

ASA system submission to the Department for Digital, Culture, Media & Sport's call for evidence on online advertising

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'
- 1.2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 58 years and the broadcast Advertising Code (written and maintained by BCAP) for 16, with our remit further extended in 2011 to include companies' advertising claims on their own websites, social media spaces, apps and advergames (henceforth, "website claims").
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 550,000 pieces of advice and training in 2019.
- 1.5. The ASA system is providing this written submission in response to the Department for Digital, Culture, Media & Sport's call for evidence on online advertising.

2. Question: To what extent are consumers exposed to harm by the content and placement of online advertising?

- 2.1. Advertising regulation seeks to protect consumers from harm, sometimes on the basis of evidence and sometimes on the basis of the likely impact of certain forms of content. CAP and BCAP have tended to prefer media neutrality wherever possible in order to avoid media flight and to promote general high standards.
- 2.2. Our role is to ensure that the content of ads seen by UK consumers, including those appearing online and in social media, follow the Advertising Code. The enduring principles of the advertising rules are that ads must not mislead, harm or offend and should be prepared in a socially responsible way. We also require that ads are targeted responsibly and are appropriate for the audience that sees, hears and engages with them. All ads, whether online or not, have the potential to break these rules. Unmediated ads (i.e. ads that are not subject to media constraints) have a greater potential to do so.
- 2.3. The ASA system treats online advertising consistently with other non-broadcast media and sets specific standards for content and placement of advertising, more often on a sectoral or thematic basis than on the basis of media characteristics. For example, ads for alcohol, gambling and HFSS food and drink are all subject to placement rules, while misleading advertising rules seek to reflect consumer protection regulation.

- 2.4. The balance of the ASA's work has increasingly shifted to tackling online ads. In 2019, 80% of the 14,747 online cases resolved by the ASA were website claims, and 20% were other online media. We have found that website claims increased as a share of all complaints cases resolved, but the prioritisation work outlined in the third strand of our More Impact Online strategy, has arrested the eight year rise in Formal Investigations cases. Website claim cases have continued to be more focused on misleading issues (86% v 70%), more likely to be investigated (31% v 22%) and marginally more likely to be Upheld (67% v 65%).
- 2.5. We're aware of concerns around potential harms from undisclosed influencer advertising. The number of cases involving influencers on social media increased in 2019, and the chief cause of complaint concerned no or inadequate labelling of advertising content. CAP has long maintained rules on undisclosed "adverorial" content (now backed up by consumer protection legislation) so this harm isn't novel or specific to online media. We have continued to offer advice and guidance to influencers and brands in the first instance to educate them about the Code's requirements. We are now initiating a project aimed at improving online influencer compliance with our rules and standards, using the Brandwatch monitoring tool, working with the Competition and Markets Authority (CMA) and undertaking targeted 'manual' monitoring. From December 2020, the ASA will, very likely, and in co-regulation with Ofcom, regulate notified video sharing platforms for compliance with a new influencer advertising disclosure provision deriving from the Audiovisual Media Services Directive.

3. Question: How effective are the current governance and regulatory system for online advertising in the UK, including the self-regulatory system governing content and placement standards, which operates through the provision of a complaints system and technology-assisted monitoring and enforcement interventions.

- 3.1. The ASA operates a system of 'collective regulation': a combination of self- and co-regulation providing comprehensive coverage of ads across UK media. The ASA and CAP approach to regulating advertising is widely acknowledged as being a 'best in class' comprehensive model, with nearly all key aspects that make for an effective system under one roof and providing 360° regulation: proportionate and evidence-based policy making; complaints handling and investigation leading to published rulings; pre-publication advice, training and guidance; proactive compliance and enforcement; effective sanctions; independent decision making; and, transparent communication.
- 3.2. The ASA is trusted by the UK Government and contracted or otherwise engaged by statutory regulatory bodies e.g. Ofcom, Trading Standards, the CMA, Gambling Commission, the ICO etc. to be the frontline, day-to-day regulator for ads in the UK. This responsibility extends chiefly to the content, scheduling and placement of ads.
- 3.3. Many of the 8,881 ads amended or withdrawn in 2019 resulted from the ASA's own initiative sector compliance action. The ASA undertakes sector compliance action when it becomes apparent that a significant percentage of companies in a given sector are in breach of the Code. This can involve sectors where the number of organisations are relatively small (e.g. the broadband sector and other utility sectors); or, sectors involving a very large number of organisations characterised, in the main, by SMEs (e.g. dentists, florists, theatres, estate agencies, complementary and alternative medicine practices etc.).
- 3.4. Our experience tells us that the majority of advertisers want to play by the rules. 97% of advertisers comply with our rulings. However, we have a range of sanctions at our disposal which we can use when they don't comply. For example:

- CAP can issue alerts to its members, including the media, advising them to withhold services such as access to advertising space.
- We can ask internet search websites to remove a marketer's paid-for search advertisements when those advertisements link to a page on the marketer's website that contains material which breaks the rules.
- The name and details of problem advertisers may be featured on a dedicated section of our website, designed to appear in search engine results when a consumer searches for a company's website.
- If necessary, we can also place our own ASA search ads, further highlighting a companies' non-compliance.

3.5. But we aren't complacent. We launched our five-year strategy, More Impact Online, to give us the foundation to be even more effective. The strategy prioritises:

- Working more closely with the large online platforms to improve our regulation of online paid ads, and more prioritisation and partnership working, in particular in our regulation of website advertising
- The protection of vulnerable people and the appropriate limitation of children and young people's exposure to age-restricted ads
- Exploring new technological solutions and listening in new ways, including through research, data-driven intelligence gathering and machine learning.

3.6. In the first year of the More Impact Online strategy, we used new monitoring technology in the form of child avatars, which simulate children's online browsing profiles to identify ads that children see online. This technology is proving to be a valuable tool in our regulatory armoury, providing intelligence rich data at scale and speed and helping us proactively to identify and tackle problem ads. It has also provided a strong indication of the efficacy of using ad tech-based targeting restrictions in limiting exposure to sensitive product categories online.

3.7. Our avatar monitoring of online ads for food and drink products categorised as being high in fat, salt or sugar (HFSS) and therefore subject to strict rules that prohibit them from being targeted at children, found:

- 2.3% of the 41,030 ads served to child Avatars across general interest and youth interest websites and YouTube channels were for HFSS products
- Over two-thirds of HFSS ads on websites and YouTube were for products likely to be of little interest to children, e.g. ads for supermarkets and Grana Padano cheese
- Breaches of the rules by eight brands on YouTube channels, against which we took successful action
- Over the same period, we monitored openly available website and social media content from a selection of the 50 top UK food and drink brands. Advertising on only one website was found to be problematic.

3.8. Our avatar monitoring of gambling advertising found:

- Gambling ads were served to the child Avatars on 11 of the children's websites monitored. Gambling ads were seen by the child Avatars on those 11 children's websites a combined total of 151 times – 1.40% of all ads served to child avatars in children's media during the research
- One gambling operator was responsible for 122 of the ad impressions (81% of the 151)

- The gambling operators accepted their ads broke the rules. In most instances, we were told the problems arose due to errors by third-party companies.

3.9. Our avatar monitoring of alcohol advertising found:

- 73 of the 95,665 ads served to the seven avatars were for alcohol products (0.08%)
- The monitoring did not identify any instances where alcohol ads were served to child avatars on websites clearly intended for children.

3.10. Our findings show the majority of advertisers are sticking to our rules, but the monitoring has enabled us to take action to enforce the rules against a number of ads that we have found to be irresponsibly targeted.

3.11. As part of a range of activities, 2020 will see several tech-driven projects to build on the avatar work summarized above. The ASA will:

- replicate the 2019 avatar work with a dedicated focus on mixed-audience environments;
- employ 'scraping technology' to produce quarterly reports on sensitive product categories appearing on children's websites and other spaces like children's YouTube channels – providing intelligence for quick and effective enforcement action; and
- explore ad tech that allows monitoring to be carried out in 'signed-in' environments, principally, social network platforms.

Together these initiatives will add even further to the ASA's compliance reach.

4. Question: How would you assess levels of compliance with the current regulatory system as you have outlined above?

- 4.1. We are able to secure compliance in over 97% of cases where a breach of the Advertising Codes is identified, without having to refer an advertiser to a legal backstop. Referrals are rare because UK media and platforms agree to act as gatekeepers for the ASA. If we spot a bad ad on YouTube, on Instagram, on a TV channel, in cinemas, on outdoor media or in print media, those organisations and platforms work with us to remove the offending ad quickly.
- 4.2. Between 2014-2018, we resolved around 71,000 complaint cases and 64,000 own-initiative cases involving misleading advertising. Of those, around 30,000 resulted in us taking follow-up compliance action of some sort, including threatening referral to the appropriate legal backstop. That compliance action was overwhelmingly successful, resulting in us referring only 68 companies, all to Trading Standards, in those five years. On average, only 14 cases were referred each year, with obvious big savings for Trading Standards and the taxpayer.

5. Question: What, if any, gaps do you consider there to be?

- 5.1. With the exception of non-broadcast political advertising, the ASA is not aware of any significant gaps in the coverage of UK ad regulation. Should self-regulation of an advertising sector or an advertising medium become ineffective and existing statutory enforcement mechanisms cannot or will not tackle the resultant enforcement gap, the ASA would be obliged to make known to the industry and the government the nature of the gap and the related consumer protection concerns.

- 5.2. The ASA system is always open to evidence that demonstrates a need to set new standards or intervene in advertising practices that are not explicitly covered by the current regulatory framework (although such practices could be addressed in the interim by general, enduring principles in the Codes that seek to ensure social responsibility in advertising). The system does and has updated its approach to a range of potential harms in advertising. For example, in 2018 after undertaking research and running a public consultation we introduced a new rule on tackling harmful gender stereotypes in advertising.
- 5.3. Under the UK Advertising Code, parties involved in preparing or publishing marketing communications accept an obligation to abide by the rules. For non-broadcast media, this means taking steps, to a greater or lesser extent, to ensure third party ads comply with the Code and, where they don't and the advertiser refuses to cooperate with the ASA, the medium works with the ASA to remove the ad. The ASA has and continues to work effectively with social media platforms and other online ad networks in this way, developing informal compliance procedures and partnerships with the larger platforms and other advertising networks.
- 5.4. Owing to the significant role that these platforms play in the UK's social, political and economic fabric, stakeholders are increasingly calling into question whether the platforms are sufficiently transparent and accountable, including in respect of their advertising services. In this context, some stakeholders may question whether the 'informal' arrangements described remain appropriate and do enough to secure the public and stakeholders' trust, no matter their effectiveness in practice.
- 5.5. It is worth noting that the funding of the ASA system has always primarily relied on a 0.1% levy paid by companies who are buying advertising space. The movement of advertising budgets online presents a structural challenge to that funding model. The ASA system has a funding board, Asbof, which has made some progress addressing that challenge in recent years, but we are not there yet. Asbof is currently engaged in a major review of the model, including seeking to make sure all parts of the advertising industry contribute meaningfully and fairly to the ASA system, including digital advertisers, platforms and networks. We're confident it will succeed, as it needs to if we are to make as much of a success as we would like with our new strategy of doubling down on our regulation of online advertising.

6. Is there any further evidence that you would like to provide on how effective the current regulatory system is at preventing instances of the exploitation of vulnerabilities / vulnerable people, manipulation, or discrimination through the use of targeting (whether direct or indirect), which you think is not being considered by existing reviews?

- 6.1. As mentioned above we have begun undertaking avatar monitoring which gives us a snapshot of what age-restricted ads children could be seeing. This is world leading work and we're sharing the methodology with advertising and media regulators in many other countries. It is also worth noting the following case studies of our work on online targeting and consumer protection.
- 6.2. In 2018, we issued an Enforcement Notice to the 150 CEASE therapists operating in UK. CEASE therapy is a branch of homeopathy which promotes itself as a 'treatment' for autism. The Enforcement Notice made clear that any efficacy claims for CEASE therapy in the treatment of autism – either direct or implied – would be considered a breach of our rules. We also made clear that any practitioners who do not comply would face the prospect of referral to Trading Standards.

- 6.3. A representative sample of ads was subsequently monitored. Of those who failed to comply, we identified the practitioners whose websites represented the most serious breaches of the Code, and referred them to our legal backstop Trading Standards.
- 6.4. Our work on CEASE therapy raised compliance rates in the sector and protected those with autism (from physical harm from the treatments), as well as their parents/carers who were at risk of being exploited.
- 6.5. In January, CAP together with the MHRA, issued an Enforcement Notice to the beauty and cosmetic services industry on advertising Botox and other botulinum toxin injections on social media platforms. The Enforcement Notice targeted over 130,000 businesses within the cosmetic services industry. This followed compliance work where CAP had identified an ongoing practice of ads of this kind appearing on social media. The enforcement notice compelled businesses to review ads and make immediate changes, and included paid-for ads, non-paid for posts and influencer marketing.
- 6.6. At the same time we announced that CAP was using new monitoring technology to discover problem ads on Instagram and flag these organic posts for removal as part of ongoing work with Facebook. The monitoring tools allow CAP to identify posts that break rules by tracking problems in social media posts. CAP is also running a targeted ad campaign across Facebook to raise awareness of the issue. Advertisers not following the rules run the risk of being referred to the MHRA or their professional regulatory body.

7. Question: There are some differences in the way that broadcast and non-broadcast advertising, including online advertising, is regulated. What effect do you consider any regulatory disparities have on individuals, businesses and/or society?

- 7.1. Government, the courts and regulators have traditionally accepted that TV merited a higher degree of protection because of its reach, its place in the family home and its audio-visual impact, which, in combination, can have a powerful impact on society at large and on individuals.
- 7.2. The standards we apply through the Codes are, almost without exception, the same for broadcast advertising and for non-broadcast advertising including online. That is in no small measure because the underlying law is the same for the two. The vast majority of the work we do is to stop ads from being misleading and to encourage companies to avoid producing misleading ads in the first place.
- 7.3. The rules that we have in our Advertising Codes reflect and are underpinned by consumer protection law that says that ads must not mislead. As such all media that run ads must put in procedures for ensuring compliance.
- 7.4. Ads appearing in mediated spaces may have to comply with additional checks and balances required by the media to ensure that consumers are protected from ads that mislead, harm, seriously offend or are otherwise irresponsible. In some cases, this is subject to formal pre-clearance processes, where ads must be checked before they are broadcast or published. This is either because of the law or because this is a requirement that has been imposed, sometimes for products e.g. medicines advertising.
- 7.5. As mentioned we provide Copy Advice and training for online advertisers to ensure they get their ads right before they're published. CAP and BCAP provided over 550,000 pieces of advice and training in 2019.

- 7.6. In comparing online with broadcast advertising regulation, the multi-faceted, heterogeneous nature of the internet should be considered and, in particular, the extent of ASA regulation devoted to non-paid-for ads online (for which there is no broadcast equivalent).
- 7.7. All TV channels broadcasting from the UK must be licensed by Ofcom and must have adequate procedures in place to check the ads they broadcast comply with the UK Code of Broadcast Advertising. Some Ofcom TV licensees, but by no means all, outsource this requirement to Clearcast, which means compliance procedures may vary between different TV channels.
- 7.8. An innumerable and diverse number of organisations populate the online environment, a subsection of which host third party ads. These host websites and platforms are, similarly, likely to have in place different policies and procedures relating to ads on their sites, whether booked directly with the host website or platforms, or via a third party. All such websites and platforms have a secondary responsibility under the CAP Code to help the self-regulatory system tackle irresponsible ads; a primary responsibility to comply with fair trading, course of business and other relevant legislation.

8. Question: Considering the benefits and challenges you have identified above, what additional actions / measures / initiatives could be proposed that would help ensure that the online advertising sector can continue to innovate and grow?

- 8.1. When advertising is responsible it is beneficial to people, business and society. It funds the media and culture that many of us can and do enjoy for free, including vast swathes of the internet. It can inform and educate and encourage consumers to support good causes. The ASA system's regulation must be proportionate to enable it to flourish. However, we don't believe in being complacent. We have completed the first year of our More Impact Online strategy and are undertaking more work to ensure consumers are protected online and that we are fit for purpose as a regulator for the future.

9. What further role, if any, should government play?

- 9.1. We believe that this is a matter for Government but would suggest that whatever action may be taken should support and not undermine the advertising self-regulatory system. The ASA stands ready to address any such gaps identified by the Online Advertising Review. However, in all but exceptional circumstances, the ASA system is responsible for identifying and addressing harm arising from the content or placement of online ads that fall under the Advertising Codes.

Contact

Kate Roche
Advertising Standards Authority
kater@asa.org.uk or publicaffairs@asa.org.uk
020 7492 2176