner's Office and EU data protection supervisory authorities.²⁷

It is important that the free flow of data continues between the UK and the EU after exit day. Any free trade deal should include provisions that protect current data transfer methods, ensure cooperation between the UK's Information Commissioner's Office (ICO) and EU supervisory authorities and encourage the EU to determine that the UK has an adequate level of data protection to allow for EU – UK data transfers.

6. Protecting the interests of games companies in relation to intellectual property

²⁰ Data Protection Act 1984, Data Protection Act 1998 and General Data Protection Regulation (EU) 2016/679.

²¹ General Data Protection Regulation (EU) 2016/679.

²² Free Flow of Non-Personal Data Regulation (EU) 2018/1807.

²³ [Part I, B of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom.](#)

²⁴ <https://www.theguardian.com/law/2016/dec/21/eus-highest-court-delivers-blow-to-uk-snoopers-charter>

²⁵ <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/77404.htm>

²⁶ [Slides - Internal EU27 preparatory discussions on the future relationship: "Personal data protection \(adequacy decisions\); Cooperation and equivalence in financial services".](#)

²⁷ [Part I, B of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom.](#)

If a game is a developer's baby, intellectual property rights are its soul. Developers and publishers are rightly concerned to protect the copyrights and design rights arising in their creations, as well as the trade marks over their studios and titles. At the same time, games companies must navigate the intellectual property (or 'IP') rights of others to avoid releasing a game that infringes the rights of a third party in a particular territory, whether someone who published a game with a similar name previously or someone unrelated to the games industry, such as a car manufacturer. Further, games companies must deal with the day-to-day issues that affect IP-rich businesses, such as properly compensating individual authors, claiming IP-related tax reliefs, making licensing arrangements and taking enforcement action against pirates, counterfeiters and other IP infringers.

Unfortunately for business, IP rights are inherently territorial property rights that arise under, and subject to, the laws of various jurisdictions around the world. There is no worldwide unitary copyright or international trade mark available. This means that, for example, a games company has to apply separately to protect its studio name in the USA as well as in the UK, and the copyright that arises in its game will be subject to different protections under its US copyright when compared with its UK copyright. Additionally, where the latest game might not infringe the trade mark of a car manufacturer in the USA, it might do so in the UK. As all games companies are global companies nowadays – even the smallest indie developer that makes a game in her bedroom and releases it to the world through a platform like Steam – this substantial variation in IP laws presents a serious regulatory burden for all games companies to bear. This burden falls heaviest on the smallest businesses.

Membership of the EU previously meant that one of the world's largest games markets, namely the UK, had almost complete harmonisation on trade mark laws and partial harmonisation on copyright and design laws. Withdrawal from the EU will inevitably impose an additional regulatory burden on games companies, who will no longer be entitled to assume that the IP position in the UK will be substantially the same to the position in other major games markets, such as Germany, France, Spain and Italy. Greater divergence over time seems likely because Section 6(1) of the European Union (Withdrawal) Act 2018²⁸ confirms that UK courts will not be bound by decisions of the Court of Justice of the European Union (or 'CJEU') after exit day in its judgments on IP or other legal matters. In its current negotiations with the EU, the Government has also indicated that it does not want a future role for the CJEU in the UK and it will not voluntarily implement Directives issued by the EU, such as the 2019 Copyright Directive. Additional trade marks will have to be filed, additional clearance searches carried out and additional changes made to game and studio practices to accommodate a divergence in law.

Harmonisation on IP with the EU generally benefits the UK by reducing the regulatory burden to cross-border business, which certainly includes the games industry. Greater divergence may add to the financial burden on studios in the UK. TIGA urges the Government to avoid needless regulatory burdens where it can. TIGA welcomes decisions to reduce IP-related regulatory burdens where possible, such as the decision to grant new, identical 'grandfathered' UK trade marks to holders of EU trade marks without charge or action required by the proprietor to preserve existing trade mark rights. TIGA also agrees with the decision to create a new Supplementary Unregistered Design right to replace the EU's Community Unregistered Design right that would otherwise have been lost. While TIGA does not believe the Community Unregistered Design right has been widely used by the games sector to date, the current limitations on the scope of UK copyright in protecting against clone games means that it is a potentially useful additional right with a different scope that may benefit games companies seeking to enforce their IP rights.

²⁸ <http://www.legislation.gov.uk/ukpga/2018/16/section/6/enacted>

Nonetheless, as the Government has indicated, Brexit and divergence from EU harmonisation does represent an opportunity to improve IP law where the existing law is unsatisfactory. TIGA would welcome such divergence where it benefits games companies and remedies some of the problems that EU IP law has created.

An example of an area of potential improvement in IP law would be the burden placed on games companies in clearing computer games for release in the UK, especially games that try to recreate a version of the real world for players to explore. Currently releasing such games in the UK (and the EU) generally requires games companies to distort real-world objects and remove real-world brands, even where used as part of the background scenery, or else pay thousands or millions in licensing fees. This burden does not affect TV and film production companies in the same way, as they can generally rely on statutory exemptions (such as the 'incidental inclusion' exemption in the Copyright, Designs and Patents Act 1988) or benefit from legal principles and judicial authority (such as laws on 'exhaustion' of IP rights).

TIGA considers this IP clearance burden to affect the games industry unfairly when compared with other creative industries, especially film and TV, who can generally use real-world buildings, objects and brands with a great degree of freedom. If the Government undertakes any IP reforms, TIGA would point the Government towards jurisdictions that are more friendly towards games companies, such as the USA. In the USA, the broad 'fair use' doctrine in US copyright law gives broad protection to games companies who want to use the copyright of others to recreate the real world, so long as that use is fair and does not prejudice the rights of the copyright holder. In relation to trade marks, the US also has judicial recognition in the 2011 US Supreme Court case of *Brown v. Entertainment Merchants Association* that recognises games as creative works entitled to free speech protection under the First Amendment, which is a clearer and fairer concept than the current complexities and contradictions of the EU's doctrine of 'trade mark functions', which are solely a creation of the CJEU and have no basis in European legislation.

The Government's decision not to implement the EU's 2019 Copyright Directive may also be beneficial (although Ministers have stated that the UK may adopt similar laws at some unspecified point in the future). One of the most controversial provisions of the Copyright Directive, Article 17 (as adopted), which imposes liability on media-sharing platforms (e.g., YouTube) to monitor and filter content that may infringe copyright is of obvious benefit to passive media like film and music. However, games are active, interactive media that cannot be replaced by watching them played by someone else on YouTube or Twitch. Accordingly, there is no real so-called 'value gap' for games companies, who have actually – in most cases – benefited from (and often encouraged) the community engagement associated with streamers on Twitch, 'Let's Play' walkthroughs posted on YouTube and the rise of official and unofficial e-sports. The filters that will soon be imposed by content sharing platforms to prevent infringing music and film content being uploaded may soon also catch games content being uploaded that many games companies may actually have encouraged. This means that the main provisions of the Directive that are supposed to benefit copyright owners do not actually benefit games companies, but they could be harmed by the provisions that impose additional burdens, such as the 'best-seller' provision in Article 20 that introduces a statutory compensation scheme for individual artists.

Overall, regulatory alignment with IP to the EU is generally advantageous for games companies because of the reduction in costs of complying with separate IP laws. However, as the Government has chosen to diverge (at least in part), TIGA would urge the Government to take the opportunity to reform IP law to address imbalances and lack of certainty in the current system. TIGA would also urge the Government to consult with TIGA and games companies that represent one of the UK's fastest-

growing creative, export focused industries before introducing any reforms and without assuming that the interests of the games industry are always identical to those of the film, TV and music industries.

7. State Aid

State aid involves the use of taxpayer-funded resources to provide assistance to one or more organisations in a way that gives an advantage over others.²⁹ Some state aid is illegal under EU rules because it distorts competition in a way that is harmful to citizens and companies in the EU.

In principle, state aid is not allowed in the EU. However, some state aid is good for the economy and supports growth and other policy objectives. State aid can be given to support a wide variety of activities including research and development, environmental protection and aid for small to medium-sized businesses. It is also possible for state aid to be deployed to support culture, provided it is notified to the EU Commission and the Commission has approved it (hence the provision for VGTR).

The EU wants the UK to abide by its existing state aid rules permanently, which the UK Government finds unpalatable. The UK Government wants greater flexibility over state aid in the future to support, for example, more R&D.

It is crucially important for the games industry that future UK state aid policy permits the maintenance and potential enhancement of Video Games Tax Relief (see section 2); the introduction of a Video Games Investment Fund (see section 3); the continuation of schemes such as the UK Games Fund;³⁰ the operation of Coronavirus inspired support measures such as the Bounce Back Loans scheme;³¹ and Government schemes to encourage investment in training.³²

8. Labour, environment and climate change standards and divergence

The UK's aim is to have as much autonomy as possible whilst maintaining tariff and quota free trade. The EU has said that it is willing to offer zero tariffs and zero quotas, provided that it can be legally assured that there will be zero dumping (i.e. unfairly undercutting EU companies with subsidies or more lenient labour and environmental standards). The EU has therefore requested that the UK does not relax its current employment and environmental standards.

As set out in the revised Political Declaration, a UK – EU trade deal should maintain employment, environment and climate change standards at the current levels.³³ There may be a case for the UK – EU agreement to conclude that whilst overall standards in these areas should not fall, the two parties should have the autonomy to change individual rules. The UK Government is unlikely to support the principle of automatic dynamic alignment.

Conclusion

The video games sector is an export focused, high skills, high technology industry. If the UK – EU trade deal avoids quotas, tariffs and barriers to trade, whilst enabling the UK Government to maintain VGTR, introduce a VGIF, allow studios to recruit highly skilled people from the EU and ensures the free flow of data between the two jurisdictions, then the UK will remain a world-leader in video games development.

²⁹ <https://www.gov.uk/guidance/state-aid>

³⁰ <https://ukgamesfund.com>

³¹ <https://tjga.org/covid-19>

³² For example, a pound for pound match funding scheme for training, whereby the Government matches business investment in workforce development; or a Training Tax Relief which could operate in a similar fashion to the R&D Tax Relief.

³³ Department for Exiting the European Union, *New Political Declaration*, 19 October 2019