

Broadcast Complaint Handling Procedures

Introduction

1. This document outlines the procedures to be followed by the ASA¹ when handling complaints about advertising in both radio and television services². It was first published on 1 November 2004 and most recently revised on 17 January 2008.

2. It deals only with complaint handling up to the point where a statutory sanction might be appropriate, when the case would be referred to Ofcom (the communications regulator with 'backstop' powers). Ofcom publishes its own guidelines about statutory sanctions (Outline Procedures for Sanctions in Content Cases i.e. sanctions as prescribed under the Communications Act 2003 and the Broadcasting Acts 1990 and 1996 as amended). See www.ofcom.org.uk for further details.

The codes

3. CAP³ inherited from Ofcom its broadcast advertising codes⁴ (henceforth the codes), which Ofcom in turn inherited from the Independent Television Commission and the Radio Authority. The ASA adjudicates under the codes.

Licensee obligations

4. As Ofcom's licensees, broadcasters are obliged under their licences to adhere to the provisions of the codes and ASA adjudications.

Clearing commercials

5. Broadcasters must have adequate procedures in place to ensure advertisements carried by them comply with the codes. Clearcast (formerly the Broadcast Advertising Clearance Centre) and the Radio Advertising Clearance Centre (RACC) are contracted by many licensees (including most major channels and stations) to provide television and radio advertisement clearance respectively. Except for sensitive product category advertising that must be centrally cleared by the RACC, advertising carried by local radio stations is generally cleared by broadcasters in-house. The ASA, the CAP Code Policy team and the CAP Copy Advice team (which advises on non-broadcast marketing communications) liaise with Clearcast and the RACC and, where appropriate, other broadcasters' representatives to ensure consistency in regulation across media, where common advertising

¹ The Advertising Standards Authority (Broadcast) Ltd is the legal entity that, exercising powers contracted out to it by Ofcom, resolves all broadcast advertising complaints. For simplicity's sake, and to reflect the fact that the ASA operates a 'one-stop shop', the term ASA is predominantly used throughout this guidance.

² These procedures apply only to advertisements carried by television and radio services licensed by Ofcom.

³ The Committee of Advertising Practice (Broadcast), legally known as the Broadcast Committee of Advertising Practice Ltd (BCAP), is contracted by the communications regulator Ofcom to write and enforce the broadcast advertising codes. For simplicity's sake, the term CAP is predominantly used throughout this guidance.

⁴ The broadcast advertising codes are: the CAP (Broadcast) Television Advertising Standards Code; the CAP (Broadcast) Rules on the Amount and Scheduling of TV Advertisements; the CAP (Broadcast) Code for TV Text Services; and the CAP (Broadcast) Radio Advertising Standards Code.

rules/interpretations, characteristics and contexts make such consistency appropriate.

The ASA's remit

6. The ASA is responsible for regulating all broadcast advertising carried by Ofcom licensed TV and radio services. That includes traditional spot advertising, teleshopping output and broadcast advertising made available on interactive TV and TV text services. The ASA also regulates the scheduling of TV and radio advertisements to ensure that audiences are adequately protected from harmful or offensive material. The ASA might, for example, require a TV advertisement to be scheduled after 9pm. Where relevant to the particular broadcast media, Ofcom remains responsible for the rules governing:

- the insertion of advertising breaks
- the amount of advertising permitted on TV
- sponsorship and
- political advertising on TV and radio.

A Memorandum of Understanding with Ofcom explains in more detail the breakdown of responsibility between the ASA and Ofcom (see www.ofcom.org.uk for further details). Ofcom will pass to the ASA any complaints it receives that fall under the ASA's remit; it will not normally consider those complaints even when specifically asked to by the complainant. The ASA will pass to Ofcom any complaints it receives that fall under Ofcom's remit.

ASA's primary point of contact

7. Broadcasters are obliged under their licences to adhere to the provisions of the codes. In practice the ASA's primary point of contact is usually Clearcast or the RACC. Indeed Clearcast very often responds on behalf of the broadcasters and is the conduit for the advertisers' and/or agencies' responses to complaints about television commercials it has cleared. In addition it keeps the broadcasters, advertisers and agencies informed of the progress of any investigation. In all cases the ASA will copy important correspondence to the advertisers⁵.

Receipt of complaints

8. If a complainant can satisfy the ASA that there is an issue for the advertising parties to answer, and assuming there is no other legitimate reason not to investigate (for example see paragraph 13), the ASA will investigate the complaint. There is no charge to the complainant.

⁵ Henceforth the broadcasters, Clearcast, the RACC, advertisers and agencies responsible for airing, clearing, commissioning and creating commercials will be referred to as the advertising parties. For simplicity's sake the term advertising parties will be used when correspondence might, for example, be primarily with Clearcast or the broadcaster.

9. The details of the complaint will be logged by the ASA Complaints Reception team.

Timely complaints

10. Broadcasters are obliged under their licenses to keep recordings for specified periods. Those periods are: 42 days after the relevant radio transmission; 60 days after the relevant satellite and cable television transmission; and 90 days after the relevant terrestrial television transmission. Complaints must be made well within those periods; ideally, as soon as possible after transmission.

Acknowledging complaints

11. The ASA will acknowledge each complaint and give it a reference number. It will respond to all complainants, even if the complaint does not fall within the ASA's remit. The ASA is committed to acknowledging complaints within five days of receiving them.

Anonymity and identity disclosure

12. The ASA will not disclose the identity of individual members of the public who complain (public complainants) without their permission. In some circumstances public complainants might be asked for a formal, written assurance that they have no commercial or other interest in registering their complaints. Non-public complainants, for example competitor complainants and groups with an obvious interest in the outcome of the complaint (such as consumer bodies and pressure groups), are required to: agree to the disclosure of their identity; endeavour to resolve their differences, wherever possible, direct with the advertising parties or through their trade or professional organization; and confirm that they are not engaged in simultaneous legal action on the point at issue.

Simultaneous legal action

13. The ASA will not normally pursue complaints if the point at issue is the subject of simultaneous legal action.

Confidentiality

14. The ASA will on request treat in confidence any genuinely private or secret material supplied unless legislation, the Courts or officials acting within their statutory powers compel its disclosure. The ASA might send confidential evidence to external consultants, who are obliged not to disclose it to anyone else. The ASA will on request make available to complainants and advertising parties the names of relevant external consultants. Copies of draft recommendations (see paragraph 31) are sent to advertising parties and complainants, who should treat the recommendations as confidential until the date that the adjudication is published. The ASA's published adjudications are publicly available and the ASA might circulate them to the media.

ASA- and CAP-initiated investigations

15. The ASA might itself initiate an investigation into what it believes are potential code breaches on the back of complaints it receives. The procedures in a complaint-led investigation and an ASA-initiated investigation are broadly the same. Similarly, in the course of undertaking monitoring, CAP might raise issues about apparent code breaches.

Assessment of complaints

16. An initial assessment of the complaint is made by the ASA Complaints team.

Sourcing an advertisement

17. If necessary, the team will require the broadcaster to provide it with a recording of the commercial. However it will not necessarily request a written response from the broadcaster at that stage. Broadcasters should normally deliver copies of the material in question within five working days of a request being made. All requested copies of long-form advertisements (e.g. teleshopping) should include an embedded timecode.

Suspension pending investigation

18. In exceptional circumstances, for example where public harm is likely to result from the continued transmission of a commercial, the ASA will direct a broadcaster (or broadcasters), via Clearcast and the RACC if either party cleared the ad, to suspend a commercial immediately pending investigation and adjudication by the Broadcast Council (henceforth Council) at a later date. The ASA will make such a direction only when it believes there is prima facie evidence of a serious breach of the codes. The ASA Chairman (or in his absence the senior independent Council member), in consultation with the Director General (or senior manager), one independent and one industry Council member, must have agreed to such a direction.

'No investigation' cases

19. The Complaints team does not submit to Council cases that it believes involve frivolous complaints or those that relate to commercials that clearly do not breach the codes. The team closes those cases directly by writing to the complainant explaining that there has been no breach of the codes.

Turnaround targets for 'no investigation' cases

20. The ASA's turnaround target for straightforward 'no investigation' cases is five working days from the receipt of the complaint to notification of the decision and 10 working days where preliminary work is required.

'No investigation after Council decision' cases

21. The Complaints team submits to Council those cases that it believes raise issues but that it considers, on balance and without needing formally to investigate, do not appear to breach the codes. If Council agrees with that assessment the team closes those cases, notifying the advertising parties so they are aware of the response to their commercials. If Council does not, the team passes them to the ASA Investigations team for further investigation.

Turnaround target for 'no investigation after Council decision' cases

22. The ASA's turnaround target for 'no investigation after Council decision' cases is 25 working days from the receipt of the complaint to notification of the decision.

Named investigation executive and keeping complainants informed

23 If a case is passed to the Investigations team, a named investigation executive will be in charge of the case and will act as the point of contact with complainants and advertising parties. Complainants should be kept informed of progress with the handling of their complaint at intervals of no longer than 15 working days.

Informal investigations

24. The Investigations team might decide to resolve cases informally. Reasons for doing that include but are not limited to:

- if it considers an apparent breach is minor and clear cut and is unlikely to be of interest, in terms of indicating where the ASA draws the line, to other advertising parties and/or
- if an advertising party has taken immediate and relevant action and remedied a minor problem before being contacted by the ASA.

25. The decision to resolve cases informally is solely at the discretion of the Investigations team and is likely to be taken only if there are few complaints.

26. When resolving cases informally the team will, if necessary, request an assurance from the appropriate advertising party that the ad will be suitably amended or withdrawn and on receipt of that will close the case without producing a formal recommendation for Council. It will promptly notify Council of those cases that have been resolved informally and will publish the names of the advertising parties concerned on the ASA website. The website will not identify those cases as breaches.

Turnaround target for 'informal investigations'

27. The ASA's turnaround target for 'informal investigations' is 35 working days from the receipt of the complaint to notification of the decision.

Standard investigations

28. The Investigations team conducts a full investigation into standard investigation cases. Reasons for conducting a full investigation include but are not limited to:

- if it believes an apparent breach is not minor and/or
- if it believes it is not clear cut whether a breach of the Code has occurred and a Council decision is therefore required.

Advertising parties' response to the complaint

29. The investigation executive will send a summary of the complaint (normally without disclosing the complainant's identity) to the advertising parties and request a written response. The executive will explain in their correspondence which part of the codes is thought relevant and might also raise issues beyond those raised by the complainant (see paragraph 15). Advertising parties should normally respond to the ASA within seven working days, however more time might be allowed for complicated investigations or in other exceptional circumstances. The grounds for an extension request should be set out in writing. An extension is unlikely to be for longer than five working days.

30. The codes require advertising parties to produce documentary evidence to substantiate all claims that are capable of objective substantiation. All evidence submitted by marketers must be in English.

The draft recommendation

31. On receipt of the response and any further written comments or clarification, the investigation executive will analyse the case and prepare a draft recommendation. The draft recommendation consists of a summary of the ad and complaint, the relevant code's clauses, a summary of the advertising parties' arguments in defence of the commercial, a draft assessment to uphold, uphold in part or not uphold the complaint, the rationale for that assessment and the action, if any, required to remedy the problem.

Advertising parties' response to the draft recommendation

32. The investigation executive will then send the draft recommendation to the advertising parties and complainant⁶ for any comments on the factual accuracy of the recommendation. Advertising parties should normally respond within seven working days and should confine their comments to the factual accuracy of the draft recommendation; they should not normally repeat arguments already put to the ASA or try to present new substantiation or lines of defence. The recommendation will form the main part (together with, for example, a copy of the commercial and any guidelines that might be relevant) of the submission to Council. Council might disagree with the ASA

⁶ In multi-complaint cases where ostensibly the same complainant is made by different complainants, only the first few and/or principal complainants are sent the draft recommendation. However, all complaints are logged, fully considered and assessed and all complainants are sent the final adjudication.

Executive's recommendation, so advertising parties wishing to defend the commercial fully should have done so by this stage even if the draft recommendation is not to uphold the complaint.

Council's adjudication

33. The investigation executive will present the recommendation to Council, which adjudicates. No provision is made for oral hearings. Council might agree with the recommendation, adjudicate differently or suggest that further investigation is necessary.

34. If minor changes to the adjudication are needed after Council has deliberated, for example to explain better the rationale for the decision, the investigation executive might make those changes without re-presenting the case to the advertising parties or Council. If more significant but not substantial changes are necessary, the investigation executive might re-present the case to Council only. If substantial changes are necessary the investigation executive might re-present the case to advertising parties, the complainant (if necessary) and then Council. It will be for the ASA to decide on the significance of changes; it will normally re-present the case to advertising parties only if Council has introduced an important argument or point of view to which they have not yet had a reasonable opportunity to respond.

Closing the case

35. The investigation executive will send a letter of notification to the advertising parties and all complainants. That letter will inform them of Council's decision. If Council has not adopted the ASA Executive's recommendation, the letter will explain that and give reasons. The letter will also include a date for publication of the adjudication on the ASA website.

Remedial action

36. If the ASA adjudicates that a breach has occurred but no referral to Ofcom is appropriate, the letter of notification to the advertising parties will inform them of the necessary remedial action (for example to change the commercial prior to future transmission, to restrict transmission as directed or to cease broadcasting the commercial altogether).

Publishing adjudications

37. The ASA will normally publish adjudications on the ASA website (www.asa.org.uk) within 12 working days of Council's decision. In exceptional circumstances, perhaps after the broadcaster or advertiser has requested a review (see paragraph 45), the ASA might agree to withdraw an adjudication before publication because the case needs more consideration, for example there might be significant doubt about the accuracy or fairness of the adjudication or about the way the investigation was carried out. In such circumstances the investigation executive will write to complainants and

advertising parties to explain the postponement and ask them to keep confidential the adjudication and the status of the investigation until the final adjudication, in whatever form, is confirmed.

'Artist separation', 'radio pre-clearance' and 'scheduling' cases

38. Complaints about 'artist separation' issues (where a commercial featuring an artist has appeared in a break in or adjacent to a programme featuring that same artist), 'radio pre-clearance' issues (where a radio commercial should have been, but was not, pre-cleared by the RACC) and 'scheduling' issues (where a commercial failed to observe a timing restriction) might be satisfactorily resolved without the need for a full investigation culminating in a recommendation to Council. Council is, however, promptly notified when those cases are resolved.

Turnaround target for 'standard investigations'

39. The ASA's turnaround target for 'standard investigations' is 85 working days from the receipt of the complaint to notification of the decision.

Complex investigations

40. 'Complex investigations' are those that require extended investigation, for example multi-media cases (such as those relating to claims that have appeared in the same form in advertisements in both broadcast and non-broadcast media), those involving non-public complainants and those requiring specialist or technical knowledge, for which external consultants might have to be consulted. Although they follow the same process as above, they typically take longer to resolve than standard investigations.

Turnaround target for 'complex investigations'

41. The ASA's turnaround target for 'complex investigations' is 140 working days from the receipt of the complaint to notification of the decision, but those involving disputes between competitors might take longer.

Ofcom sanctions

42. If the ASA concludes that a further sanction might be warranted it will inform the broadcaster, and where relevant Clearcast or the RACC, that it will refer the matter to Ofcom. Following referral, the procedures in Ofcom's Outline Procedures for Sanctions in Content Cases will apply. Ofcom can impose a number of sanctions if it feels the conditions of its broadcast licences, the advertising codes or the terms of ASA adjudications have been seriously, deliberately, repeatedly or recklessly breached. It can direct a broadcaster not to repeat material, direct a broadcaster to publish a correction or summary of a decision or adjudication, fine a broadcaster and, with the exception of Channel 4 and S4C, revoke a licence.

Fast Track cases

43. The ASA might, where circumstances warrant, depart from standard processes and deadlines and impose shorter response deadlines, forward the summary of the complaint and the draft recommendation to advertising parties at the same time (forgoing the process described in paragraph 29) or forward draft recommendations direct to Council (forgoing the processes described in paragraphs 29 and 32).

The CAP General Media Panel

44. The CAP General Media Panel is composed of industry experts together with one ASA Council member. It guides and helps the ASA and CAP to produce advice for the industry and interpret the codes (both broadcast and non-broadcast) in individual cases and on general issues. It also provides a forum to reassess recommendations and advice given by the ASA and CAP. The Panel can be asked to look at an issue by the parties to a complaint before the Council has adjudicated; the Council will take account of the Panel's opinions but the decision of Council is final. The Panel Chairman can reject requests and will do so if it appears that the Panel is being used to hamper the effective running of the self-regulatory system.

Requests for an Independent Review of an ASA adjudication

45. The Independent Reviewer of ASA Adjudications (Sir John Caines, KCB, a former Whitehall Permanent Secretary) will consider requests for a review of Council decisions against commercials.

Terms of reference

46. Requests for a review should contain a full statement of the grounds for review, be in writing and addressed to the Independent Reviewer of ASA Adjudications, 5th Floor, 21 Berners Street, London, W1T 3LP (fax: 020 7580 7057, e-mail: indrev@asbof.co.uk). They should be sent within 21 calendar days of the date on the ASA's letter of notification of the formal adjudication or Council decision that a complaint requires no investigation. The Independent Reviewer might waive the 21-day time limit if he judges it fair and reasonable to do so.

47. Requests should come only from the complainant, the advertiser or the broadcaster (henceforth the parties to the review). Those from the advertiser or broadcaster or from the non-public complainant should be signed by the Chairman, Chief Executive or equivalent office holder; requests made only by their solicitor, agency or clearance centre will not be accepted. All dealings with the Independent Reviewer must be in writing.

Grounds for a review

48. There are two grounds on which such a request can be made:

- where additional relevant evidence comes to light that was available at the time, or shortly after, the commercial appeared but could not

- reasonably have been submitted in the course of the investigation, and/or
- where it is alleged that there is a substantial flaw in Council's adjudication or in the process by which that adjudication was made.

49. No review will proceed if the point at issue is the subject of simultaneous or contemplated legal action between anyone directly involved. Requests for a review should make plain that no such action is underway or is contemplated.

50. During the review process, the original adjudication (and any subsequent remedial action or sanctions) will normally stand. The ASA will not delay publication of the relevant adjudication pending the outcome of a review save in exceptional circumstances (on the authorisation of the ASA Director General).

The Assessors

51. Before deciding whether or not a request for a review merits inviting Council to reconsider an adjudication, the Independent Reviewer will consult two Assessors. The two Assessors are the Chairman of Basbof⁷ (or nominee) and the Chairman of the ASA. The Independent Reviewer will not normally consult the two Assessors about requests for a review of a Council decision that a complaint requires no investigation.

The review process

52. If the Independent Reviewer decides that an adjudication does not merit reconsideration by Council because he concludes that the request does not meet either of the two grounds set out above, he will inform the person making the request accordingly and close his file on the case.

53. If he decides that an adjudication (in whole or in part) merits reconsideration by Council he will undertake, either by himself or with assistance from the ASA or any other source of help or advice, such further investigation as he thinks appropriate. He will also inform the other party to the case and, if appropriate, Clearcast or the RACC that a review is being undertaken and he will invite those other parties' comments on the submission made by the party requesting the review⁸.

54. If he decides that a Council decision that a complaint requires no investigation merits reconsideration by Council, he will recommend to Council that it asks the ASA Executive to conduct a formal investigation of the complaint.

⁷ Basbof (the Broadcast Advertising Standards Board of Finance) is responsible for funding the system through a levy on TV and radio advertising.

⁸ When corresponding with the parties to a review in cases where either the advertiser or the broadcaster has requested the review, the Independent Reviewer will normally treat the person who requested the review (e.g. the advertiser) as the primary point of contact and merely copy important correspondence to the other (e.g. the broadcaster).

55. If he decides that an adjudication (in whole or in part) merits reconsideration by Council and he believes that it would be desirable for the ASA Executive to re-open its investigation, he will make an interim report to Council making that recommendation. If Council decides to re-open the investigation, he will notify all parties to the review of that decision. When the ASA Executive makes its recommendation to Council at the conclusion of the re-opened investigation, he will advise Council whether all the relevant issues raised in the review request have been satisfactorily resolved. He will inform all parties to the review of Council's final adjudication.

56. If he conducts the investigation himself he will, at its conclusion, make a recommendation to Council, stating whether the adjudication should be reversed, amended or confirmed.

57. Council must consider the Independent Reviewer's recommendation but is not obliged to accept it; Council's adjudication on reviewed cases is final.

58. The Independent Reviewer will inform the parties to the review of the Council's final adjudication. Adjudications that are reversed or amended following a review will be published on www.asa.org.uk.

59. The Independent Reviewer contributes a report of his activities to the ASA Annual Report.