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Dear Mr Thompson,

Thank you for your letter of 5 July 2007 concerning the Draft Commonwealth Games Bill. We welcome the opportunity to comment on the Draft Bill.

By way of introduction, eBay is the world's biggest online marketplace, with over 241 million users worldwide. We do not as a company sell tickets on our site, nor do we at any time hold in our possession any of the items listed on our site. It is also important to stress that eBay does not create, approve, or edit any listings for tickets. These are generated by our users.

Our comments are confined to the Ticket Touting offences set out in Clauses 15-19.

Clause 15

Generally, we would question whether it is right for the Scottish Executive to prohibit the resale of tickets for more than face value, particularly when consumers are likely to have paid more than face value for the ticket. For example, the primary ticket agent may have charged an Order Processing Delivery Fee plus a Service Charge Booking Fee on top of the original face value. Depending on the face value of the ticket, this may account for anywhere between 20% and 50% of the face value¹. An OFT report in January 2005 found that for a selection of events, the highest fee charged as a % of face value ranged from 16% to 67%². In the absence of a full refund from the event organiser or ticket agent, the Bill as drafted would prevent consumers from recouping in full their initial outlay.

¹ The Ticketmaster Fee-nomenon', Washington Post, June 2004

² Ticket Agents in the UK, Office of Fair Trading, January 2005, Table 3.3, p25



We would also question whether restrictions on the resale of tickets represent a restraint on trade under EU law.

Clause 18

In particular, we wish to highlight our serious concern about Clause 18. This Clause states that:

“Making facilities available in connection with electronic communications or the storage of data cannot of itself constitute a touting offence.

This exception to the touting offence does not apply if the person who makes the facilities available-

- (a) discovers that they are being used in connection with the commission of a ticket touting an [sic] offence, and*
- (b) continues to make them available for such use after the shortest time reasonably needed to stop doing so.”*

This Clause, as drafted, would have the effect of firstly making eBay legally liable for content which is posted on its site without its actual knowledge, in so far as it would be sufficient under this Clause to notify eBay or any other Information Society Service Provider of the 'general problem' of people selling tickets on our site without specifying where on the site such infringing content is hosted. The Bill as drafted therefore imposes a de facto monitoring obligation on eBay.

More importantly, it would also require eBay, upon discovering that its site has been used to sell even one ticket, to effectively shut down its entire site as soon as possible, since it would be required to discontinue the '*facilities*' which made it possible for the original offence to be committed within '*the shortest time reasonably needed to stop doing so*'. Other online marketplaces, online classified sites, and arguably paid search - e.g. Google AdSense or AdWords - would be similarly covered.

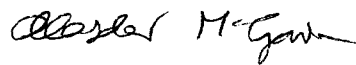
As such, we believe that the Bill as drafted is in direct contravention of the E-Commerce Directive and the Electronic Commerce Regulations 2002 which transposed the Directive into UK law. These set out clearly the obligations of Information Society Service Providers (ISSPs) in respect of notice and takedown. Upon receiving notice and therefore actual knowledge of illegal content, we are already obliged to act expeditiously to remove such content. However, the E-Commerce Directive makes it clear that Member States may not impose general monitoring obligations on ISSPs, and the E-Commerce Regulations specify clearly that third parties are obliged to notify us not only that infringing content is hosted on our site but also specify its precise location. These provisions are

essential for sites such as eBay which hosts over 100 million listings globally at any given time, with over 6 million new listings added every day.

Whilst we do not believe that this is the intention of the Scottish Executive, we are concerned that the Clause is clearly capable of being so interpreted. We would therefore welcome the opportunity to discuss with you some potential amendments to the Bill.

I am copying this letter to Stephen Timms MP and Nigel Hickson in the Department of Trade and Industry.

Yours sincerely,



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