

**Advertising Association response to the Government's review of the Balance of Competences  
between the United Kingdom and the European Union**

**Competition and Consumer Policy review**

**17 January 2014**

**1. Introduction & context**

- 1.1. The Advertising Association (AA) is the single voice in the UK for all sides of the advertising and promotions industry worth £17bn in 2012 – advertisers, agencies, and media. A list of AA members can be found here: <http://www.adassoc.org.uk/Members>.
- 1.2. We welcome the opportunity to respond to this consultation and to provide input to HMG's thinking and understanding of how competition and consumer policy is handled, how it affects the UK, and whether the balance of competences is broadly effective in protecting and promoting UK consumers and business interests.
- 1.3. Sometimes EU proposals, designed to promote and harmonise consumer protection across Europe, can have unforeseen consequences for existing UK business practices that have previously been regarded as compatible with consumer protection. In these cases, we appreciate the work usually done by Whitehall civil servants to consult widely to ensure that consumer and business interests remain balanced.
- 1.4. Our response uses as examples those Directives which most directly affect our day-to-day business mainly the Misleading and Comparative Advertising Directive, the Unfair Commercial Practices Directive (UCP), Audiovisual Media Services Directive (AVMSD), the E-Commerce Directive, and Data Protection Regulation (DPR).

**2. Advertising and the Creative Industries**

- 2.1. The creative industries, and marketing and advertising within that, are a key UK sector. The January 2014 statistical report by the Department of Culture Media and Sport<sup>1</sup> found that 1 in 12 jobs in the UK is in the Creative Economy. 'Advertising and marketing' remains the second highest employer within the Creative Economy, making up 18% of the Creative Economy. In 2012, employment growth in the Creative Industries (8.6%) was 12 times that of the wider economy (0.7%). The rate of export growth for the Creative Industries, from 2009-2011, increased by 16.1% compared to 11.5% for total UK exports.
- 2.2. As was found by research carried out by the think-tank Credos: "The advertising industry is central to the creative industries. It provides a third of all TV revenues and two-thirds of newspaper revenues; it supports sectors from photography to film production. We estimate that over 550,000 people work in jobs that are funded by advertising revenues, or involved in the commissioning, creation and production of advertising across the relevant supply chains."<sup>2</sup> The UK advertising industry is recognised across Europe for its leadership in adspend, creativity, and effective system of self-regulation.

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<sup>1</sup> Creative Industries Economic Estimates: January 2014 Statistical Release. DCMS. Available [here](#).

<sup>2</sup> Advertising Pays: How advertising fuels the UK economy. Deloitte. 2012. Available [here](#).

### 3. European Procedures

- 3.1. The degree of harmonisation of consumer protection rules is difficult. Full harmonisation, where practicable, creates legal certainty for businesses and consumers by removing the fragmented approach that currently exists (for example in cooling off periods across Europe because of different interpretations of “calendar days”). But this approach should only be taken where demonstrably needed to address clear barriers to trade. It should not be interpreted as support for the highest levels of protection and harmonisation across Europe because this could place undue and inhibiting burdens on businesses. Equally, the danger of minimum harmonisation is that Member States tend to adopt unnecessary strict rules in order to protect their national markets. We therefore point to the need for proportionality and an evidence-base for proposals.
- 3.2. The AA recognises that the Government – Whitehall and Westminster – engage with industry effectively and seek to understand the concerns of key economic sectors. We recognise that the UK Perm Rep in Brussels successfully briefs UK MEPs and feeds into the Council effectively. We would welcome however greater dialogue between Westminster and the European institutions as this would help to ensure consistency in policy proposals, principles, and approach. For purely UK-based organisations such as the AA, greater dialogue would facilitate inputting to EU proposals.
- 3.3. European institutions should adopt some clear values that reflect the Better Regulation Principles in the UK. In addition, these principles should provide clarity on when the EU should take forward action versus subsidiarity at Member State level. We have noted that the boundaries of EU action can be vague (despite the treaties to clarify this) and lead to over-reaching by the Commission.
- 3.4. Two key principles are those of proportionality and evidence-based policy-making. On this latter point, we consider that there is often too much reliance on Eurobarometer data which is not necessarily the best source of information on consumer attitudes and is over-relied on as an authoritative source to justify new legislation. On the former, we note a lack of meaningful impact assessments – absolutely key in ensuring that adherence to principles of proportionality and subsidiarity.
- 3.5. We are concerned for certain European procedures which are not transparent, subject to political trade-offs not in the best interests of policy-making, and easily and quickly move away from the evidence-base for action. For example, the trilogue process between the Commission, Council, and representatives from the European Parliament is informal and closed, but key to final agreement on legislation and regulations.
- 3.6. Also, the Delegated and Implementing Acts provided by the Lisbon Treaty have removed oversight by Parliament and Council. While we recognise the need to be able to make small technical amendments without going through a lengthy political legislative procedure, we are concerned that such Acts can be open to abuse and allow the Commission to give itself significant powers while taking them away from national authorities. For example, The Commission’s proposal on DPR included 26 provisions that grant the Commission the power to adopt Delegated Acts, with a further 19 provisions that allow the Commission to adopt Implementing Acts. The Council and Parliament texts have stripped out the vast majority of these references, highlighting the Commission’s overzealous use of these tools. The remaining references are still worrisome: one such reference still allows the Commission to

make significant changes, under the guise of additional protections for children, that could affect the implementation of the entire Regulation.

- 3.7. Because of this, we prefer a principles-based approach to European legislation and full harmonisation and prescriptive rules only when they serve for the better functioning of the single market and therefore the removal of barriers to trade.

#### **4. Consumer protection – misleading advertising & unfair commercial practices**

- 4.1. The Advertising Association believes that advertising should be legal, decent, honest, and truthful. We therefore support the key Directives in this regard namely the Misleading and Comparative Advertising Directive and the Unfair Commercial Practices Directive. We agree with the need to protect consumers and recognise the importance of consumer trust, which is essential to establishing a mutually beneficial relationship between trader and consumer.
- 4.2. We believe that European legislation should be evidence-based and proportionate, particularly when balancing the real or perceived risk to consumers against the benefits of advertising, commercial communications, and well-funded media (including online).
- 4.3. We also caution against re-opening legislation that works well as consumer understanding of the rules takes time but also improves confidence. As industry and consumers in the European Member States are becoming more familiar with the laws on unfair commercial practices, legal uncertainty is decreasing through interpretation by national and European Courts. Any changes in the harmonised European law would need to be implemented again in national laws and would therefore lead to renewed uncertainty, to the detriment of both business and consumers. Changes that require new interpretation and implementation can therefore cause apprehension and be counter-productive unless they clearly meet a consumer risk.
- 4.4. At what level consumer protection measures should be adopted depends on:
- Whether there is, or could be in future, a single market currently limited because of consumer concerns;
  - The evidence-base beyond Eurobarometer data of attitudes – in our view insufficient basis for new legislation;
  - Cost/benefit analysis (impact assessments) of taking action at EU or national level – or not at all.

#### **5. Country of Origin Principle – key to advertising regulation**

- 5.1. The Country of Origin Principle is fundamental to the functioning of the single market in media and advertising. It ensures that consumers receive the quality and choice of service that they deserve.
- 5.2. It is also the backbone of advertising self and co-regulation as it provides the legal certainty required for national authorities to police and adjudicate on advertising placed in national media, despite it being received in other countries. A cross-border complaints mechanism exists, and this together with effective regulation and enforcement, ensures a high level of protection from misleading or harmful advertising for UK consumers across broadcast, print, outdoor, and online platforms. Any dilution of the country of origin principle, particularly in key directives and regulations such as the Audiovisual Media Services Directive, the E-commerce directive and the Consumer Protection Cooperation Regulation would be destructive to advertising regulation and consumer protection.

- 5.3. The UK is a recognised leader in its system of advertising self-regulation, it has a robust legal framework, underpinned in statute, which is not replicated in all Member States. The EU could do more to encourage and promote self-regulatory systems but ultimately it is for Member States to develop the framework for effective consumer protection and freedom of commercial communications.

## **6. E-commerce – increasing cross-border purchases**

- 6.1. The consultation notes concern about the low level of cross-border e-commerce. While changes to legislation may appear a silver bullet, it is vital for proposals to be evidence-based and proportionate and therefore for national governments to take forward actions that address key underlying barriers such as computer literacy, buying habits, 'last mile' concerns (post and courier services), and access to the internet and broadband penetration. The UK is one of the leading economies for e-commerce and this can be explained by favourable conditions in these areas. Indeed, we believe that other Member States could usefully learn from the policies that have worked in the UK to achieve high levels of e-commerce, and look to developing them in their jurisdictions also. This bottom-up approach rather than top-down is likely to be more effective in addressing consumer access and confidence in cross-border e-commerce. This is an example of where action at EU level may not be justified as it won't achieve the stated aims.
- 6.2. As we noted in paragraph 5.1, there are a range of other barriers to e-commerce that the Advertising Association believe act as a hindrance to cross-border e-commerce. In addition, Member States can act to unreasonably and unhelpfully undermine the intentions of a single market by protecting their markets through national legislation. One example – of many – is the transposition of the Waste Electrical Electronic Equipment Directive into Irish law which makes it very difficult to sell electronic goods into the Irish market from other member states. Addressing this problem, and others similar to this, should be a priority at EU level.
- 6.3. Another concern which could potentially lead to an undermining of the e-commerce sector relates to the Data Protection Regulations, currently under discussion. We believe that the overall approach should be technology-neutral. However, the proposals threaten the very existence of many business models which rely on the analysis of data. Today's advertising models would be severely impacted, depriving many website owners, publishers, and small businesses of revenues, compromising access to high quality news, information, and entertainment, as well as putting future innovation in danger. While Commissioner Reding believes that harmonising 28 national data frameworks will lead to administrative savings of £1.9bn each year, proposals that are too restrictive will simply stifle the sector, and the opportunities for both consumers and business, of online advertising. However, we agree that the intention for a single data protection regime is helpful and as leaders in e-commerce, the UK stands to gain from regulations that are proportionate.
- 6.4. The degree of harmonisation of consumer protection rules is difficult. Full harmonisation, where practicable, creates legal certainty for businesses and consumers by removing the fragmented approach that currently exists (for example in cooling off periods across Europe because of different interpretations of "calendar days"). But this approach should only be taken where demonstrably needed to address clear barriers to trade. It should not be interpreted as support for the highest levels of protection and harmonisation across Europe because this could place undue and inhibiting burdens on businesses. Equally, the danger of minimum harmonisation is that Member States tend to adopt unnecessary strict rules in

order to protect their national markets. We therefore return to the need for proportionality and an evidence-base for proposals.

## **7. Conclusion**

- 7.1. The Advertising Association supports efforts to ensure consumers are protected from harmful and misleading advertising practices. We support the work undertaken by the EU in this area. However, whether full harmonisation is necessary or national policy should take precedence depends on the situation. In all cases, it is vitally important for proposals to be proportionate and evidence-based.
- 7.2. We are concerned about the use of European procedures that lack transparency and easily move away from evidence-based policy-making. We would welcome the adoption of principles like the Better Regulation Principles in Brussels and a principles-based approach to legislation unless there is a clear single market benefit to be derived from full harmonisation.
- 7.3. The Country of Origin principle is the cornerstone of the single market in advertising and media services, and therefore ensures that consumers have access to the best choice and quality of service. It also serves to protect consumers as it is fundamental to an effective system of advertising regulation that provides legal certainty.
- 7.4. We believe that more can be done at the national level to support e-commerce and cross border purchases online. We are not convinced that a fully harmonised consumer protection regime, and overly-restrictive data protection rules, will achieve greater cross-border trade as disproportionate regulation will stifle and restrict innovation and use of new technologies for the benefit of consumers and business alike.