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CreativeMediaBusinessAlliance

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Position Paper on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)

The Creative and Media Business Alliance (CMBA) is an informal grouping gathering Europe's top media and creative businesses and industry associations. It was launched in November 2004 to give the sector a strong and united voice at the level of the European Union. The companies we are representing invest creative efforts, time and financial resources in developing a wide range of broadcasting, music, film, book, magazine and newspaper offers, including on the Internet. We therefore appreciate the opportunity given by the European Commission to contribute to its e-commerce consultation.

The Commission has set an ambitious target of having 50% of the EU population buying online, and 33% of SMEs buying and selling online by 2015, increasing the e-commerce market by 35% from the size it represents today. The creative industries have great ambitions for their online future and are working hard at developing online business models so they can better take advantage of the opportunities the online world offers.

At the same time, it should also be highlighted that different languages, coupled with the very specific content that is linked to national or local interests, can explain the slower take up of e-commerce, including cross-border e-commerce, for some types of creative content.

Here are some key points the CMBA would like to make in response to the Commission's e-commerce consultation, highlighting how it believes e-commerce might be boosted in the coming months and years:

1. CMBA members believe that there is no need to re-open the e-Commerce Directive, however a clarification on certain aspects would be useful. The Directive provides an appropriate balance between the high level of consumer protection provided for in the EU consumer *acquis*, coupled with the legal certainty that businesses need to trade across borders.

2. For creative businesses that want to sell to customers across EU borders, it is vitally important that they have the legal certainty to do so. The E-commerce Directive with its Country of Origin or 'Internal Market clause' provides this legal certainty. It is therefore important that the Internal Market clause is maintained; weakening it would pose a substantial threat to cross border sales.

3. The Directive includes carefully drafted provisions on liability that were intended to foster cooperation between the relevant parties and to “constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information“. Overall, only a few countries have failed to implement these provisions correctly. However, in the context of copyright, the fundamental concerns driving the Directive’s provisions on the limitations on the liability of internet intermediaries were quite different than those that face us today. Today the varieties and sources of infringement are more diverse, and we find ourselves in a new world of peer-to-peer file-sharing, cyber lockers, and websites that often are located outside the EU. As regards case law, the trend in the courts is not obvious and the criteria used to distinguish between providers who should benefit from the liability privileges and those who should not differ between countries. In addition, ISPs often claim that they might consider helping but cannot because of fears to no longer being able to invoke the liability privileges.

Our view is that the Directive should under no circumstance provide any tailor-made defense for illegal services in legal proceedings brought against them. What is needed is a interpretative document providing interpretations of the language used in the Directive in order to clarify that its scope is appropriate and covers the new forms of illegal activity online, and to avoid its use in unintended ways to immunize the undeserving or block reasonable mechanisms for curbing infringement. A number of issues would benefit from clarification from the Commission, for example along the lines that (i) ISPs that cooperate under appropriate circumstances to prevent illegal activities online should not be deprived the benefit of the limitations on liability in Articles 12-14, (ii) the “knowledge” requirement should not amount to a hiding place for illegal services, (iii) there is a clear distinction between the liability privileges and the continuing possibility for courts to issue injunctions ordering the cessation of illegal activities – ISPs are often the best placed to stop these infringing activities. On the other hand, the responsibility for legitimate businesses like readers’ opinion forums in the context of digital press offers must not be overstretched as such new services are integral and necessary parts of new business models of the digital press.

4. For the creative industries, one of the main obstacles to growth of e-commerce in copyright content and the development of further cross-border online services within the EU is the widespread availability of illegal content on the Internet. This supply of illegal offer constitutes unfair competition for legitimate e-commerce and undermines the possibility to expand the offer of legitimate content online.
5. The current tension between privacy and other fundamental rights creates legal uncertainty and hinders the proper application of the rule of law online; this does not create the trust necessary to make e-commerce flourish. The Commission should ensure that privacy does not mean anonymity before the law and lack of accountability for illegitimate businesses to the detriment of citizens.
6. Online advertising plays an important part in e-commerce for certain businesses; some online business models are heavily dependent on it for their development, or even their

very survival. It is therefore vitally important that online advertising is allowed to develop. Some creative industries need to be in a position to be able to get a fair share of the advertising revenue generated by the presentation of their content, with the user always being able to easily identify and access the source of the original information. A lack of negotiating power experienced by many businesses – which stems from a lack of competition in the online advertising market - is a problem that needs to be addressed.

7. We believe that facilitating cross-border advertising and supporting the development of new online business models would help boost e-commerce. There are various ways that the European Commission and Member States can help facilitate this development in the coming months:
 - i. In the implementation of the E-Privacy Directive, any new requirements in the name of protecting privacy, which may for example affect the use of cookies, should not jeopardize the possibility of developing and maintaining new business models or the advertising revenues that are crucial to sustain them.
 - ii. Likewise, it is important that the revision of the EU's Data Protection strategy maintains the current technology-neutral approach, which is valid for new technologies and provides a high level of consumer protection. Given that these rules are fundamental to businesses being able to continue to deliver a quality service to their customers and attract new customers, any constraints would have a detrimental impact on businesses, both on-line and off-line, as well as both across and within borders.
8. We believe there is room for improving cross border e-commerce by facilitating cross border payments: it should be easier to make micropayments and banks should not be able to make unfair charges.
9. More generally, we believe that more support for education concerning the security features of paying for online services and more support for increasing awareness of the existing legitimate online offer can only help encourage the development of e-commerce across EU borders.
10. Finally, the development of e-commerce could be greatly improved by adopting a coherent approach to VAT. It makes no sense that reduced VAT rates may be enjoyed by consumers purchasing cultural goods in a shop, but that these reduced VAT rates cannot be enjoyed by the same consumer when buying the same content online. We therefore encourage the Commission to promote the uptake of e-commerce, by proposing to the Member States the possibility of applying reduced VAT rates to online sales or eliminate it altogether as in the case of the US, thereby of cultural goods and services, thus allowing creative content providers or their e-commerce partners to present a more competitive offer to European citizens.