

## **Advertising Self-Regulation: An effective tool to support Competition and Consumer Protection in the 21st Century**

### **Introduction**

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This paper is the comment of the International Council for Advertising Self-Regulation (ICAS) to the U.S. Federal Trade Commission (FTC) public consultation on International Engagement as Part of its Hearings on [Competition and Consumer Protection in the 21st Century](#). It focuses on two questions of the consultation, namely:

- Question 10: What role should "soft law" (e.g., best practices/guiding principles) play in promoting convergence or interoperability in policy approaches?
- Question 11: How do differing views on the roles of government, self-regulation, and private enforcement affect policy development and enforcement cooperation?

We wish to comment because these two questions are at the core of our mission. We promote responsible advertising practices through self-regulatory programs around the globe. Our membership includes Self-Regulatory Organizations (SROs) from all continents, such as the Council of Better Business Bureau administered Advertising Self-Regulatory Council (ASRC) in the US market<sup>1</sup>. SROs are independent bodies funded by the advertising industry that work to ensure that ads and marketing communications are responsible, meaning for instance that they are truthful and meet applicable social and legal requirements.

A Self-Regulatory System usually contains at least three elements:

- standards governing the content and placement of ads;
- a system for adopting and reviewing the standards;
- an independent and impartial body responsible for ensuring compliance of individual ads with the standards (e.g. by providing advice prior to the publication of an ad and/or by handling complaints once an ad has been released).

More information on advertising self-regulatory systems can be found at:

<https://icas.global/advertising-self-regulation/faq/>

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<sup>1</sup> On 1 June 2019, the Advertising Self-Regulatory Council (ASRC) will merge into the newly created BBB National Programs, Inc. to provide a unified home for national self-regulatory programs formerly administered by the Council of Better Business Bureaus. Policies and procedures formerly set by the ASRC Board will now be the responsibility of BBB National Programs.

ICAS appreciates the Federal Trade Commission’s recognition of the role that self-regulation plays in protecting consumers. We also welcome the FTC’s efforts to ensure that the role of self-regulation is considered by consumer protection policy makers globally, particularly the Organization for Economic Cooperation and Development (OECD) Committee on Consumer Policy, and the Asian-Pacific Economic Cooperation (APEC). For the reasons described below, ICAS commends the FTC’s work and in particular looks forward to continued engagement with APEC’s Committee on Trade and Investment (CTI). We are filing this comment in support of those and other future initiatives.

## **1. Self-regulation and “soft law” are a great way to support cross-border convergence when it comes to competition and consumer protection**

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### **A. Advertising Self-Regulation provides an additional layer of consumer protection**

Self-Regulation is a mechanism put in place by a given industry to regulate itself beyond the requirements contained in the law. It usually involves a system tasked with enforcing standards agreed by representatives of this industry sector. It does not replace regulation but complements it by providing an additional layer of consumer protection. It is especially helpful to address issues on which it is difficult to legislate, such as ethics and cultural sensitivities.

In the advertising sector, self-regulation has been well established for over half a century. In markets as diverse as the United States, Brazil, France, Australia, India or South Africa, SROs have been set up to allow competitors and/or consumers to submit complaints against ads they deem unfair, unethical, or otherwise contrary to the laws or social standards of the applicable jurisdiction. If the complaints are justified, the ads that fail to meet the self-regulatory standards are amended or removed.

Self-regulation entails several benefits for policy makers, consumers, marketers, and society as a whole:

- For consumers, self-regulation provides an inexpensive (typically cost-free), fast and efficient solution to handle their complaints and obtain redress;
- For policy makers and law enforcers, self-regulatory advertising standards provide a useful “filter” allowing them to focus on serious breaches. For instance, SROs can help avoid problems before they happen by providing copy advice, i.e. an assessment of ad blueprints before these are released in the media. Moreover, in those (fortunately infrequent) cases where advertisers repeatedly refuse to change or withdraw an ad found to be in breach of existing standards, SROs may “name and shame” offenders or, in certain markets, as a last resort, refer the case to enforcement bodies like the FTC for further action.
- For advertisers, ad agencies, the media, and all other players in the advertising ecosystem, self-regulation has a long-term positive effect on consumer trust in brands. This is because it promotes responsible practices which respect consumers’ rights and preferences.

## **B. Advertising Self-Regulation also provides an effective mechanism to address competition issues, nationally and internationally**

Most self-regulatory standards and programs worldwide require that all ads conform to the principle of fair competition, as generally accepted in business, and be consistent with competition laws.

In practice, the vast majority of advertising SROs are responsible for handling competitor complaints on ads. The process for handling competitor complaints is usually broadly similar to that in place for handling consumer complaints. It contributes to establishing a level playing field, including in cases where the advertisers are located outside of the home market of consumers targeted by an ad. Self-regulation holds advertising to a set of standards in each market, and industries across the globe benefit from fair competition, which in turn supports innovation.

## **C. Advertising Self-Regulation supports cross-border convergence**

For the FTC and other consumer protection law enforcement bodies worldwide, advertising SROs provide a great way to promote cross-border cooperation and the convergence of standards. These cooperation efforts are of course without prejudice to the right of countries and regions to tailor existing standards to local needs, where appropriate.

Global initiatives such as the Advertising and Marketing Communications Code of the International Chamber of Commerce (thereafter the “ICC Marketing Code”) show that self-regulation can be a driving force in promoting a harmonized approach to consumer protection and competition issues. The ICC Marketing Code, whose first version dates back from 1937, contains a series of guiding principles which have been adapted by self-regulatory systems worldwide. Although advertising standards typically incorporate local specificities, the core principles behind the standards are largely the same.

Moreover, every update of the ICC Marketing Code is an opportunity for stakeholders in different markets to discuss convergent approaches to new challenges such as the rise of digital marketing and the resulting privacy concerns. For example, within ICAS, SROs from all over the world have been discussing the rise of influencer marketing and the need for transparent disclosures to ensure that consumers able to distinguish independent content from sponsored content. Without seeking to adopt global guidelines, ICAS members decided to collect and share information on existing rules to facilitate the exchange of best practices and experiences. This gave rise to an overview of influencer marketing guidelines, available on the ICAS website at <https://icas.global/advertising-self-regulation/influencer-guidelines/>. Ultimately, such exchanges can give rise to largely consistent outcomes, with many markets taking inspiration from existing guidelines, such as those adopted by the FTC. Despite local specificities, guidelines across the globe typically define influencers similarly and require disclosures that are easy for consumers to notice and understand.

Going forward, ICAS hopes to promote cross-border convergence of existing advertising standards in many more areas, always keeping in mind the interests of consumers. The overarching objective of our convergence efforts remains to promote responsible business practices, protect consumer rights, and secure a fair environment for commercial communications.

## 2. International recognition of self-regulatory systems and initiatives positively impacts policy development and enforcement cooperation

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### A. Self-regulation is already internationally recognized as an efficient complement to regulation

Although different views exist on the roles of government, self-regulation, and private enforcement, many international governmental organizations, the European Union, and national governments generally recognize the value of self-regulation as a useful complement to regulation, both in terms of policy development and enforcement cooperation.

In a research paper published in 2015<sup>2</sup>, the Organization for Economic Cooperation and Development (OECD) recognizes the role of industry self-regulation in supporting consumer interests. In particular, it points out to four major benefits in terms of consumer protection, namely:

- improved information;
- more effective dispute resolution;
- combatting unfair or abusive practices;
- enhanced consumer rights.

More recently, Ministers of the Asia-Pacific Economic Cooperation (APEC) issued a joint statement<sup>3</sup> instructing government officials “to continue working on aligning advertising standards” and recognizing “the benefits, effectiveness and efficiency of public sector and self-regulatory organizations working together on self-regulatory approaches, contributing to potential reduction of the cost of doing business in the region.”

In Europe, several pieces of law such as the European Audiovisual Media Services Directive (AVMSD) explicitly recognize the importance of self-regulation as a useful tool “in view of changing market realities” such as the rise of global or multi-market actors. Article 9(4) of this Directive, for instance, encourages “the fostering of self-regulation through codes of conduct [...] regarding inappropriate audiovisual commercial communications”.

These examples show that different governments with different approaches to self-regulation and different views on the role of government in the economy generally agree on the basic principle that advertising self-regulation is an indispensable tool to support consumer protection standards and an efficient implementation of those standards.

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<sup>2</sup> OECD (2015), “Industry Self Regulation: Role and Use in Supporting Consumer Interests”, *OECD Digital Economy Papers*, No. 247, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5js4k1fjqkwh-en>

<sup>3</sup> APEC (2017), Joint Ministerial Statement at the APEC Ministerial Meeting of 8 November 2017. [https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/2017/2017\\_amm?mc\\_cid=c6ba0766bd&mc\\_eid=b6a7c8bb7f](https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/2017/2017_amm?mc_cid=c6ba0766bd&mc_eid=b6a7c8bb7f)

ICAS therefore urges the FTC to make self-regulation, and especially advertising self-regulation, both domestically and cross-border, a key component of its Strategy on Competition and Consumer Protection in the 21st Century.

## **B. The value of self-regulation for policy makers and law enforcers increases in a global, interconnected world**

Looking into the future, ICAS believes that self-regulation is more needed than ever. Tremendous challenges and opportunities face the advertising industry and consequently have a significant potential impact on consumers, and consumer trust. The rise of social media, the global scope of these media, mobile devices, immersive technologies, the changing perceptions of gender roles, and attitudes towards personal data, are all issues that can benefit from principled standards that can quickly adapt to new developments while being enforced by trusted, independent bodies. SROs bring a unique experience in understanding advertising as an industry, evaluating the impact of advertising on consumers, and seeing through the lens of consumer complaints those issues of greatest concern to them. SROs also support industry collaboration as a means to design common solutions to global challenges. ICAS members for instance regularly exchange experiences and ideas on how new technologies such as artificial intelligence (AI) can be used to support automation for detecting and addressing non-compliant ads.

In all markets in which ICAS members operate, SROs work hand in hand with policy makers and law enforcers to ensure the highest possible level of complementarity. We therefore welcome the FTC hearings as a great opportunity to reflect on and reinforce this synergy. ICAS and its members stand ready to support the work of the FTC and its counterparts in other markets in their enforcement efforts, especially as regards cross-border initiatives in the field of advertising standards. As demonstrated every day by ICAS members in the markets in which they operate, self-regulation can be instrumental in achieving more responsible advertising and marketing practices, building consumer trust, and respecting the principles of fair competition.

## **About ICAS**

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The International Council for Advertising Self-Regulation (ICAS) is a global platform promoting effective advertising self-regulation. ICAS members include Self-Regulatory Organizations (SROs) and other national, regional and international bodies working to ensure that ads and marketing communications are legal, honest, truthful and decent.

As of 31 May 2019, ICAS had 30 member organizations active in all major regions of the world: Europe, the Americas, Asia-Pacific, Africa and the Middle East.

For more information on ICAS, its members, mission and activities, please visit <https://icas.global> or contact Ms Soraya Belghazi, ICAS Manager, at [info@icas.global](mailto:info@icas.global).