

ASA system submission to the Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy consultation on a new pro-competition regime for digital markets

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 59 years and the broadcast Advertising Code (written and maintained by BCAP) for 17, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 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 and our application of them remain fit-for-purpose.
- 1.4. As the UK’s frontline advertising regulator of legitimate businesses, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system of collective regulation involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including the Gambling Commission (GC), the Information Commissioner’s Office (ICO), the Medicines and Healthcare products Regulatory Agency (MHRA), the Financial Conduct Authority (FCA) and the Competition and Markets Authority (CMA).
- 1.5. We use our convening powers to bring together the ad industry and media owners to set, maintain and police high standards. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this collective regulation helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.
- 1.6. The UK Advertising Codes are drafted and maintained by CAP and BCAP, supported by experts in our Regulatory Policy team. This authorship of the rules by the ad industry is an important part of our system. It means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. Many of the rules derive directly from legislation, of course. For example, the rules requiring ads not to mislead or be likely to mislead originate from UK consumer law. However, many do not, particularly those seeking to prevent harm, offence and social irresponsibility. Whichever the case, in setting the rules which govern UK advertising, CAP and BCAP have multiple checks and balances in place to ensure the process is transparent, open to scrutiny and follows the principles of good regulation. From calls for evidence and public consultations on rule changes, having an independent consumer panel advising CAP and BCAP, Ofcom signing off on BCAP rule changes and, ultimately, the ASA System’s processes being open to

judicial review. All to ensure the system is wholly accountable to everyone with a stake in advertising, particularly the public.

- 1.7. 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 722,523 pieces of advice and training in 2020.
- 1.8. The ASA system is providing this written submission in response to the Department for Digital, Culture, Media & Sport and Department for Business, Energy & Industrial Strategy consultation on a new pro-competition regime for digital markets.

2. Regulatory context

- 2.1. The ASA regulates the content, placement, scheduling and targeting of UK advertising across media. We take action where ads break the rules whether that's by being misleading, harmful, offensive or irresponsible. The ASA is not, however, an economic or market regulator and we do not have a specific role in promoting competition, innovation or growth.
- 2.2. The Government's consultation on a pro-competition regime for digital markets does not appear to focus on the creative content or targeting of online advertising (by targeting, we mean for the regulatory purpose of appropriately limiting under 18s' and other vulnerable groups' exposure to advertisements for products that may not be suitable for them). However, the remit envisaged for the Digital Markets Unit (DMU) and the proposed principles underpinning its Code of Conduct – on fair trading, trust and transparency – which the consultation acknowledges may impact on pricing, quantity and format quality of advertisements could overlap, in limited circumstances, with our regulation. For example, a firm with Strategic Market Status (SMS) might promote via its website or social channels (or elsewhere), the services its users (prospective customers) can purchase from them. Where the claims an SMS makes are directly connected with the supply or transfer of goods, services or opportunities they are likely to be considered advertising for the purposes of our Code.
- 2.3. The consultation also gives consideration to how algorithms can be used to personalise services, rank search results and change the way third party products are displayed on websites. Again, indirectly, this touches upon areas of our regulation in so far as we require ads to be targeted appropriately, to be responsible and avoid misleading people.
- 2.4. We think it important, therefore, to set out clearly that there is an effective online advertising regulatory framework in place in the UK to protect people and businesses from misleading advertising by legitimate businesses, and to appropriately limit under 18s' and other vulnerable groups' exposure to advertisements for products that may not be suitable for them. It is one that creates a level-playing field for competitors, ensuring businesses respect the principles of fair competition generally accepted in business, and which allows responsible advertising to flourish.
- 2.5. Our submission explains how that system works and the additional measures we're taking, including closer working with online platforms, to bolster protections for UK consumers, business and society from irresponsible or inappropriate advertising online.

3. ASA remit for online regulation

- 3.1. With almost 60 years' experience regulating advertising, the ASA provides a one-stop shop for consumers and for the industry across all media and platforms. We regulate almost all advertising online, including paid ads on platforms and the open internet, influencer ads, and companies' own website and social media advertising claims. (The exceptions are [political advertising](#) and misleading-related issues in non-broadcast financial advertising, which falls to the FCA.)
- 3.2. 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.
- 3.3. Moreover, under our [More Impact Online](#) strategy we're using [proactive, tech-assisted, collective regulation](#) to be more effective and to tackle irresponsible ads online at scale and speed.
- 3.4. We know people are spending more time online, businesses are increasingly advertising online and the pace of technological change online is contributing to societal concerns. That's why our strategy focuses on improving the effectiveness of our online advertising regulation. We're proud of the technological initiatives we've undertaken as a part of that.
- 3.5. The strategy prioritises:
 - Delivering high quality, proactive regulatory projects on ads that cause the most detriment to people, particularly children and other vulnerable people.
 - Working more closely both with the large online platforms and with the government and Ofcom, both on Video Sharing Platform advertising regulation and to address any gaps in online advertising regulation.
 - Using machine learning to improve our regulation, act more nimbly, simplify and make more efficient our regulation where we can.
- 3.6. As mentioned in 1.4 and 1.5 the ASA operates a system of collective regulation. That includes working openly and effectively with the Competition and Markets Authority. We also have a long established and strong co-regulatory partnership Ofcom and stand ready to build on that relationship in relation to any advertising issues that might emerge from its new role as the Online Safety regulator. Collective regulation encompasses a range of expertise and enforcement mechanisms that would be impractical if not impossible for any new regulator to replicate.

4. Our relationship with the online platforms

- 4.1. 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 ensure third party ads comply with the Code and, where they don't and the advertiser refuses to cooperate with the ASA, the medium/platform/agency works with the ASA to remove the ad.

- 4.2. Online, 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.
- 4.3. Social media platforms and online advertising networks help the ASA secure advertising standards by removing non-compliant ads (those appearing in paid-for space online and those appearing in 'non-paid-for' space on social media platforms) we bring to their attention, and raising awareness of our regulation.
- 4.4. As an example of our work with platforms, in 2020, we [issued an enforcement notice](#) to 130,000 wide-ranging businesses across the beauty and cosmetic services industry about 'non-paid-for' ads for Botox. Botox is a prescription-only medicine, and so is prohibited from being advertised to the public. We identified a trend of these ads appearing on social media, particularly in organic Instagram posts, and took action to ensure advertisers reviewed their advertising. We used monitoring technology to identify where these ads were appearing on Instagram, and flagged them with the platform to have them quickly removed. We made it clear that any advertisers that continue to break the rules risked being referred to the MHRA and/or their professional regulatory body.
- 4.5. These industry partners, which includes Google and Facebook, helped set-up and also participate in our [Scam Ad Alert system](#), which has successfully led to the disruption of fraudulent activity online, by identifying and removing paid-for scam ads across multiple platforms.
- 4.6. In the context of a changing online regulatory landscape, we and the platforms we engage with are determined to adapt and play our part in delivering a more inclusive and accountable form of advertising regulation for everyone's benefit. As part of that, we want to see greater transparency and accountability from online platforms and ad networks for the role they play in upholding the advertising rules. We are engaging with them and government in exploring how we achieve this, including reporting publicly on how they perform.

5. Consultation question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?

- 5.1. As mentioned, we already have established strong working relationships with online platforms some of which may be classified as SMS firms. And we are also exploring working more closely with the platforms to integrate them further into our regulatory system.
- 5.2. The consultation sets out that the DMU, when considering whether and what actions to take, should "... consider whether other regulators are better placed to act... working with other regulators to design and enforce remedies, or handing over to other regulators issues it has identified." We recognise this is with particular reference to regulatory coordination and information sharing with the likes of the Ofcom, FCA and the ICO. We consider the same principle should apply if and when the DMU finds itself considering a policy issue that might overlap with our work and we stand ready to support the DMU in identifying these boundary issues and assigning regulatory accountability accordingly.
- 5.3. We believe it is important that the DMU has regard to the existing regulatory framework in place for online advertising and the role and remit of the ASA. We would also signal our willingness to work in partnership, as we already do effectively with the CMA and others, on

tackling issues that are covered by our rules and/or where appropriate referring matters that fall outside our remit to the DMU for its consideration.

- 5.4.** In setting out its approach we note the DMU aims to “focus its work where it could have the highest impact” and “minimise unnecessary [regulatory] burden”. We are supportive of that aim. Through successive pieces of legislation, there are a number of different regulators operating in the online space. Because of this, we place great emphasis on effective collaboration to avoid regulatory inconsistencies and gaps. In the field of advertising, we deliver a one-stop shop for consumers and for the industry across all media and platforms. In setting the parameters for the DMU to intervene online, we think it is vitally important to ensure that those powers complement the established and wide-ranging protections afforded by the ASA system and we do all we can to prevent inadvertently undermining our organisations’ respective roles.
- 5.5.** Overall, we think it is unlikely that the scope of the DMU and ASA system will overlap or conflict, but we would welcome further discussion if the DMU believes its scope of impact will become more broad.

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