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Dear Mr Cormie,

ASA response to the DTI Consultation: 'Reducing Administrative Burdens – the Consumer and Trading Standards Agency'

1. Introduction

- 1.1 The Advertising Standards Authority (ASA) is the self-regulatory body responsible for ensuring that all ads, wherever they appear, are legal decent, honest and truthful.
- 1.2 The ASA's mission is 'to apply the advertising codes and uphold standards in all media on behalf of consumers, business, and society'. The ASA is not on anyone's 'side', consumers or competitors; but it is on the side of good advertising. To do our job effectively we need to secure a level playing field between advertisers and combat advertising that is misleading, harmful or offensive.
- 1.3 Information about the ASA and the work that we can do can be found on our website: www.asa.org.uk.
- 1.4 The ASA is not seeking for any part of this response to be treated as confidential.
- 1.5 The ASA welcomes the opportunity to respond to this consultation. The proposals in the consultation paper will directly impact on the self-regulatory system for advertising content standards.
- 1.6 The ASA is recognised by Government and the Office of Fair Trading (OFT) as the 'established means' for enforcing the Control of Misleading Advertisements Regulations 1988 (as amended) (CMARs). The OFT is

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ASA Council Chitra Bharucha • Jean Coussins • Christine Farnish • Sunil Gadhia • Alison Goodman • Mike Ironside • Colin Philpott • David McNair • Susan Murray • Dan O'Donoghue • Martyn Percy • Diana Whitworth • Donald Trelford • Nigel Walmsley • Neil Watts

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the ASA's legal 'backstop' regulator for these regulations. This means that we are able to refer those advertisers that are unable, or unwilling, to work within the self-regulatory system to the OFT for statutory action.

- 1.7 Given our close relationship with the consumer division of the OFT and the obvious direct implications that the proposed Consumer and Trading Standards Agency (CTSA) will have on our relationship, we were very surprised and disappointed that the ASA was not consulted by the DTI when preparing the consultation or even identified as a key stakeholder for inclusion in the formal consultation list (annex E).

2. Focus of the ASA's response

- 2.1 The ASA's main area of concern is related to whether the CTSA will be established as a separate body or as part of the OFT, therefore our response will generally concentrate on those proposals outlined in Chapter 5.
- 2.2 The ASA strongly supports the overall proposal to strengthen the consumer-related aspects of the OFT's work. The ASA believes that it is of benefit to both consumers and business to provide a better focus on consumer protection and regulation.
- 2.3 However, the ASA believes that this strengthened focus should be created through the OFT and **not** through a new separate body.
- 2.4 Point C.14 of the consultation document ruled out creating a CTSA with a consumer campaigning role because of the existence of bodies such as the National Consumer Council, which already cover this role. Surely the same logic can be applied to the question of whether an entirely separate CTSA should be established: we already have the OFT performing this function.
- 2.5 The ASA would urge the DTI not to consider the establishment of a new separate body as a pre-requisite for improving consumer protection regulation and education.

3. Benefits of the link between consumer and competition policy and the danger of separation

- 3.1 The ASA believes that the link between consumer and competition regulation is crucial for healthy and fair markets for both consumers and business. In its own work, the ASA balances competitor and consumer complaints. About 10% of total complaints are business-to-business complaints, but in resolving them the ASA is acting in the consumer interest as well as securing a level playing field. The fact that the ASA ensures fairness in, for example, comparative advertising is one of the reasons why the industry is content to invest around £8 million in advertising self-regulation via the 0.1% levy paid to the Advertising Standards Board of Finance (Asbof). A break in the interdependence of competition and consumer policy could make the ASA's job more difficult.
- 3.2 The ASA has enjoyed a good relationship with the OFT. The OFT has respected and trusted the ability of the advertising self-regulatory system to uphold high levels of consumer protection and maintain a level playing field for the industry. The ASA strongly believes that this good relationship is founded on the fact that the OFT has an intrinsically good understanding of, and appreciation for, the links between consumer and competition policy.
- 3.3 The ASA is aware that having strong, explicit links between consumer and competition policy and enforcement has been a long-standing policy objective of the UK Government, as it helps to ensure a balanced approach to both consumer and competition concerns.
- 3.4 Indeed, in the foreword to the 1999 White Paper 'Modern Markets: Confident Consumers', the then Secretary of State, Stephen Byers stated, *"This White Paper has been drawn up in the closest consultation with consumer organisations, business and local authorities. That is how policy should be made. It is also how it should be implemented."*
- 3.5 The DTI itself is organised with a strong link between consumer and competition policy. The very fact that there is a single Directorate covering both areas (the Consumer and Competition Policy Directorate) denotes the importance of linking these two areas. The ASA believes that this link should be strong in implementation by ensuring that the proposed CTSA is established within the OFT.

- 3.6 Furthermore, the UK Presidency recently held an event in London which championed the UK system of having intrinsic links between consumer and competition policy to other EU25 partners; it seems illogical – and hardly ‘joined up’ - that having held such an event so recently the UK should now propose to depart from this position.
- 3.7 The ASA studied the DTI’s various options for maintaining links between consumer and competition concerns should the CTSA be established as a separate body to the OFT. However, the ASA remains unconvinced that maintaining these links will happen to the extent intended in practice.
- 3.8 The ASA also has the following practical concerns:
- the proposed name of the Agency will inevitably suggest an institutional mindset focusing on consumer interests alone. Certainly, the name will suggest such a focus to members of the public, lobby groups, etc.
 - how would the CTSA and OFT overcome the physical blocks to effective communication should they be located on different geographical sites, possibly in different cities?
- 3.9 Having separate consumer and competition bodies might lead to a lack of even-handedness: an apparently consumer-focused organisation would be open to understandable pressure from consumer campaigning organisations, just as a business-only focused organisation would be open to similar pressure from business. If the CTSA became single-minded zealots for consumer rights, or, whether fairly or unfairly, were seen as such, the ASA can imagine that it would be very difficult for the ASA to continue to work with the agency as the ‘established means’ for implementing CMARs while retaining the confidence of the advertising business.
- 3.10 The consultation paper suggests that the CTSA will be a ‘neutral’ organisation to business. The ASA doubts whether that could continue to be the case over time. In relation to advertising, the ASA is uneasy about the new Agency’s ability to remain neutral if it loses the current explicit link between consumer and competition enforcement. The ASA’s good relationship with the OFT is founded on the fact that the OFT is committed to the principle of self-regulation; this commitment is based on the ability to view consumer and competition concerns as complementary.

- 3.11 The DTI should also bear in mind that CMARs cover business-to-business, as well as business-to-consumer advertisements. The ASA presumes that the CTSA will become involved in those circumstances in which business is also the consumer (ie where an ad is directed at a business customer). This underlines the importance of the CTSA having the ability to understand and be aware of business issues and supports our view that responsibility for these issues should lie with the OFT.
- 3.12 The ASA is apprehensive about a CTSA seeking to apply advertising standards legislation directly, rather than working with effective advertising self-regulation. This would not be a good use of public expenditure when the self-regulatory system can show that it is a more than effective means of securing compliance.

4. Better Regulation Principles

- 4.1 The ASA believes that the establishment of a separate CTSA runs counter to the Government's own aims for better regulation:
- A separate body would be more complicated to establish, in terms of legislation, time and relocation
 - Even by the DTI's own conservative costing, it would be more expensive to establish a new separate regulator. Inevitably, there would be a duplication of overheads
 - The Hampton Report identified that larger regulators were more efficient than smaller regulators
 - The Hampton Report's principles of inspection and enforcement state that, *'no new regulator should be created where an existing one can do the work'*.
- 4.2 The establishment of a CTSA within the OFT would be quicker and easier to set up. A separate CTSA would require legislation to create its powers. This would take up a considerable amount of Parliamentary time. Furthermore, time spent creating more legislation and establishing a separate body would be valuable time that could have been spent improving consumer enforcement services.

4.3 Regardless of where the Government decides to place the new CTSA, the ASA believes that it is imperative that it is established with Better Regulation Task Force principles at its heart. The ASA would urge the Government to ensure that there is a specific reference recognising self- and co-regulation in the body's fundamental principles.

5. Value of the OFT Brand

5.1 It is important that the DTI does not under-estimate the value of the OFT brand. The OFT is a strong and recognised brand amongst business and consumers.

5.2 The threat of referral to the OFT is an extremely effective backstop sanction for the ASA. This is primarily because of the recognition of the role of the OFT amongst advertisers of all sizes. The threat of referral is so strong that the ASA has had to refer fewer than thirty advertisers to the OFT for non-compliance with ASA adjudications since 2000.

5.3 The loss of impact of the well-known OFT brand might not be considered to be such a great problem with larger, national advertisers and businesses, however amongst smaller, perhaps local, advertisers (who probably do not keep abreast of various Government changes) the loss of the OFT brand could considerably weaken one of our strongest sanctions.

5.4 In addition, there is no suggestion that the general public has lost confidence in the OFT. Indeed, the ASA believes that consumers find comfort in a body that has been in the public consciousness for over thirty years.

5.5 Overall, the ASA believes that the transition period during which a new brand and authority are developed, could lead to an unnecessary period of weakness in consumer enforcement and regulation.

6. Speed of Response of Consumer Enforcement Services

6.1 The ASA acknowledges that there is room for some improvement in consumer enforcement within the OFT. However, we consider that it would be quicker and easier to resolve the issues within the OFT rather than developing an entirely new body.

- 6.2 The ASA is unaware of any serious problems at the OFT in relation to consumer enforcement. Indeed, in our experience, the OFT has always demonstrated a sound commitment to consumer issues.
- 6.3 The only notable concern that the ASA has with the current system is that, on some occasions, we have been frustrated by the speed of response from the OFT. However, this problem could be easily resolved by improving the resources and renewing the focus of the OFT's consumer division. It is certainly not an issue so serious as to require the removal of all consumer enforcement work from the OFT.
- 6.4 The problem of speed raises a serious concern in relation to a separate CTSA. The options mooted in the consultation paper which aim to maintain a competition link appear to be burdensome and impractical. The ASA is doubtful whether such arduous responsibilities to consult formally would - and could - be maintained on a long-term basis.
- 6.5 Nonetheless, if the CTSA were to be established as a separate body, then the ASA would envisage that a requirement to consult with the OFT would be an unavoidable and necessary burden to maintain a link between consumer and competition regulation.
- 6.6 However, given that the ASA's only concern with the current system is precisely the speed of response, moving to a system into which time delays would be purposely built, would undoubtedly negatively impact on the ASA's relationship with its legal backstop.

7. Powers of the CTSA

- 7.1 The ASA has some concerns about the Government's intention to afford the new CTSA powers similar to those of the Food Standards Agency (FSA). From the ASA's experience and observation, the FSA has a powerful role in enforcement, consumer education *and* policy development. For the reasons we have outlined above, we would oppose the creation of a consumer-focused body, which had a strong role in policy development, but without the necessary strong links to competition policy.

8. Conclusion

- 8.1 The ASA supports the aim for an improved focus on consumer enforcement.
- 8.2 The ASA believes that it is of crucial importance to maintain an explicit link between consumer and competition regulation and that the best way to achieve effective regulation would be through the OFT.
- 8.3 The ASA is concerned that a separate CTSA would have in-built time delays which would be considerably worse than the current system, which we believe works reasonably well.
- 8.4 The ASA would urge that better regulation principles, in particular strong references to self- and co-regulation are placed at the heart of the CTSA.
- 8.6 We would urge the DTI not to underestimate the power and value of the existing OFT brand.

I do hope that you find the ASA's comments useful. If you require further information about any aspect of this response, then please do not hesitate to contact me.

Yours sincerely,



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