

# Position Paper

## UEAPME<sup>1</sup> position on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC)

### General remarks

UEAPME welcomes the Commission's consultation on the issue of electronic commerce. With the technical developments of the internet, this topic has become more and more significant for our SMEs. There is a clear need for some improvements, since European e-commerce is still largely fragmented along national lines.

A distinction must be made between e-commerce at national level and cross-border e-commerce. Business activities regarding national e-commerce are indeed taking off, but it is still uncommon for consumers to use the internet to purchase goods from other Member States. Furthermore, there is also a difference between the e-commerce of goods and services. Because of the special characteristic of services, e-commerce is not as developed in this respect, especially not in cross-border cases. The difference between the legal nature of sales and service contracts must be respected.

UEAPME has noticed several reasons and barriers which slow down the improvement of e-commerce business activities. As also stated in the European Commission's report on cross-border e-commerce,<sup>2</sup> *"in order to ensure that online retailers can market and advertise in a simplified and predictable regulatory environment and consumer can trust the online offers they see, it is important that national enforcers ensure uniform implementation of the Unfair Commercial Practices Directive (2005/29/EC)"*. UEAPME also sees the necessity for further promotion of the small claims procedure for cross-border disputes and on the Directives on certain aspects of mediation in civil and in commercial matters (2008/52/EC).

UEAPME underlines that the different VAT systems are one of the major barriers for cross-border e-commerce activities. As long as a certain level of harmonisation at European level in this field is missing, cross-border e-commerce will not improve as wished.

It is also needed to reduce online business administrative burdens related to electrical and electronic equipment, as this kind of goods is subject to further regulatory barriers.

The issue on copyright levies must also be solved, as it is still the case that cross-border traders end up paying and reporting these levies for the same good in different countries.

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<sup>1</sup> UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](https://ec.europa.eu/transparency/initiative/representatives/ueapme).

<sup>2</sup> Commission staff working document, Report on cross-border e-commerce in the EU, SEC(2009) 283 final

Furthermore, problems related to payment systems have been identified as well. Also the report of the Commission stated<sup>3</sup> that despite the efforts on the Directive on payment services<sup>4</sup> making and receiving payments cross-border online throughout the EU still remains a challenge particularly for SMEs and for consumers, and a major deterrent to cross-border trade. A further huge challenge for the internal market is the limitation of the risk for fraud by e-payments, because legal security is needed on the one side by the consumer and on the other side by the entrepreneur. An inquiry regarding the automatic chargeback by credit card companies should be undertaken. Also the costs for online payments by credit card companies should be lowered.

The physical market and the digital retail market are getting more and more intertwined. More and more SME retailers are working with franchise contracts. In these contractual relations franchisees are entitled to use the franchise formulas of the franchise organisation. It is very common that both parties agree an exclusive geographical area for the franchisee in order to avoid that different franchisees and the franchisor will compete with each other in the same area. All this is legally settled in the vertical restraints regulation. In most franchise contracts, agreements are made about the physical situation. E-commerce is not involved. Although franchise organisations must respect the geographical rights of its franchisees, in practice franchisees are being competed by their franchise organisation/franchisor who expands its e-commerce activities to the area of the franchisee. At this moment retailers experience a gap in European competition law to settle these problems effectively. Competition law does not (yet) acknowledge that e-commerce activities can influence competition as well.

It has to be borne in mind that e-commerce is very often an additional tool for businesses. Most of the businesses are going to establish e-commerce activities if they are effective and successful enough in their traditional purchase activities. Therefore it should be avoided that the issue of e-commerce is dealt with too separately from the original commercial activities.

## **Specific remarks related to the questionnaire introduced by the European Commission within the consultation**

**1)** With respect to **question 19** (*what are your views on the growth of the economic development of electronic commerce and information society services in Europe, in general and compared to its most important competitors*), e-commerce is without any doubt growing, and it is important from the business and competitive perspective. Depending on the geographical place of a country, e-commerce provides SMEs with access to markets that would not have been possible previously. But, as already mentioned before, a difference must be made between cross-border and domestic e-commerce businesses. Businesses show little willingness to have cross-border e-commerce activities. There are several reasons for this, which were outlined in our general remarks. As long these issues are not solved there will be no internal market for e-commerce. Nevertheless, domestic e-commerce has become a part of the every-day life. It also shows that the overall level of acceptance and trust in the existing relevant national legislation seems to be sufficient. On the other hand there is still a lack of confidence compared to traditional ways of contracting and distributing, because of the lack of physical presence of both parties and the missing availability of the trader to ask him directly individual questions.

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<sup>3</sup> Commission staff working document, Report on cross-border e-commerce in the EU, SEC(2009) 283 final

<sup>4</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC

**2)** With respect to **question 20** (*more specifically, do you have any indications that delivery problems would be an obstacle to the development of your electronic commerce activity; if so, which*) UEAPME considers the delivery of the ordered goods as one of the problematic part of e-business t. This is mainly provided by external companies. As such, sellers do not have 100% control over the service. Another limiting factor is the time of delivery and the need “to wait” to receive the goods, e.g. 4 hours.

**3)** With respect to **question 21** (*do you encounter problems in raising capital for your electronic commerce activities from banks or venture capital; if so, please specify*) capital is provided in particular by private investors. It must be mentioned at this point that during this period of economic crisis it seems more difficult to obtain a bank credit than earlier.

**4)** With respect to **questions 22** (*is a lack of knowledge of your legal or fiscal obligations in the context of electronic commerce or of the provision of information society services an element dissuading you from entering into such activities*) and **23** (*are you deterred from undertaking such activity by insufficient offer of competitive legal or fiscal advisory services, specialised in electronic commerce or information society services*) the current e-commerce provisions are quite burdensome for many enterprises and do not support a possible introduction of e-businesses by enterprises. In particular, the lack of full harmonisation on certain areas, or rather the possible exceptions in the internal market clause, are one of the reasons why SMEs do not establish cross-border e-commerce activities. These exceptions in the internal market clause that weaken the “country of origin” principle, are especially harmful in consumer issues, such as information requirements, right of withdrawal, but also for product labelling in the area of administrative law. These kinds of burdens are simply impossible to accomplish for SMEs.

It is doubtful that the currently discussed proposal for a Directive on Consumer Rights will bring any improvement in this area. Although most likely several aforementioned issues, as right of withdrawal and information requirements, will be fully harmonised, it will be not enough in order to improve cross-border e-commerce businesses activities, since many important issues, proposed in the Directive, will stay in the area of minimum harmonisation.

Currently, if the information requirements of a Member State are not respected according to its national law, this is on the one hand breach of the consumer rights provisions but on the other hand also breaches of the principles of the fair competition of advertising practises and can serve as a basis for an injunction. Not to mention that also a notice by a lawyer can be introduced against the foreign SME.

An example in this case is that in Germany there are concrete wordings that must be used by information requirements. Such wordings are not required in the Austrian legal regulations. Furthermore, these kinds of wordings are changing consistently to guarantee the conformity with the German and European jurisdiction. For an Austrian SME it is nearly impossible to introduce the correct wording in its advertisement and information requirements would the enterprise like to do cross-border business in Germany.

This kind of problem can be only solved with full harmonisation or through the elimination of exceptions from the “country of origin” principle that effect consumer information and consumer contracts.

**5)** With respect to **question 24** (*do you have information according to which payment problems (lack of choice in terms of methods of payment, confidentiality issues, refusal of payment cards from another Member State, etc) would be an obstacle to the development of your electronic commerce activity; if so, can you assess and illustrate these problems*) the developments of e-commerce are not limited by the methods of payment. Although there are differences in the uptake, many consumers still prefer to pay cash on delivery.

**6)** With respect to **question 25** (*do high bank charges for accepting payments hinder your online activities and do you think that, at European level, there are sufficient alternative payment schemes without high charges for the retailer*) as it was also mentioned in our general remarks, high bank charges, especially those related to credit and debit cards, are considered as an obstacle for many internet retailers. In some countries (e.g. Czech Republic) a significant proportion of retailers does not offer payment by card at all. In those countries, the purchase by means of electronic wallet has been up to now unimportant and unsuccessful and not attractive for the costumers.

**7)** With respect to **question 26** (*do you experience problems in accepting payments of small amounts due to the high level of bank charges (for instance merchant service charges) or, in general, due to the scare availability of payment methods which are suitable for this purpose*) high bank charges indeed limit number of retailers accepting other methods of payment, notably payment cards.

**8)** With respect to **question 29** (*in your view, what are the economic sectors where electronic commerce has developed significantly over the past decade and the fields where, on the other hand its potential has not yet been sufficiently exploited*) it can be clearly noticed that e-commerce has been developing in the area of the sales of goods, financial services, green economy, consultancy. On the contrary, the development concerning services is less significant, especially in respect to cross-border services. The reason for this is that services are almost always individualised and require a pre-contractual and individual consultation between the parties. We would like to state again that e-commerce is only an additional tool for businesses and cannot replace the traditional way of commerce. Because of the limited character of e-commerce, the modification of the legal aspects would not be able to improve the disadvantages compared to traditional businesses. It is a fact that most consumers still prefer to purchase in physical shops and prefer personal contact. This is a matter of course and this attitude of the consumers will never change. Therefore, this should be not described as a “lack of achievement of the internal market”. Nevertheless, this does not mean that there is no need for legal certainty regarding e-commerce. In order to achieve this and to improve this field of commercial transactions, the current legal framework must be developed.

**9)** With respect to **question 34** (*in your view, is the derogation to the internal market clause covering contractual obligations concerning contracts concluded by consumers, set out in the Annex to the Directive, still useful, despite the development over the last ten years of Community and national legislation concerning consumer protection; if yes, could you provide the reasons justifying the maintenance of such an exemption*) and the internal market clause, as already mentioned before in point 1, the exceptions which effect consumer information and consumer contracts are inhibitive. There is a need to expand the scope of the internal market clause by limiting the possible exceptions.

**10)** With respect to **question 36** (*in your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services*) the problem is related to the pictures/photos of the products. The most controversial issue is if these photos have been taken over or they have simply the same, most of the time quite simple, content. The problem is that the competent court can be based in another Member State and the cost of the procedure is not proportionate to the value of the pictures/photos. There is a clear need for harmonisation in this area of industrial property rights. Furthermore, an online arbitration procedure, such as the one in use on the domain name issue, could give a solution in order to have fast result.

**11)** With respect to **question 37** (*in your view, are there other rules or practices which hinder the provision or take-up of cross-border on-line services; if so, which*) as article 2 point h) ii) of the current directive is exempted the internal market clause does not apply for “requirements applicable to goods as such”. Since a significant part of e-commerce businesses purchase goods this exemption is highly problematic.



**12)** With respect to **question 45** (*what are, in your opinion, the obstacles to the development of codes of conduct for on-line commercial communications for regulated professions at European level*) UEAPME does not see the added value of a code of conduct. This kind of instruments is used in common law systems. In most Member States, there are already existing public-law provisions in order to regulate this issue. Furthermore, the non-compliance of this kind of voluntary instruments breach article 6(2)b) of the Unfair Commercial Practices Directive (2005/29/EC).

**13)** With respect to **question 51** (*in your view, is it necessary to ensure more transparency on the origin of the contents presented by news aggregators of information<sup>12</sup>; if so, by which mean(s)*) within the developments of the press on the Internet we do believe that more harmonisation is needed at this point. Information about sources, e.g. in press releases, is crucial as the omission of it is misleading according to article 7 Unfair Commercial Practices Directive. Furthermore, the problem of the naming which will be infringed by several national copyright provisions must also be mentioned. As concerning this only a certain degree of originality is required many products, texts and press releases are affected.

**14)** With respect to **question 58** (*are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations*) there is currently a preliminary procedure in the Court of Justice (C-360/10, SABAM versus Netlog). The judgment will affect the issue of question no. 58.

**15)** With respect to **question 60** (*do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse*) there is a significant problem concerning filter methods. This kind of filtering methods cannot make a difference between the content of the filtered message, they can only recognise the format. Moreover, the application of filter technologies would slow down the data signalling rate and would open the way to interferences of the legally protected position of the operators.

**16)** With respect to **question 61** (*are you aware of cooperation systems between interested parties for the resolution of disputes on liability*) and **62** (*what is your experience with the liability regimes for hyperlinks in the Member States*) it would be more useful to extend the indemnity, as compensation claims are rarely relevant. Concerning article 12 of the e-commerce Directive, it is wished to introduce that claims can be imposed only after an unsuccessful notice and after an appropriate deadline was set for determine the infringement without any success.

**17)** With respect to **question 65** (*are you aware of specific fields in which obstacles to electronic commerce are particularly manifest; do you think that apart from articles 12 and 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain*) especially in the fields where the internal market clause does not apply, it seems a danger that the operator will receive a notice on the basis of the different provision of the Member States.

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