

EACA Position on the Draft Regulation on promoting fairness and transparency for business users of online intermediation services (COM (2018) 238)

The European Association of Communications Agencies (EACA) represents more than 2,500 communications agencies and agency associations from nearly 30 European countries that directly employ more than 120,000 people. EACA members include advertising, media, digital, branding and PR agencies.

EACA welcomes the European Commission's determination to increase the transparency and fairness around "providers of online intermediation services" (referred to as "platforms") in their relationships with businesses. Advertising and media agencies work closely with these intermediation service providers, such as Google and Facebook, and must be able to rely on fair, transparent and balanced trading practices. EACA therefore endorses the proposed rules on terms and conditions, transparency around ranking and availability of redress.

However, EACA is disappointed at the Commission's lack of ambition regarding the scope of the legislation. Under the [current proposal](#), only a very narrowly defined set of business users would be able to benefit from increased transparency and fairness. EACA considers this a missed opportunity given the momentum that this draft proposal has created. The amount of time spent on preparing the actual proposal will make it unlikely for the issue to be addressed again any time soon.

We therefore call on decision-makers to include agencies as „business users“ (as per Article 2 (1)) and to make sure that the data given by providers of online intermediation services is verifiable.

1. Preliminary remarks

Advertising agencies are not online intermediation services as per the draft Regulation Art. 2. Neither are they information society services, nor do they allow business users to offer goods or services to consumers. There is also no double contractual relationship. The exclusion of certain advertising services (advertising servicing tools) and certain advertising business types (advertising exchanges) is underlined in Recital 9. Therefore, even in the rare case that an agency would manage an ad exchange, it cannot be considered an online intermediation service.

2. Why agencies should be included as business users

1) Agencies rely on platforms' transparency to assess success and decide on investments.

Platforms provide a unique environment for advertising clients (i.e. advertisers and/or agencies on behalf of advertisers) to reach consumers and markets with relevant advertising. There is a value exchange between (1) the consumers of platforms who enjoy their functions, information and utility, (2)

platform owners who build their businesses on advertising revenues, and (3) advertisers or brands which provide monetisation in support of their need to advertise. To maintain a trust-based relationship, platforms must increase their transparency and, for example, share more metrics with their advertising clients in order for them to objectively assess the effectiveness of campaigns and consider investment decisions.

Agencies often cooperate with so-called third-party verification companies that measure the success of campaigns against a standardised set of criteria. However, most platforms do not allow these companies access to relevant data. As a result, agencies have to rely on platforms' self-reported data and metrics when informing their clients about the success of a campaign. In addition to providing more transparency about ranking parameters and other metrics, platforms should therefore allow such third-party verification companies access to data.

2) The interaction of users with advertising goes well beyond the mere „click“

Engagement: Agencies facilitate the interaction of users with brands via platforms. This includes but often goes well beyond the mere display of clickable ads next to or within, for example, a feed. Agencies create campaign information sites, video clips, games and experiences around brands in order to incite curiosity, awareness, engagement and loyalty. Consumers might not go on a platform to actively search for an ad, but they might want to find out more about and engage with their favourite brand (i.e. they „like“ it, leave comments; subscribe to channels, play online games, etc.).

Reasonable expectations: Most if not all platforms' terms and conditions stipulate that users will see (tailored) ads, offers and other content to help them discover products and services. Users must agree to these terms and conditions prior to being able to access platforms and can therefore be reasonably expected to be exposed to advertising.

3) Clarifications around „corporate website users“ are missing

Corporate website users: The definition provided in Art. 2 (7) does not clarify the term “to use a website”, and therefore, does not specify whether the natural or legal person, e.g., owns, operates or administers the website, which is used for the trade and what the pre-conditions for being considered a corporate website user are. A website can be used for various purposes, including promoting goods or services and/or providing the possibility to purchase them. A natural or legal person using the website for such purposes can also be an agency, which operates and/or manages the website on behalf of the trader as a channel of communications or sales.

Optimising traffic: Agencies' services to their clients (advertisers) often include search engine optimisation (SEO), paid search or influencing rankings against payment. They also design and sometimes operate corporate websites on behalf of advertisers. Under the current proposal, however, agencies would not benefit from increased transparency around the impact payments will have and what the main parameters determining ranking are and how they can be influenced.

4) Differentiating business users risks creating an uneven level playing field

By providing only a subset of business users a privileged contractual relationship with platforms, the

European Commission is creating an uneven level playing field. We strongly believe that the draft regulation provides for a rare opportunity to afford all business users of online intermediation services greater transparency and fairness. For example, while the media using YouTube channels to reach their audience would benefit from greater transparency under the regulation, brands that use YouTube to engage with their customers and/or have agencies manage their channels would not.

3. Suggested amendments

1) To ensure the inclusion of agencies as business users

Article/Recital	Amendments suggested
Art. 2 Definitions, (1)	"business user" means any natural or legal person which through online intermediation services offers and/or promotes goods or services to consumers for purposes relation to its trade, business, craft or profession;
Art. 2 (2) "online intermediation services"	b) they allow business users to offer and/or promote goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded.
	c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer and/or promote goods or services.
Art. 2 (7): Corporate website user	means any natural or legal person which uses websites to offer and/or promote goods or services to consumers for purposes relating to its trade, business, craft or profession.
	<i>Articles 2 (8), Art. 6(1), Art. 8 (1) and Recitals 3, 7, 17, 18, 19 would need to be amended accordingly.</i>

2) To ensure that the data provided by online intermediation service providers can be verified

Art. 7, 2 (c) Access to data	Whether, in addition to point (b), a business user has access to personal data or other verifiable data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers thereof, and if so, to which categories of such data and under what conditions;
Recital 20 (access to data)	The ability to access and use verifiable data, including personal data, can enable important value creation in the online platform economy. Accordingly, it is important that providers of online intermediation services provide business users with a clear description of the scope, nature and conditions of their access to and use of certain categories of data. The description should be proportionate and might refer to general access conditions, rather than an exhaustive identification of actual data, or categories of data, in order to enable business users to understand whether they can use and/or verify the data to enhance value creation, including by possibly retaining third-party data services. Processing of personal data should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council.

For more information or questions, please contact:

Nina Elzer
Senior Public Affairs Manager
EACA – European Association for Communications Agencies
Tel: +32 (0)2 740 07 13
nina.elzer@eaca.eu