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ASA response to DCMS open letter on 'A Communications Review for the Digital Age'

1. The Advertising Standards Authority's (ASA) mission is to ensure that advertising in all media is legal, decent, honest and truthful, to the benefit of consumers, business and society. We are happy for this submission to be published.
2. The ASA is grateful for the opportunity to put forward our thoughts on the development of a new regulatory framework for the communications sector. As the one-stop shop for advertising complaints in the UK, our response will focus on advertising regulation in the context of question 13:

Q13. Where has self- and co-regulation worked successfully and what can be learnt from specific approaches? Where specific approaches haven't worked, how can the framework of content regulation be made sufficiently coherent and not create barriers to growth, but at the same time protect citizens and enable consumer confidence?

3. We believe self- and co-regulation can be an excellent way of achieving public policy aims - especially if business is on-board, appropriate structures are put in place and standards are sufficiently high to be acceptable to stakeholders.
4. Self- and co-regulation can allow business to flourish by achieving public policy aims at no cost to the taxpayer via a more business sensitive approach to regulation.
5. The ASA is an excellent model of effective self- and co-regulation, which could be applied to other sectors and areas of communications regulation. Through this response, we will outline why the ASA is a best-practice model and how we operate effectively as a regulator. We will finish by discussing what areas Government and the advertising industry could consider, to ensure the ASA remains an effective self- and co-regulatory system.

The ASA as a best practice model

6. The success of the ASA lies in the commitment of the advertising industry to support a regulatory system that protects consumers by helping to ensure that ads are legal, decent, honest and truthful. It also accepts competitor complaints to help ensure consistency of standards across sectors, and it provides an easier way of resolving disputes than by civil litigation or criminal prosecution. It is simple and effective at the point of use and the adjudication process is independent, which allows the ASA to take robust action when necessary, without fear of inappropriate interference. There are numerous benefits of the ASA system.
7. **An experienced and recognised system** – The ASA has been operating for nearly 50 years. The system is recognised by the Government, the industry, consumers, the Courts and partner regulators as the established means of consumer protection against misleading, offensive or harmful advertising.
8. **A compulsory system** – Although the ASA is a self-regulatory system, it is not a membership organisation. All advertisers must comply with the Advertising Codes and ASA decisions. The ASA system has a range of sanctions at its disposal to ensure advertisers comply with its rulings.
9. **A comprehensive system** – Nearly all aspects of advertising regulation are under one roof. The system offers:
 - Robust Advertising Codes
 - An effective and experienced complaints & investigations department
 - A free non-broadcast Copy Advice service, offering pre-publication advice
 - A compliance and monitoring department that proactively monitors ads across all media
 - Effective and robust sanctions
 - Advice and training for the industry
 - Open and transparent performance evaluation
 - Consumer information through the ASA website
10. **Strong governance** – Both the ASA Chairman and Council are independently appointed in line with Nolan principles. The Chairman is required to be someone who has never been engaged in the advertising business and two thirds of Council members are similarly independent. The current Chairman of the ASA is the Rt Hon Lord Smith of Finsbury.
11. **Effective action** – The ASA has consistently proven that it is prepared to take action against advertisers that breach the Codes. In 2010, 2,226 ads were changed or withdrawn following direct ASA action. Numerous others complied with the Codes as a result of receiving advice or training.

12. **Arms-length funding** – The ASA receives no tax-payer funding. Instead it is primarily funded via a levy on advertising space and airtime. The levy is the only part of the system that is voluntary. The voluntary nature of the levy and the fact that it is collected by arms-length funding bodies (the Advertising Standards Board of Finance (asbof) and the Broadcast Advertising Standards Board of Finance (basbof)) ensures that the ASA's decision-making remains independent of the industry.
13. **Responsive to change** – The advertising industry has consistently proven its ability to respond to changes in technology and advertising techniques. For example, on the 1 March this year, the ASA's remit was extended significantly further online to cover marketing communications on companies' own websites and in other third party space under their control, such as social networking sites like Twitter and Facebook. Currently, the system is working with the industry to develop a workable self-regulatory regime for online behavioural advertising.
14. **International partner** – The ASA works in partnership with advertising self-regulatory systems from across Europe and the world to address international advertising regulatory issues of concern and to resolve cross-border complaints.
15. Although the system has proven itself to be both robust and simple at the point of use, the regulatory structures that sit behind the system differ greatly from almost pure self-regulation to formal co-regulation. The ASA is aware that co-regulation can come in many different forms (**see Figure 1**), but can be equally effective in achieving high standards in advertising and consumer protection.

Figure 1



16. The ASA has many different relationships with other regulators. The following are three examples.
17. **Ofcom** – The ASA has a formal co-regulatory partnership with Ofcom for broadcast advertising. This partnership is agreed through a Memorandum of Understanding and the Deregulation and Contracting Out Act 1994 is the legal instrument that enables this partnership.
18. Although the day-to-day operation of the system is contracted-out to the Advertising Standards Authority (Broadcast) Ltd (ASA(B)), the Broadcast

Committee of Advertising Practice (BCAP) and Basbof, compliance with the broadcast advertising rules is a condition of the broadcasters' Ofcom licence. Under the MOU, Ofcom retains all its legal powers stemming from the Communications Act 2003 and can direct BCAP to make changes to the UK Code of Broadcast Advertising. Any BCAP proposed Code changes must be signed-off by Ofcom, and on a quarterly basis the ASA(B) and BCAP are required to provide Ofcom with performance data against agreed key performance indicators.

19. **Office of Fair Trading (OFT)** – Although the ASA is self-regulatory for non-broadcast advertising, the system is recognised as an 'established means' for enforcing the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs). The CPRs and BPRs provide protection against unfair and misleading advertisements and unacceptable comparative advertisements.
20. This recognition means that the ASA can refer an advertiser to the OFT if, for example, the trader is of doubtful repute, or if the advertiser repeatedly fails to comply with the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing. This is rarely necessary because most advertisers comply with the self-regulatory system. The ASA views this part of the system as self-regulation with a legal backstop. Although, the ASA has a close working relationship with the OFT, it is not formally accountable to the regulator, nor do we have an MOU.
21. **Gambling Commission** – Under the Gambling Act 2005, the Gambling Commission can issue code of practice provisions for non-broadcast advertising. Instead the Commission asked the Committee of Advertising Practice (CAP) to perform that function and for the ASA to administer the new rules.
22. Like broadcasters, gambling operators in the UK must have a Gambling Commission licence to operate and the Commission has made compliance with the Advertising Codes a licence condition. However, the ASA does not formally report to the Commission, nor does it have an MOU. The ASA views this system as being self-regulation with legal underpinning.
23. The ASA has positive working relationships with all our regulatory partners. As demonstrated, there are different structures that are accommodated within the ASA one-stop shop, but those do not translate to different levels of consumer protection.

The ASA as a regulator

24. The ASA system takes a comprehensive approach to regulation, incorporating robust rules, a simple complaints mechanism, pro-active monitoring and industry advice and training.

25. The Advertising Codes that the ASA administers are extremely robust, yet flexible and adaptable to changes in technology or advertising techniques. The Codes are written and maintained by two industry bodies, the non-broadcast Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP).
26. CAP and BCAP adopt a principles-based approach to Code writing, on the overarching premise that all advertisements should be legal, decent, honest and truthful. Recognised within the Codes is importance of protecting children, who are more vulnerable and credulous than adult consumers, and the fact that certain products and services require specific rules. There is a dedicated section on advertising to children and specific rules on products such as food, health and beauty, finance and alcohol.
27. The system has a good track record of strengthening the Advertising Codes where evidence clearly shows a need – for example alcohol (2005) and food advertising to children (2007). As recently as 2009, CAP and BCAP undertook a full review of all the Advertising Codes, to ensure they remained relevant, robust and based on the latest and best evidence. As part of the process they held a full public consultation which generated thousands of responses. The new Codes came into force in September 2010.
28. Overall, compliance with Advertising Codes is high, but the ASA offers a free, confidential complaints service for members of the public who see ads of concern. In 2010, the ASA dealt with over 25,000 complaints. Those advertisers that breach the Codes face having an ad campaign pulled and damage to reputation through the publication of upheld adjudications, which attract media attention. For those few advertisers who refuse to comply, sanctions are applied.
29. We also have a dedicated compliance and monitoring department that proactively monitors ads on a daily basis to check for compliance with the Codes. The team also undertakes surveys in high profile areas such as gambling or alcohol, or amongst sectors with lower compliance records.
30. However, the ASA system is not simply concerned with punishing advertisers. Our principal aim is to ensure that advertising is legal, decent, honest and truthful and to achieve this, the system places a lot of emphasis on industry advice and training via seminars, online advice and Help Notes and advice in our regular newsletters. In 2010, CAP provided advice and training to industry on over 45,000 discrete occasions.
31. This comprehensive approach to regulation is highly effective because it ensures that consumers have a strong regulator that is easily accessible, but also that industry has the advice and training it needs to ensure that ads are legal, decent, honest and truthful.

Where does this leave the ASA in the context of the Communications review?

32. The day-to-day operation of the ASA system works well for both consumers and industry. Importantly the rules are robust and our sanctions are effective regardless of the media in which the ad appears. We do not believe that this review should be looking at these aspects of our work.
33. In order to allow responsible advertising and new technologies to continue to flourish, Government should always permit the self- and co-regulatory advertising regulatory system to act first in response to the changing media environment or policy issues about advertising.
34. The ASA values greatly Ofcom's role as the statutory backstop for broadcast advertising, which is currently an important component of the regulatory system. But this review presents an opportunity to explore whether simplification of the structures behind broadcast advertising co-regulation might be possible and beneficial to all parties.
35. Whether and how this might be done has not been discussed widely throughout the industry, but we feel it is an area worthy of further exploration.
36. Any decisions on changes to the structure of the advertising regulatory system must be agreed by the industry. We look forward to engaging with the debate with the industry and Government over the coming months.
37. The above are the ASA's thoughts on the general areas of focus for the review in regard to advertising regulation. The ASA has other thoughts about detailed aspects of the current Communications Act, which we will be happy to outline in detail as this review progresses.



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