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Ofcom
Consultation on promoting effective self-regulation:
Criteria for transferring functions to co-regulatory bodies

Joint Response of the Advertising Standards Authority
and Committee of Advertising Practice

Introduction

The Advertising Standards Authority (ASA) and Committee of Advertising Practice (CAP) are responsible for maintaining the highest standards in non-broadcast advertising in accordance with the British Code of Advertising, Sales Promotion and Direct Marketing. The CAP Code (the Code) applies to all non-broadcast marketing communications in the UK, covering such media as print, posters, sales promotions, direct mail, SMS and internet advertising.

The Code, adjudicated on by the ASA, requires all marketing communications to be 'legal, decent, honest and truthful'. They should be prepared with a sense of responsibility to consumers and to society, and should respect the principles of fair competition generally accepted in business. The Code, and the ASA's interpretation of it, is the standard to which all organisations involved in non-broadcast advertising in the UK defer. Although the system is non-statutory, participation in it is mandatory by virtue of the agreement of advertisers, agencies and media to maintain common standards.

More information about the ASA and CAP is available on their respective websites www.asa.org.uk and www.cap.org.uk.

We welcome the opportunity to respond to Ofcom in its consultation on promoting effective self-regulation. This response is submitted jointly on behalf of the ASA and CAP and sets out their position on the proposed criteria.

Background

In addition to its work on co-regulatory principles Ofcom is consulting in parallel on the future regulation of broadcast advertising. The model proposed is of a 'one-stop shop' for the regulation of advertising across all platforms under the banner of the

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Director General. Christopher Graham
Members of Council
Jean Coussins
Christine Farnish
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Advertising Standards Authority. The principles upon which this broadcast co-regulation model will rest are consistent with those consulted upon here. Although the remarks that follow are in response to the promoting effective self-regulation consultation, the comments made cannot wholly be separated from the ASA's interest in the matter of the future regulation of broadcast advertising.

Summary of Position

As leading practitioners of self-regulation, the ASA and CAP warmly welcome Ofcom's intention to promote the development and use, where appropriate, of effective self-regulation. Consumer, government and industry confidence in any future scheme will to a large extent depend on the robustness of its procedures and thus its credibility as a co-regulatory partner. We consider that the criteria specified in this consultation are sufficiently demanding to ensure that partners can meet Ofcom's expectations and requirements.

Specific Remarks

Under the Communications Act 2003, Ofcom is under a duty to explore co-regulatory arrangements involving 'effective self-regulation' in areas where these are likely to bring real benefits to citizens and consumers. The regulation of broadcast advertising is one such area where government considers this to be a possibility, and Ofcom's current consultation on the future regulation of broadcast advertising is seeking to establish the viability of such a system.

Effective self-regulation, in contrast to statutory controls, has a number of significant advantages for consumers, government and industry. Crucially, effective self-regulation brings the added value of industry 'buy-in' – indeed, it is axiomatic to self-regulation. When industry considers itself indispensably a part of the regulatory system it will be more committed to seeing that regulation succeed because it is necessarily in its own interest to make the system work. To use the example of non-broadcast advertising self-regulation, consumer belief in the advertising message is fundamental to its effectiveness – without credible self-regulation the credibility of the advertising itself is in doubt.

Self-regulation is also a faster way of dealing with apparent breaches of the rules than going to law. It is also much more 'user friendly' being readily accessible, informal and, crucially, free to its users. Even where a statutory regulator can offer the same consumer access, a self-regulatory system is able to judge in accordance with the spirit of the rules and, being non-statutory, self-regulation is well-placed to respond with the flexibility needed in a fast-changing world such as that of media over which Ofcom presides. Contracting out also provides the benefits of specialisation through empowering a dedicated and expert body with a responsibility for which it is uniquely suited instead of requiring a strategic regulator with many other responsibilities to focus on activities which an existing self-regulatory body may already have developed expertise.

But self-regulation is not homogeneous. Its many forms are often founded on different principles and procedures, thus ensuring that the criteria that underlie a system are rigorous and robust is fundamental to delivering effective self-regulation.

Truly effective self-regulation is not soft regulation and this can mean operating with recourse to a backstop statutory enforcement body. In non-broadcast advertising, for example, recalcitrant advertisers can be referred to the Office of Fair Trading (OFT) for action under the Control of Misleading Advertisements Regulations. We welcome the fact that Ofcom will necessarily act as this backstop for any co-regulatory relationships it enters into – the big stick in the cupboard, as Lord Currie has described it.

Question 1: In what specific areas might co-regulation have a role to play?

Although we do not consider it appropriate to propose areas in which co-regulatory arrangements might be developed, we would suggest that self- and co-regulation can only be effective where all partners share the common goal of delivering consumer and citizen benefit, and have confidence in the ability of future co-regulators to deliver it.

Question 2: Do respondents agree with the criteria set out for assessing whether a co-regulatory organisation is likely to be effective

In commenting on Ofcom’s co-regulatory criteria ASA-CAP inevitably draw upon their own experience of what makes self-regulation effective for non-broadcast advertising. That said, co-regulation is about partnership between contracting bodies so there will, thus, be limits to which this experience is useful. Indeed, the ASA expects to learn and improve its own performance and procedures should it enter into a co-regulatory arrangement with Ofcom.

Section 3 of the consultation document details twelve criteria that must be met in order for Ofcom to delegate functions to a co-regulatory partner. We would highlight four that are of particular importance for effective co-regulation – clear division of responsibilities, independence from interference by interested parties, auditing and review by Ofcom and, an independent appeals mechanism – as it is through these four that the nature and strength of the partnership is principally established.

We also draw Ofcom’s attention to the five principles of good regulation identified by the Better Regulation Task Force¹ – transparency, accountability, proportionality, consistency and targeting – which the document could usefully refer to in paragraph 3.3, and with which the ASA has long conformed.

Clear division of responsibilities

Co-regulation can only be truly effective where each partner is clear about – and has full confidence in – the role to be performed by the other. We therefore welcome Ofcom’s declaration that its role in such a partnership would be to serve as an

¹ Better Regulation Task Force *Principles of Good Regulation*, 2000. See also *Alternatives to State Regulation*.

enabler and evaluator for co-regulation and not second guess the decisions of the contractor (paragraph 3.6).

Ofcom should therefore have, as a default, a 'hands-off' posture towards the day-to-day operation of its co-regulatory partners. Indeed, these partners will only be useful if their independence is respected and any right for Ofcom routinely to interfere with the functions and procedures of its partners would be likely to undermine their authority. There would also be double jeopardy for those whose actions were to be regulated. Thus a clear delineation of responsibilities will be required in order for any co-regulatory system to build its credibility. This could mean, for example, leaving an adjudicatory body largely to determine – within the context of Ofcom's statutory obligations – the standards appropriate for its sector, and to judge upon these free from pressure by Ofcom.

This is not, however, to suggest that Ofcom have no input in the setting of acceptable standards. With Ofcom retaining statutory responsibility – and therefore Parliamentary accountability – for those contracted out functions, it should routinely maintain constructive communications with its partners on all areas of mutual concern. Equally, should public policy develop on issues dealt with by a particular co-regulatory relationship, these might legitimately and formally be raised by Ofcom with the body to whom it had contracted out any of its functions.

What is clear is that a 'hands-off' attitude does not mean a lack of interest. Ofcom will have to work closely with its co-regulatory partners to ensure a joined-up approach to issues – to give an example that might apply to broadcast advertising co-regulation, interaction between scheduling and content regulation – but, provided agreed standards are met by the co-regulator its decisions should not be second guessed by Ofcom.

Auditing and review by Ofcom

The converse of a hands-off approach is that Ofcom should demand an appropriate measure of accountability and transparency from its partner organisations. In contracting out co-regulatory responsibilities Ofcom will need to define expected standards of service, measured by appropriate Key Performance Indicators (KPIs).

These should be challenging but realistic. Benchmarking must be based upon past performance for the sector or an organisational equivalent and should also consider the benefits of co-regulation in their totality rather than simply as measured by narrow quantitative data.

Ofcom must also set trigger points at which, should they be touched, Ofcom could step in and take remedial action to ensure effective discharge of the contracted-out functions.

Independence from interference by interested parties

The criterion that will perhaps attract the most attention from respondents is that regarding the independence of the co-regulator.

For self-regulation to be a success the sector regulated must 'buy-in' to the system and have confidence that those policing it are aware of its practices and the issues

that affect it. Without this there will be no true partner with whom Ofcom can enter into a co-regulatory arrangement. But industry input should not be allowed to cross the line into undue influence upon the operation of the self-regulatory system. Organisations that lack the necessary separations from industry in funding, code ownership, or arbitration procedures will be ineffective.

In the regulatory model for non-broadcast advertising, three separate entities exist to provide the arms-length funding (Asbof), code setting (CAP), and adjudicatory functions (ASA) – a configuration that would be mirrored in the proposed broadcast model through the formation of the separate legal entities Basbof, BCAP and ASA(B). Although such a three-way division might not be appropriate for all co-regulatory propositions, a structure of equivalent robustness should be demanded of all potential co-regulatory partners.

Drawing attention, lastly, to the ASA adjudicatory panel, we note that it meets the test suggested by Ofcom in regard to its composition. The Chairman is appointed in a manner and on terms that preserve his/her independence from industry and Government (although the DTI and OFT are consulted - but have no right to veto of that appointment) and in turn is responsible for appointing all members to the ASA Council.

A two-thirds lay majority of Council are appointed for fixed terms following public advertisement, the remaining one-third minority being recruited for their experience of the media or advertising business. All Council members register their interests and take no part in the consideration of any matter where a conflict might arise.

The presence of an industry-experienced minority on Council is an essential factor in persuading the advertising business to co-operate actively and enthusiastically in a self-regulatory system. The industry members do not behave any less independently than do the lay members – and would, in any case, be outvoted should they act questionably. Advertisers and complainants who are dissatisfied with a decision can request a review by the Independent Reviewer of ASA Adjudications.

Independent Appeals Mechanism

As the consultation notes, the ability to trigger a review of decisions in defined circumstances is fundamental to the credibility of a co-regulatory partner and we very much welcome the requirement for this in Ofcom's criteria.

To add value to co-regulation such a mechanism must not, however, be allowed to become merely a *de facto* extension of the decision-making process. Instead it must be focussed solely on situations where there is *prima facie* evidence that something has gone badly wrong. There must be clear terms of reference for any review mechanism. Nor should Ofcom itself be the appeals body, as if it were it would terminally undermine the rationale of contracting out and frustrate the intended benefits.

As with judicial review, the appeals mechanism should not seek to substitute its own judgement for that of the decision-making co-regulatory body. Instead, it should be a means to return a case to that body for further consideration in certain circumstances. Judicial review will remain in the background, and like Ofcom's backstop

responsibility, will have the effect of ensuring appropriate procedures are followed – or of calling the system to account if this has not been the case.

Question 3: What other criteria should be considered?

Provided there is a clear understanding amongst all co-regulatory partners on the nature and expectations of their relationship, we consider that the twelve criteria set out in this consultation document are broadly sufficient to ensure an effective co-regulatory partnership between Ofcom and its contracted body that will serve for the benefit of consumers, government and industry. Ofcom might, however, wish to consider some of the following additional criteria, application of which would undoubtedly enhance the robustness of its co-regulatory partners:

- Appointments to adjudicatory bodies in accordance with Nolan principles
- The maintenance of a public Register of Interests
- Declaration of member interests at meetings
- Requirement for accessible and informative publications, especially searchable websites
- Transparent procedures (although we do not favour the publication of minutes in areas where matters of commercial confidentiality are likely to be at issue.)

Question 4: How should self- and co-regulation be developed by Ofcom in future?

We would be reluctant to suggest which other of Ofcom's many statutory duties might be most appropriately and effectively delivered through self- or co-regulation. As noted, above, self- and co-regulation can only prove effective in domains where a viable partnership can be established and maintained. Ofcom should be cautious of believing that the success of co-regulation in one area, for example broadcast advertising, is evidence of the success of co-regulation *per se*. From a parochial viewpoint, we would be disappointed to see ill-considered co-regulatory arrangements fail if a consequence was to cast doubt on the efficacy of co-regulation in truly appropriate spheres.

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