

Brussels, 3 February 2022

### Position paper on the Digital Services Act

The European Advertising Standards Alliance (EASA) would like to comment on the proposal for a Regulation on a Single Market for Digital Services (Digital Services Act - DSA) which main objectives are to contribute to the protection of consumers, ensure higher standards on transparency and accountability of online platforms and foster innovation. Even though the DSA will update the horizontal legal framework for digital services, the EU policy makers should further ensure that it recognises current legal frameworks and does not duplicate or weaken any existing best practices, such as advertising self-regulation, which has proven its added value and effectiveness in protecting consumers and responsible business from misleading, harmful or offensive advertising. Therefore, EASA would like to provide initial thoughts and feedback on the following issues identified in the DSA proposal:

1. Codes of conduct and codes of conduct on online advertising
2. The extension of the scope of Art. 34 to advertising
3. Definition of “advertisement”
4. Online advertising transparency
5. Out-of-court dispute settlement
6. Consistency with other legal acts

#### About EASA and advertising self-regulation

EASA<sup>1</sup> is the single authoritative voice on advertising self-regulation in Europe and promotes high ethical standards in commercial communications by means of effective self-regulation. Established in 1992, EASA represents and coordinates the advertising self-regulatory systems across Europe. Its membership is composed of 28 independent advertising self-regulatory organisations (SROs), which enforce advertising self-regulatory codes of conduct at national level, and 14 stakeholders representing the advertising ecosystem (advertisers, agencies, media and digital platforms) which are all committed to ensuring responsible advertising.

Advertising self-regulation plays an important role in ensuring a high level of consumer protection and trust. It supports industry stakeholders in maintaining and further developing ethical standards for commercial communications in response to rapid technological developments and changing consumer behaviour.

EASA and its network, which encompasses responsible advertising industry players, strive to achieve that all advertising practices must be legal, decent, honest and truthful, which is also reflected in EASA's Charter<sup>2</sup> and applies to all forms of marketing communications and to all mediums and platforms, including digital<sup>3</sup>. A self-regulatory system enables continued development, improvement and effective enforcement of the industry's commitments in order to reflect market realities and

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<sup>1</sup> More information about EASA is available [here](#).

<sup>2</sup> EASA, [Advertising Self-Regulation Charter](#), 2004

<sup>3</sup> EASA, [EASA Best Practice Recommendation on Digital Marketing Communications](#), 2015

adapt to new consumer behaviours in digital environments. Such a system features not only codes of conduct, independently enforced by the self-regulatory bodies, but provides monitoring, training and compliance advice to the industry. The European SROs handle, on average, 60.000 complaints per year and review compliance of more than 90.000 ads before publication<sup>4</sup>. The complaints procedure is free of charge to consumers and provides investigations quickly, as the vast majority of cases<sup>5</sup> are resolved within two months. Furthermore, it is important to stress that the European consumers have significantly increased their focus on digital commercial communications over the past years, which also prompted EASA and its member SROs to introduce targeted industry guidelines<sup>6</sup> and design specialised training programmes aimed at addressing the challenges brought by the expansion of the online advertising ecosystem.

### **1. Codes of conduct and codes of conduct on online advertising (Articles 35 and 36)**

**Codes of conduct and codes of conduct on online advertising should be without prejudice to national advertising self-regulatory codes.**

EASA notes with interest the recognition in Articles 35 and 36 of the DSA draft Regulation of the role to be played by codes of conduct. Such recognition can be useful to further stimulate commitment to responsible advertising and to online advertising transparency.

However, EASA is concerned that Articles 35 and 36 may duplicate the already existing codes of conduct and self and co-regulatory best practices developed on the national level. The risk of overlapping codes of conduct could cause legal confusion and undermine national level self-regulatory codes. Furthermore, there is a possibility of a conflict between existing codes and self & co-regulatory best practices and new DSA driven codes. EASA, therefore, calls for the inclusion of additional safeguards and clarifications, which would ensure that codes of conduct under Articles 35 and 36 are without prejudice to national self and co-regulatory practices and codes of conduct which are already in place and well-functioning.

National advertising codes are regularly updated to address emerging trends and risks from the advertising ecosystem. SROs have a longstanding history administering and enforcing national self-regulatory codes as well as the cross-border complaints mechanism<sup>7</sup>, altogether providing comprehensive coverage across Europe. EASA would also like to underline that the national level is the most relevant for consumer-facing bodies. It allows easier access to consumers, especially regarding the matter of language and proper understanding of cultural and societal norms, sensitivities and consumer behaviours.

**The title of article 36 on codes of conduct on online advertising should reflect its main focus.**

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<sup>4</sup> Estimations are based on the average number of complaints and copy advice requests, respectively, provided in the five-year period between 2014 and 2019. For more information, please refer to [EASA's European annual statistics reports](#).

<sup>5</sup> Around 90% of all cases are resolved within the period of two months, based on the statistics reports over the five-year period between 2014 and 2018. For more information, please refer to [EASA's European annual statistics reports](#).

<sup>6</sup> For example, in the area of influencer marketing, addressed in EASA's [Best Practice Recommendation on Influencer Marketing](#) and across national guidelines adopted by EASA member SROs.

<sup>7</sup> EASA's [Cross Border Complaints System](#)

Furthermore, EASA recommends that Article 36 on codes of conduct on online advertising should be renamed from “Codes of conduct for online advertising” to “Codes of conduct for online advertising transparency”, since it specifically aims to address issues connected with further transparency of online advertising. This change would clarify which aspect of online advertising falls under the scope of Article 35 and of Article 36.

## **2. The extension of the scope of Art. 34 to advertising**

Requirements relating to online advertising transparency, especially regarding the fact that the information displayed is an advertisement and the identification of the natural or legal person on whose behalf the advertisement is displayed, have long been covered by national advertising codes enforced at national level in Europe by self-regulatory organisations. These codes draw their principle from the long-standing Advertising and Marketing Communications Code<sup>8</sup> of the International Chamber of Commerce (ICC) featuring dedicated articles on identification and transparency and identity of the marketer. Such codes and self-regulatory systems are widely recognised<sup>9</sup> and are successfully operated by Self-Regulatory Organisations (SRO), which are not “*standardisation bodies in accordance with Regulation 1025/2012*” as defined in Art. 34 in the European Parliament position.

Considering the extensive experience of EASA SRO network in enforcing relevant provisions of self-regulatory codes and the ICC Code, the extension of the scope of Article 34 to advertising practices, as proposed by the co-legislators, would only create confusing and unnecessary duplications.

**EASA therefore recommends not to include a point referring to advertising in Art. 34.**

At the very least, **if the co-legislators decided nonetheless to proceed with the inclusion of advertising practices in Article 34(1), the wording of the introductory part should be more inclusive, allowing for national self-regulatory organisations to be covered by the Article**, rather than only “European and International standardisation bodies”.

## **3. The definition of “advertisement” (Article 2(n))**

**The definition of “advertisement” should ensure legal certainty and consistency with existing regulation.**

As the DSA specifically refers to both commercial and non-commercial purposes in its definition of “advertisement”, it is important that it should provide a clear distinction between both concepts. Introducing two separate definitions for commercial and non-commercial advertising is important in order to ensure legal certainty and avoid unintended consequences. It should be noted that contrary to non-commercial advertising, commercial advertising is already regulated by EU legal rules, such as the Unfair Commercial Practices Directive (UCPD)<sup>10</sup>, Audiovisual Media Services Directive (AVMSD)<sup>11</sup> and Directive on Electronic Commerce (e-Commerce Directive)<sup>12</sup>. Furthermore, the definition of

<sup>8</sup> International Chamber of Commerce [Advertising and Marketing Communications Code](#), 2018 (since 1937)

<sup>9</sup> APEC [Action Agenda on Advertising Standards and Practice Development](#) (2014), OECD [Digital Economy Papers](#), No. 247 (2015), [European Commission's better regulation toolbox](#), [Audiovisual Media Services Directive](#) (consolidated text, 2018)

<sup>10</sup> European Commission, [Unfair Commercial Practices Directive](#), 2005, amended in [2019](#)

<sup>11</sup> European Commission, [Audiovisual Media Services Directive](#), 2010, amended in [2018](#)

<sup>12</sup> European Commission, [Directive on electronic commerce](#), 2000

commercial communications, which also includes advertising, is already provided by both AVMSD (i.e. audiovisual commercial communications)<sup>13</sup> and e-Commerce Directive (i.e. commercial communications)<sup>14</sup>.

#### **4. Online advertising transparency (Article 24)**

**Provisions on online advertising transparency should recognise existing legislation and self-regulatory initiatives.**

When considering online advertising transparency under article 24, due consideration should be given to current regulatory and self-regulatory frameworks.

Advertisement disclosure requirements under Article 24(a) and Article 24(b) are already addressed in the e-commerce Directive<sup>15</sup>, which covers all commercial communications and not just advertising. Furthermore, an additional framework is provided by UCPD that is also imposing standards related to disclosure of advertising<sup>16</sup>. EASA believes that policy objectives on the transparency of online advertising in the DSA can be achieved by effective enforcement of the existing legal framework, complemented by advertising self-regulatory systems, which provide robust, flexible and consumer-friendly mechanisms to ensure responsible advertising in relation to online advertising transparency and appropriate disclosures.

With regard to the transparency of the ad delivery parameters mentioned under Article 24 (c), EASA contributed to the initiation and upholds the industry-wide, pan-European self-regulatory programme on Data-Driven Advertising, administered by the European Interactive Digital Advertising Alliance (EDAA). EASA's network of national SROs contributes to ensuring that companies are accountable to these best practice standards and that consumers can conveniently register queries or complaints about interest-based advertising in their own language with their recognised local advertising standards body. EDAA's programme is an example of consumer-facing disclosure and transparency requirements in online ads, covering emerging advertising formats, including mobile and video<sup>17</sup>.

#### **5. Out-of-court dispute settlement (Article 18)**

**DSA should recognise and ensure a future-proof environment for out of court dispute settlement systems.**

EASA acknowledges the European Commission's recognition of extra-judicial settlements and the obligation to inform complainants regarding possible out-of-court dispute settlement options. All EASA SRO members have established systems for expeditious and free of charge extra-judicial complaint handling for consumers at the national level, which resolve complaints relating to advertising, including digital advertising. Therefore, the DSA needs to recognise and ensure a future-proof environment where EASA SRO members can continue operating these free and self-regulatory out-of-court dispute settlement mechanisms on issues related to advertising.

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<sup>13</sup> For further information please see [AVMSD](#), Article 1 (h)

<sup>14</sup> For further information please see [e-Commerce Directive](#), Article 2 (f)

<sup>15</sup> For further information please see [Directive on electronic commerce](#), Article 6

<sup>16</sup> For further information please see [UCPD](#), Annex I and general provisions on misleading advertising

<sup>17</sup> More information can be found at [www.edaa.eu](http://www.edaa.eu)



## **6. Consistency with other legal acts (Article 1 and Recitals 9 and 10)**

EASA welcomes Recitals 9 and 10 and Article 1 establishing that the DSA would be without prejudice to other relevant legislative acts at the EU level<sup>18</sup>. In particular, it is important for the DSA to ensure the highest level of consistency with these existing Regulations and Directives, as well as to be developed in coordination with other ongoing legislative initiatives<sup>19</sup>, in order to avoid legal uncertainty brought by duplications, redundancies or unnecessary overlap.

### **For more information, please contact:**

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<sup>18</sup> [General Data Protection Regulation](#) (GDPR) (2016), [e-Privacy Directive](#) (2002), [Unfair Commercial Practices Directive \(2005\)](#), [Audiovisual Media Services Directive \(2010\)](#), and [e-Commerce Directive](#) (2002).

<sup>19</sup> Such as the draft [Privacy and Electronic Communication \(e-privacy\) Regulation](#), the [Digital Markets Act](#), or the [Data Governance Act](#).