EUROPEAN ASSOCIATION OF COMMUNICATIONS AGENCIES

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EACA Position on the New Deal for Consumers

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 members are strongly committed to ensuring that advertising is honest, legal, decent, truthful, prepared with a sense of social responsibility and created with due respect to the rules of fair competition. This is reflected in their adherence to voluntary codes and standards, which often go beyond legal obligations. In doing so, they promote and protect the reputation and brands of their clients, making sure that advertising-related interactions with consumers are based on trust and transparency.

Whereas we perceive the consequences of the 'New Deal for Consumers' on communications agencies to be of rather indirect nature, we would like to share the following concerns of our membership with co-legislators:

1) Potential substantial and detrimental impact on advertising self-regulation

The role of advertising self-regulation has been acknowledged in various EU initiatives. For example, it has recently been enshrined in EU law in the context of the Audiovisual Media Services Directive (Art. 4a), which stipulates that self-regulation provides for effective enforcement.

The New Deal proposal, however, threatens to undermine the role and work of self-regulatory organisations (SROs)[1]. The self-regulatory (SR) system is industry-led and fully financed by the advertising ecosystem. Consumers can complain quickly and at no cost to their national SRO, which then decides whether an ad is in breach of standards and needs to be corrected or removed. Agencies can also proactively reach out to SROs for (confidential) advice when in doubt, thereby considerably reducing the risk of negative adjudications against their clients (advertisers) after airing the ad.

- A system of penalties and collective redress, as per the New Deal, would take away the incentive for the advertising industry to finance and participate in the SR system if SRO decisions could be instrumentalised in the context of an individual mass claim. The risk is the erosion of the advertising SR system, which would lead to a substantial loss of consumer protection.
- The threshold to meet the criteria to set up a „qualified entity" is set too low given the powers that would be vested in such entities. There are insufficient safeguards against the potential abuse by, for example, third parties with commercial interests in specific matters and/or those which aim to make a business out of complaining against alleged infringements. Also,

[1] An overview of how ad self-regulation works is provided by the European Advertising Standards Alliance (EASA), of which EACA is a member

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organisations would have the potential to start complaints procedures with the sole aim of acquiring more information or to harm a particular company's reputation - without the actual intention of winning.

- The proposed introduction of mutual recognition of court decisions, which might be more easily obtained in certain countries, would open the door to "forum shopping" for "qualified entities", in turn allowing such rulings to be used against the same company in other Member States. At the same time, taking legal action against such decisions will be comparatively hard for companies facing such circumstances.
- The current proposal is based on the assumption that a system of penalties and sanctions inadvertently leads to lawful behaviour. However, the self-regulatory advertising systems in Europe have, over decades, been proven to work efficiently and effectively to the benefit of consumers, the advertising industry and regulators without applying penalties or sanctions. The potential damage to brand or company reputation may be bigger, costlier and more durable than the impact of penalties or sanctions.

2) Unnecessary new provisions and inconsistencies with existing legislation

A major fitness check of EU consumer law, which was concluded in 2017, confirmed that, in general, consumer law remains fit for purpose, including for the online marketplace. In spite of these conclusions, however, the New Deal for Consumers was brought forward, proposing solutions where no problems had been identified as well as overlapping, yet inconsistently linking, with existing legislation, for example:

- The Unfair Commercial Practices Directive (UCPD) was drawn up as a technology-neutral, principle-based and thereby future-proof directive. It has proven to be a robust legal framework, which is complemented by advertising self-regulation. This includes Annex I, which lists prohibited commercial practices. We would therefore caution against unnecessary changes to a well-functioning legal framework.
- Some of the provisions of the New Deal for Consumers pre-empt the intended objectives of the recently adopted Consumer Protection Cooperation Regulation (CPC) and create incentives to bypass the CPC system of referring cross-border cases, while not offering the same legal certainty where these cases are challenged.
- The General Data Protection Regulation (GDPR) provides for "remedies, liability and penalties" (Chapter VIII, Art. 7 ff) and puts in place certain safeguards with regards to those organisations that can lodge complaints (statutory objectives in the public interest, the need to obtain a mandate from data subjects). As no such safeguards exists in the New Deal, it risks watering down the GDPR provisions.

Conclusions

EACA calls on co-legislators to carefully assess the potential impact of any newly introduced legal instrument on the well-functioning and balanced systems of consumer protection and self-regulation and to avoid counter-acting existing legislation. In addition, EACA recommends co-legislators to consult the different stakeholders in the advertising ecosystem in order to make sure that the benefits of self-regulation are not foregone.

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