

APPENDIX 1: STATUTORY FRAMEWORK FOR THE REGULATION OF BROADCAST ADVERTISING

Advertising Standards

- 1 The Communications Act 2003 requires Ofcom to set, and from time to time review and revise, codes containing such standards for the content of television and radio services licensed under the Broadcasting Acts 1990 and 1996 as appear to Ofcom to be best calculated to secure the standards objectives.

Sections 319(1), 319(3).

- 2 Ofcom has contracted-out its advertising standards codes function to the Broadcast Committee of Advertising Practice Limited (BCAP) under the Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004. Such function is to be exercised in consultation with and with the agreement of Ofcom.

- 3 These provisions imposed upon Ofcom by the Communications Act are therefore relevant to BCAP:

- The standards objectives, insofar as they relate to advertising, include:

"(a) that persons under the age of 18 are protected;

(b) that material likely to encourage or incite the commission of crime or lead to disorder is not included in television and radio services;

(e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;

(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from inclusion in such services of offensive and harmful material;

(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;

(i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with [in particular those obligations set out in Articles 10, 12-16 and 19-22a of Directive 39/552 EEC as amended by Directive 97/36/EC (the Television without Frontiers Directive)];

(l) that there is no use of techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds, without their being aware, or fully aware, of what has occurred.

Section 319(2)

- In setting or revising any such standards, Ofcom must have regard, in particular and to such extent as appears to them to be relevant to the securing of the standards objectives, to each of these matters:

"(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;

- (b) *the likely size and composition of a potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;*
- (c) *the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of the programme's content can be brought to the attention of potential members of the audience;*
- (d) *the likelihood of persons who are unaware of the nature of the programme's content being unintentionally exposed, by their own actions, to that content;*
- (e) *the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section ...".*

Section 319(4).

- Ofcom must ensure that the standards from time to time in force under this section include:

- "(a) *minimum standards applicable to all programmes included in television and radio services; and*
- (b) *such other standards applicable to particular descriptions of programmes, or of television and radio services, as appeared to them appropriate for securing the standards objectives."*

Section 319(6).

- Standards set to secure the standards objectives [specified in para 3(e) above] shall in particular contain provision designed to secure that religious programmes do not involve:

- "(a) *any improper exploitation of any susceptibilities of the audience for such a programme; or*
- (b) *any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination."*

Section 319(7).

- Standards set by Ofcom to secure the objectives [mentioned in para 3(a), (h) and (i) above]:

- "(a) *must include general provision governing standards and practice in advertising and in the sponsoring of programmes; and*
- (b) *may include provision prohibiting advertisements and forms of methods of advertising or sponsorship (whether generally or in particular circumstances)."*

Section 321(1).

4 In addition, the Broadcasting Act 1996 section 24(2) contains provisions permitting advertising on analogue ancillary services on channels 3, 4 and 5 only if directly related to advertising on the main service and digital ancillary services may carry no advertising of any kind.

5 BCAP has adopted the former ITC and Radio Authority Codes as follows:

- (a) BCAP Television Advertising Standards Code (ex ITC, including teleshopping and other non-advertising content);
- (b) BCAP Radio Advertising Code (extracted from Radio Authority Advertising and Sponsorship Code);
- (c) BCAP Rules on the Scheduling of Advertising (section 4 of the former ITC Rules, relating to the scheduling of individual spot advertisements);
- (d) BCAP Code for Text Services (Part C of former ITC Code);
- (e) BCAP Guidance to Broadcasters on the Regulation of Interactive Television Services (ex ITC);
- (f) BCAP Advertising Guidance Notes 1, 2, 3 and 5 (ex ITC).

(together "the BCAP Codes").

- 6 BCAP will work closely with the Committee of Advertising Practice to provide, insofar as practicable, a co-ordinated and consistent approach to standards setting across broadcast and non-broadcast media.
- 7 The procedures for revision of the BCAP Codes, including consultation, are, to the extent applicable to BCAP's exercise of statutory functions, set out at section 324 of the Communications Act 2003.
- 8 Ofcom retains standards setting functions in respect of:
- (a) political advertising, the inclusion of which in television or radio services is prohibited by section 321(2) Communication Act, including decisions as to whether or not an advertisement is "political advertising". But the rules on that remain in the BCAP Codes;
 - (b) unsuitable programme sponsorship;
 - (c) discrimination between advertisers who seek to have advertisements included in television and radio services. NB: Subject to this broadcasters, like publishers and other media, are generally entitled to refuse advertising they do not want to carry;
 - (d) the amount and scheduling of advertising, save for the scheduling of individual spot advertising.

Investigation and complaints

- 9 The Communications Act requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards (as set out in the BCAP Codes) and to include conditions in licences for programme services requiring licence holders to comply with Ofcom's directions in relation to advertising standards.

Sections 325(2), (4) and (5).

- 10 The Control of Misleading Advertisements Regulations 1988 require Ofcom to consider complaints that any advertisement included or proposed to be included in any licensed programme service or S4C is misleading or an impermissible comparative advertisement, unless the complaint seems to Ofcom to be frivolous or vexatious.

- 11 The Medicines (Monitoring of Advertising) Regulations 1994 require Ofcom to consider complaints that any advertisement included or proposed to be included in a licensed service or S4C is an impermissible advertisement for a medicinal product, unless the complaint seems to Ofcom to be frivolous or vexatious.
- 12 Ofcom has contracted-out its powers of handling and resolving complaints about breaches of the BCAP Codes and the relevant provisions of The Control of Misleading Advertisements Regulations and Medicines (Monitoring of Advertising) Regulations to the Advertising Standards Authority (Broadcast) Limited (ASA(B)) under The Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004.
- 13 ASAB will work closely with and under the umbrella of the Advertising Standards Authority to provide, insofar as is practicable, a coordinated and consistent approach to advertising standards regulation across broadcast and non-broadcast media.
- 14 Ofcom retains complaint investigation functions in respect of:
 - (a) political advertising;
 - (b) unsuitable sponsorship;
 - (c) discrimination between advertiser and
 - (d) scheduling of advertisements.

Statutory sanctions for breaches of advertising standards

- 15 Ofcom has similarly contracted-out its enforcement powers under the Communications Act, such that ASAB has these powers (including in relation to the Welsh Authority):
 - (a) to require a licence holder to exclude from its programme service a particular advertisement or to exclude it in particular circumstances (Section 325(5)(a));
 - (b) to require a licence holder to exclude from its service certain descriptions of advertisements and methods of advertising (whether generally or in particular circumstances) (Section 325(5)(b)), such power to be exercised by ASAB only for misleading advertisements or impermissible comparative advertisements or impermissible medical advertisements;

NB: Detailed reasons must be given for any of those actions in respect of a medicinal product advertisement and reference must be made to any remedy available in court and any time limit that must be met. (MMAR 1994 Regulation 9);
 - (c) to require, from any person who to ASAB seems to be responsible for an advertisement, provision of evidence relating to the factual accuracy of any claim and to deem a factual claim inaccurate if such evidence is not so provided.
- 16 Ofcom retains these powers conferred by the Broadcasting Acts 1990 and 1996 and the Communications Act 2003:
 - (a) to direct the broadcast of a correction or statement of findings;
 - (b) to impose a financial penalty or shorten a licence period and
 - (c) to revoke a licence.

Overseas advertising

- 17 Licensees should seek BCAP's advice if they want to have any rules in the Code disapplied because the advertising is on a programme service addressed exclusively to audiences outside the UK.

- 18 An advertisement that is aimed specifically and with some frequency at audiences in the territory of a single party to the 1989 Council of Europe Convention on Transfrontier Television must, with some exceptions, comply with the television advertising rules of that party. This does not apply:
 - (a) if the party is a Member State of the European Community or
 - (b) if its television advertising rules discriminate between advertising broadcast on television services within its jurisdiction and that on services outside its jurisdiction or
 - (c) if the UK Government has concluded a relevant bilateral or multilateral agreement with the party concerned.