

**EDiMA response to the European Commission's public consultation on the relaunch of the Single Market<sup>1</sup>**

The European Digital Media Association (EDiMA)<sup>2</sup> is pleased to provide its response to the European Commission's public consultation on the preparation of its Single Market Act (hereafter, "SMA") and looks forward to working with EU officials and other stakeholders to develop policy to meet the economic challenges of 2011 and beyond.

Sharing the Commission's view on the importance of the Single Market to future EU job creation, growth, and overall EU competitiveness, EDiMA welcomes the Communication on a Single Market Act and many of the proposals therein. EDiMA believes the development of a European 'Digital Single Market' will provide consumers greater and more convenient access to an ever-increasing selection of products and services. **Addressing obstacles to the Digital Single Market should represent one of the key priorities of the Single Market Act proposals.**<sup>3</sup>

Accordingly, EDiMA wishes to highlight here the key issues and proposals it believes should be prioritized as part of a holistic effort to identify and address the current 'missing links' and obstacles to the Single Market's further development, particularly in the context of the EU2020 strategy and the Digital Agenda. In line with the Commission's emphasis on improving the Single Market's benefits to European citizens, EDiMA believes the SMA should prioritise the following:

**Proposal 2: Framework Directive on the management of copyrights**

EDiMA believes that a well-functioning and flexible market-based licensing regime is critical to meeting consumer demand, promoting cultural diversity in Europe and to the development of dynamic and innovative Internet and new media sectors. As the Commission has highlighted, however, "the absence of a European framework for the efficient management of copyright across the EU is significantly complicating the process of making knowledge and cultural goods available online."

**EDiMA believes that the market needs to deliver pan-European multi-repertoire, multi-territorial solutions, respecting individual business models and their own rights requirements, to provide consumers with greater access and choice.** Although there is no 'silver bullet' to solve the bottleneck and resource intensity caused by the existing regime, there is scope to make regulatory changes to

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "Towards a Single Market Act for a highly competitive social market economy: 50 proposals for improving our work, business and exchanges with one another" (COM(2010) 608) 11 November 2010.

<sup>2</sup> Supplementary to EDiMA online questionnaire submission of 28 February 2011 (ref: 846075727342105911). EDiMA, the European Digital Media Association, is an alliance of new media and Internet companies whose members include Amazon EU, Apple, eBay, Expedia, Google, Microsoft, Nokia, Yahoo! Europe, Orange, and others. EDiMA's members provide Internet and new media platforms offering European consumers a wide range of online services, including E-content, media, E-Commerce, communications and information/search services. EDiMA represents the interests of the new media and Internet sectors in Europe in policymaking.

<sup>3</sup> The Digital Single Market represents one of the major initiatives for structural reform in Europe with anticipated economic benefits over 10 years of at least 4% of GDP (or €500bn); [www.epc.eu/dsm](http://www.epc.eu/dsm)

the current system which will go some way to providing greater choice of legitimate content to consumers in all EU Member States. In particular, the framework should be reformed to simplify the process of acquiring licenses and provide greater transparency to online service providers as regards which entities manage which rights. Furthermore, these changes should endeavour to develop a pro-competitive environment in which licensors compete and innovate, thereby providing genuine alternatives for those seeking to licence digital content. It should also aim to ensure clear division between the commercial and non-commercial roles of existing societies and companies should continue to be entitled to choose to carry out rights clearances themselves, thereby requiring no intermediary. Transparency for rights clearance is also a prerequisite for a practical functioning market. Benefits could be achieved by rightsholders' use of a Global Repertoire Database which would allow licensees to gain full visibility as to the sources of different catalogues and content.

The SMA also provides an important opportunity for the Commission to reform the current system and management of copyright levies in Europe. The regime and its application, which is at best arbitrary, leads to unfair penalisation of consumers and at worst prevents them from benefiting from the digital single market for the devices on which they enjoy digital content. The regime is an unjustified barrier to cross-border e-commerce and does nothing to promote innovation by European companies faced with the risk of innovation leading to an unsustainable levy.

It is clear that transparency and accountability of collecting societies – including the applicability to their calculation and assignment of levies - must be addressed by regulatory means initiated by Commission proposals. Indeed EDiMA would fully support the use of a Directive on the transparency of collecting societies to specifically address transparency with respect to levies and licensing.

### **Proposal 3: Action plan against counterfeiting and piracy**

Addressing IPR infringement online must be consistent with existing European legislation, must be accompanied by the promotion and reform of the regulatory framework for distribution of digital content, and must respect the delicate balance of rights and obligations set out in the E-Commerce Directive. Any policy debate on how to tackle the sale of counterfeit goods over the internet and or online piracy must also include the promotion of innovative ways to meet consumer demand and increase consumer choice. EDiMA recognises and supports the need for all actors in the value chain to work together and co-operate to ensure that consumers enjoy the widest possible choice of legitimate products and services and that IPR owners are fairly remunerated. EDiMA's members already work closely with actors across the value chain, providing both commercial and technical solutions to the opportunities and challenges that emerge in an ever-evolving and fast-paced online environment.

In order to facilitate the emergence of a vibrant online sector with the largest variety of products and services and business models available to consumers, a balance must be struck, however, between the role of intermediaries, IPR owners, and in particular consumers. Any policy initiatives need to take into account the delicate balance between intermediary obligations and liability as laid out in the E-Commerce Directive, a regime which has served as a cornerstone for the digital economy and provided the legal certainty necessary for the development and launch of new Internet services. Furthermore, any shift in liability provisions requires considerable debate and should not be introduced through the 'back door' via other legislative proposals. EDiMA believes that policymakers must ensure that any potential new obligations are clearly defined and in accordance with established EU principles such as those found in the E-Commerce Directive.



EDiMA assumes that the European Commission will not take any position on filtering and its effectiveness to actually “prevent online IPR infringement” before leading an in-depth assessment on its feasibility and the potential economic and technical impact. Such assessment should take into account the real costs, effective benefits, and actual risks raised by the application of filtering, as well as its likely effects on innovation and the development of online services.

### **Proposal 5: Initiatives to develop electronic commerce in the internal market by 2011**

EDiMA believes that a measure of success of the Internal Market and the free movement of goods and services is the existence of an environment in which goods and Internet services can be made available on e-commerce and online platforms across the EU for the benefit of European consumers. Such a Digital Single Market will provide consumers greater and more convenient access to information and an ever-increasing selection of products and services. Consumer expectations for convenience and broad availability must be reflected and taken into account in the EU policymaking process. The business models capable of meeting these consumer expectations depend on a scale beyond individual Member States and, ultimately, beyond the EU. To be a successful and thriving digital economy, the EU must respond to these realities.

The Commission has to date focused on growth in e-commerce either in terms of (1) cross-border e-commerce or (2) those engaging in e-commerce who had not done so previously. While both measures are important and welcome, an equally important source of growth for e-commerce will come from those currently engaged in e-commerce (be it cross-border or otherwise) spending a larger percentage of their overall retail spend online. It is therefore equally important that the Commission understands and focuses on the barriers/friction points for these consumers.

EDiMA wishes to stress that the core and key principles of the E-Commerce Directive, both the Country of Origin Principle and limited liability regime, have been and remain essential to the development of information society services across Europe. A regulatory environment marked by consistency and legal certainty is necessary in order for these services to meet their full potential and for innovation to be fostered and promoted. As highlighted and confirmed in the most recent OECD study on the matter<sup>4</sup>, Internet intermediaries have played and continue to perform a key role in economic and social development across the globe. Underpinning these contributions, the Internet intermediary liability regime established by the E-commerce Directive serves as a foundation of the economic growth and innovation enabled by the digital economy in Europe.

The Single Market Act should reconfirm and emphasize the important role of the EU’s existing liability regime, as set down in the E-commerce Directive, and attempt to address the obstacles to growth caused by its inconsistent implementation. The execution of other SMA proposals should of course take into account the importance of the EU liability regime and not inadvertently stifle the very development the SMA aims to facilitate.

### **Proposal 20: Commission publication of a new VAT strategy in 2011**

EDiMA strongly believes that the opportunities provided by convergence between the online and the physical environment should be addressed in all reviews of public policy, including in relation to VAT. EDiMA advocates for the creation of a level playing field with regard to VAT rates applying to

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<sup>4</sup> The Economic and social role of Internet Intermediaries, April 2010, p.4. <http://www.oecd.org/dataoecd/49/4/44949023.pdf>



educational and cultural content, regardless of the means of user access. Specifically where reduced VAT rates exist for content distributed in physical form, these should also be available for the digital equivalent. Such an approach would support the uptake of innovative content services and new ways for users to access content online.

Given the varying tax rates across member states at present, the SMA allows for an opportunity to harmonise existing VAT rates and remove the disparities that currently create complexity and hamper the developments of online content distribution. At a minimum, administrative burdens should be reduced for all forms of transaction within the single market.

#### **Proposal 46: Alternative dispute resolutions/online ADRs**

EDiMA supports the development of alternative dispute resolutions (ADR) schemes that are flexible and non-compulsory. Overall, the measures envisaged by the European Commission should not be restricted to particular types of cases nor to particular types of ADR, although they may contain principles which only apply in certain situations (e.g. where an ADR body attempts to resolve a dispute by consent). It is also essential that the systems are set up in a way that stipulate that, subject to the right of parties to lawfully agree to ADR in advance of a dispute, ADR should be treated as a voluntary alternative to litigation. ADR systems should also be flexible enough to be capable of accommodating claims from multiple jurisdictions where appropriate, and the results should be capable of EU-wide application.

#### **Proposal 47: Enhanced Commission and Membership partnership to develop a more resolute policy to enforce the rules of the single market**

Inconsistent implementation of EU legislation goes directly against the principles of the Single Market and creates fragmentation and legal uncertainty that often make it difficult, if not at times impossible, for businesses to confidently develop and launch pan-European and cross-border online services. Where legislation does exist and where it can have a positive impact on the establishment of a fully functioning Single Market, such legislation is not always consistently implemented at national level.

The European Commission should ensure consistent implementation of EU law in order to foster the development of a true Digital Single Market marked by legal certainty for the benefit of European consumers and businesses alike.

#### **New point: Data protection**

In addition to the proposals highlighted above, EDiMA believes that failing to address the issue of data protection via the SMA would present an unfortunate missed opportunity, particularly given its importance to the development of the EU digital economy and to the creation of a digital single market. The current legislative framework for data protection creates strong institutions whose primary responsibility is to protect privacy (e.g. DPAs and the Article 29 Working Party). These institutions have an explicit privacy protection mandate. However, the Commission should seek to balance complementary policy objectives and should strive to ensure this balance through proposals in the context of the data protection review.

For example, Article 30 could include an obligation for the Article 29 Working Party to consult industry, alongside other relevant stakeholders, in the preparation of its opinions and



recommendations. The Commission should also take on explicit responsibility for oversight of the economic impact of the way the legislative framework is implemented. This would include formal dialogue with the Article 29 Working Party and powers to issue Commission Recommendations where there is a need to address economic impacts. In this context, the Commission should consider as well whether the Article 29 Working Party has sufficiently consulted industry and taken its views into account; whether the opinion or recommendation has potential effects on competition in any given market; whether the opinion or recommendation could have the effect of reducing the coherence of the Single Market; whether the opinion or recommendation could have significant effects on the growth of a specific economic sector or activity; whether rules create substantial administrative burden to businesses in the form of varying local notification obligations and other such purely formal requirements; and, whether the opinion or recommendation impacts the competitiveness of the EU vis-à-vis other jurisdictions. In addition, the Commission should proactively monitor Member States' transposition and implementation of the legislative framework, with a view to ensuring an appropriate balance between the framework's security, economic, and privacy objectives.

### **Conclusion**

In summary, EDiMA calls upon the Commission to take full advantage of the significant opportunity before it and ensure that the Single Market Act focuses on EU citizens, prioritizes the work already done at EU level on removing barriers to the Digital Single Market, and also proposes appropriate regulatory measures to ensure the digital economy can deliver its full potential for the benefits of Europe's citizens. The Digital Single Market is a high priority for EDiMA and we are looking forward to continuing our engagement with all stakeholders to promote its development through the preparation, and execution of the Digital Agenda and the Single Market Act.

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