

ASA system submission to the Department for Digital, Culture, Media and Sport's Online Advertising Programme consultation

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.'

The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18 with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.

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.

As the UK's frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.

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.

We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This 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. There are multiple checks and balances in place to ensure the committees' development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System's processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.

The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

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 850,000 pieces of advice and training in 2021.

Summary

Introduction

- I. The ASA system welcomes the government review and is grateful for the opportunity to put on the public record important information about the regulation of paid online ads and the regulation of advertising more generally.
- II. Both sets of information are important because there are fundamental interdependencies in advertising regulation, both inherent in the ASA system and in our working arrangements with statutory regulators, which mean that any proposal to unstitch paid online ads from the wider regulatory framework must be approached with caution to avoid undermining consumer protection in the UK.

Categories of harm

- III. We agree with government that any reform of the regulatory framework must be “proportionate to the problem at hand.” The ‘problem at hand’ is to effectively address three distinct categories of harm that logically emerge from the government taxonomy of harms: i) harm arising from ads by bona fide organisations; ii) harm resulting from ads by criminal actors; and iii) harm impacting the ad industry, for example brand safety concerns and financial accountability in the online advertising supply chain.
- IV. The ASA system is primarily responsible for addressing one of these categories only: harms arising from ads by bona fide organisations. We play little or no role in addressing the other distinct categories of harm, and we are not constituted or resourced to do so.
- V. We therefore limit the main part of our response to the regulatory framework necessary to address harms arising from ads by bona fide organisations and we ask government to limit its assessment of ASA system effectiveness accordingly.

Effectiveness of the ASA system

- VI. We are pleased that the Minister for Media, Data & Digital Infrastructure recognised as recently as December 2021, that “in the UK we are fortunate to boast a leading self-regulatory approach to online advertising, with the ASA system at the forefront¹.”
- VII. Section 2 and Section 6 of our response set out information that helps to evidence the effectiveness of the ASA system. In particular, we highlight in Section 2.4 the benefits of the ASA system one-stop-shop, which provides a single point of contact for consumers and industry stakeholders for advertising issues across all media.

¹ <https://www.gov.uk/government/speeches/minister-lopez-speech-to-the-advertising-standards-authority-parliamentary-breakfast>

- VIII. The information in these sections helps to describe a holistic, cross-sector approach to the regulation of ads, which is in line with government objectives. The ASA system operates inclusively and involves mutually beneficial working relationships with a large number of statutory bodies. Through the world-first Intermediary and Platform Principles pilot, we are extending the ASA role online and enhancing transparency and widening accountability in online regulation.
- IX. The ASA system rarely encounters recidivist behaviour from bona fide organisations relating to paid search, social display, open display or classified online ads, which are in scope of the government review. Where these ads are found to be in breach of the rules, we are successful in effecting amendments to, or removal of them. Accordingly, in this area of our work, the ASA system has never had cause to refer an advertiser to a statutory backstop and we have, as a consequence, not found it necessary to call on government for additional powers.

Evidence of harm

- X. The consultation identifies a snapshot of contemporary advertising regulatory issues, which we are aware of and responding to. As the ASA system remit extends to a wide spectrum of cross-media ads for goods, services, ideas, causes, opportunities, prizes and gifts, it is inevitable that issues will emerge from time-to-time. We consider it is important to assess how the regulatory system responds to these issues.
- XI. The ASA system has a long track-record of addressing emerging regulatory harms, very often through proactive initiatives and increasingly through use of data science. Accordingly, we ask government to take a broader and longer-term view of our effectiveness in addressing harms relevant to the ads we regulate.
- XII. Concerns submitted to the DCMS Call for Evidence, summarised in the consultation document, do not appear to identify ads by bona fide organisations that breach the UK advertising rules or underpinning law. This is relevant because, in our duty to apply freedom of expression tests, it is our experience that the majority of concerns we receive do not cause us to ban an ad or update the rules or guidance; accordingly, stakeholder concerns do not normally equate to matters that are ultimately determined to be harmful. For example, 86.4% of the 22,115 ads the ASA system received complaints about in 2021 did not identify a breach of the rules.

Options for regulatory reform

- XIII. The ASA system strongly opposes Option 3 (“full statutory approach”) where it has the effect of forcing the ASA system to withdraw from the regulation of paid online ads. For reasons explained in Section 8, this would render the ASA system financially unviable and put in train a series of events that would dismantle the wider framework of advertising regulation in the UK.
- XIV. We consider this outcome would be unwarranted, disproportionate and clearly at odds with the public interest. As it is not foreseen in the consultation impact assessment, we must assume government does not intend this outcome and, for reasons we provide, must oppose it to avoid any unintentional and potentially irreversible impact on the wider UK advertising regulatory framework.
- XV. According to the government impact assessment, Option 2 (“co-regulation”) would result in “no” reduction of harm arising from offensive ads; ads for products or services deemed to be harmful, but not illegal; ads that are seen to contribute to body image

concerns; mistargeting; discriminatory targeting; and targeting of vulnerable people. The impact assessment predicts a “small” reduction only in harm arising from non-identified ads and misleading ads; however, no evidence is provided to substantiate how.

- XVI. We ask government to weigh up the small reduction in harm forecasted to result from Option 2 against its high cost to the regulated industry. Additionally, we ask government to consider whether proposals to place specific requirements on regulated parties to address serious or repeated breaches of the rules (for example, record keeping, annual reporting, customer empowerment tools etc.) are proportional to the little evidence of recidivist behaviour in this area of our regulation.

Next steps

- XVII. The consultation raises multiple potential outcomes deriving from the three options for regulatory reform. These options offer different permutations as they relate to three distinct categories of harm and one or more of advertisers, intermediaries, platforms and publishers. As a result of these factors, the consultation is, in our experience, especially involved and complicated. It is difficult, therefore, to assess with any degree of accuracy the full impact of all of the potential outcomes.
- XVIII. Given this, we ask that, in planning for next steps and as necessary, government gives thought to a narrower, more focussed consultation, which allows for a more detailed inspection of the opportunities and constraints of any future proposal that government may put forward.
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1. Introduction

- 1.1 The ASA system welcomes the government review of the regulatory framework for paid online advertising. The review seeks to complement work underway on online safety legislation, which assigns to Ofcom an unprecedented duty to regulate user-generated content in the UK. In contrast, the ASA system has been regulating paid online advertising for over 20 years of its 60-year history. We are pleased, therefore, that the review recognises the established and expert nature of our regulation and asks constructively whether and, if so, how the protections afforded by the ASA system might be strengthened to ensure regulators are equipped to address harms arising from paid online advertising.

2. The ASA system

- 2.1 The Online Advertising Programme (OAP) consultation document (‘the condoc’) provides a clear explanation of the organisational structure of the ASA system and how we regulate. Our primary objectives are to prevent ads from misleading, harming or causing serious or widespread offence to their audience. By doing so, the ASA system primarily serves the public interest by ensuring the advertising industry sticks to the rules in the UK Advertising Codes².
- 2.2 In this section we highlight information about the ASA system that is either absent from the condoc or merits emphasis.

² <https://www.asa.org.uk/codes-and-rulings/advertising-codes.html>

- 2.3 **Interdependency in advertising regulation:** the information in Section 2 is intended to build a fuller picture of how the ASA system works and our effectiveness in regulating i) advertising generally and ii) paid online ads in particular. Both sets of information are important because the regulation of paid online ads cannot be separated from our regulation of ads in general. There are fundamental interdependencies in advertising regulation, both inherent in the ASA system and in our working arrangements with statutory regulators. Any proposal to unstitch the regulation of paid online ads from our wider work must be considered in the light of these interdependencies and the damaging consequences for consumer protection that would result.
- 2.4 **ASA system one-stop shop:** in 2004, Ofcom contracted out the day-to-day regulation of broadcast advertising to the ASA system in recognition of our, then, 43 years of regulating non-broadcast advertising. Ofcom concluded the ASA system was best equipped to manage the growing issues of convergence and the growth of digital communications. (Convergence refers to the merging of different types of mass media such as broadcast and new media and the emergence of interactive technologies through broadband enabled devices). Ofcom also considered that by providing a single point of contact for consumers for advertising issues across all media, the ASA system would serve the public better than a fragmented approach to advertising regulation. The same policy imperatives led Ofcom to designate the ASA system as the regulator of ads on Ofcom-regulated on-demand programme services (2014) and Ofcom-regulated video-sharing platforms (2021). As a result, we have regulated ads across all broadcast and non-broadcast media for over 17 years, providing a regulatory one-stop-shop for consumers, advertisers and others involved in preparing or publishing ads. As new technologies and devices promise even more convergence, and digital communications continue to grow, the need for and benefits of a one-stop-shop advertising regulator are stronger than ever. Our regulation continues to deliver on these consumer-first and convergence policy imperatives and on the practicalities of regulating multi-media advertising. For example, in 2021, the ASA received 3,860 complaints about paid online ads; 21% of the ads formed part of an ad campaign also running in other media, for example, on TV and social media channels. It is evidently preferable for multi-media campaigns to be regulated holistically and consistently by the ASA one-stop-shop than by the type of fragmented regulation that characterised the analogue era of the 1990s, and indeed up until 2004.
- 2.5 **Fit and proper test:** in assessing the effectiveness of the ASA system, it is relevant to consider the criteria on which Ofcom contracted out or designated day-to-day regulatory duties to us. Ofcom did so according to legal tests set out in the Communication Act 2003 (as amended). On each occasion, Ofcom satisfied itself that the ASA system was: a fit and proper body to be contracted out to or designated; that we had access to financial resources that were adequate to ensure the effective performance of our contractual functions; that the ASA was sufficiently independent of providers of Ofcom-regulated media services; and that the ASA system, in performing the contracted-out or designated functions, would be transparent, accountable, proportionate, consistent and targeted in its approach. Ofcom's latest such determination was as recent as December 2021 when it designated the ASA system as the day-to-day regulator of ads on Ofcom-regulated video-sharing platforms. These decisions made by Ofcom - an independent statutory body - following a due diligence process using objective legal tests must be given proper weight in any assessment of the ASA system's effectiveness in general and its regulation of online paid ads in particular.

- 2.6 **Advertiser accountability:** the ASA system assigns primary responsibility for complying with the UK advertising rules to advertisers because they exercise primary control over the creative content, media placement and audience targeting of their ads. This is a natural apportioning of responsibility, which must be given due weight in any design of a suitable framework for regulating advertisements, including paid online ads. The ASA can direct the advertiser through published rulings to amend or remove an ad if it is found to have breached the rules. Published rulings support transparency and accountability in regulation and serve the interests of the public and the ad industry by clarifying whether ads breach the rules or comply with them. If in breach, the advertiser almost always complies immediately with an ASA direction to amend or withdraw the ad. If the advertiser refuses, the Committee of Advertising Practice (CAP) can co-ordinate self-regulatory sanctions, including refusal of media space, to address persistent non-compliance. Exceptionally, if self-regulatory sanctions have been exhausted and non-compliance persists, the ASA can refer the advertiser to the relevant statutory regulator acting as a legal backstop to the ASA system. As the condoc acknowledges, we have never had cause to refer an advertiser to a statutory backstop for a persistently non-complying paid online ad, whether search, social display, open display or classified ads.
- 2.7 **Third party accountability:** The ASA system has always operated with the involvement of advertisers and others involved in preparing and publishing ads in all aspects of its broadcast and non-broadcast remit, including online. The ASA system places a secondary responsibility on agencies, publishers and other service suppliers to comply with the advertising rules. This recognises that whilst these parties have a role to play in tackling irresponsible ads, there are, in practice, much more limited circumstances in which they are held by the ASA to exercise primary control over the creative content, media placement and audience targeting of ads. This is an important insight, which must be given due weight in any design of a suitable framework for regulating ads, including paid online ads. As an example of these limited circumstances, the ASA may find an influencer in breach of CAP Code Rule 2.1 (requiring an ad to be obviously identifiable as such) if the influencer's post is not adequately disclosed as advertising to the audience.
- 2.8 **Online industry inclusivity:** as the advertising industry has evolved over the years, so has the ASA system. Our remit has expanded and the membership of our industry committees have grown, helping to bring industry representation and expertise to new areas of advertising regulation, including online. Today, our member bodies represent thousands of companies operating online, committed through articles of association to set and enforce the advertising rules. They do this by: raising awareness of the rules to advertisers and their agencies; putting in place advertising policies and risk-based pre-publication vetting procedures; and denying media space to advertisers on those rare occasions when an advertiser will not comply with ASA directions to amend or remove an ad found to breach the rules.
- 2.9 **Intermediary and Platform Principles (IPP) pilot:** In collaboration with the IAB UK (a member body of CAP) and the largest companies in the online advertising supply chain, the ASA system has recently launched the IPP pilot³. The pilot extends the ASA role online and enhances transparency and widens accountability in the regulation of paid online ads. In doing so it strengthens our holistic, cross-sector approach to the regulation of ads in keeping with OAP objectives. We are pleased that the pilot - referred to in the condoc as Online Platform and Network Standards (the pilot's title during its development phase) - is recognised by government. The pilot is a timely

³ <https://www.asa.org.uk/news/our-intermediary-and-platform-principles-pilot-begins.html>

reminder of the ASA system's agility and ability to adapt and, as a world-first initiative, the UK's thought leadership.

- 2.10 Working with backstop regulators:** The ASA system operates in co-regulation with many statutory regulators, which function as legal backstops for non-compliant ads, including paid online ads⁴. We work with 'horizontal' cross-sector backstops (for example Trading Standards, the CMA and Ofcom) and 'vertical' sector-specific backstops (for example the Medicines and Healthcare products Regulatory Agency, the Phone-paid Services Authority, the Gambling Commission, and the Financial Conduct Authority). In each case, formal backstop action is limited to enforcing specific legal or licensing provisions, which address the persistent non-compliance identified by the ASA system. For at least a decade, however, the ASA has not had cause to refer an advertiser to a backstop regulatory in relation to a non-compliant ad appearing in paid-for space, whether online or in other media. That is because the sanctions available to the ASA system have successfully secured amendments to or withdrawal of these ads when they have been found to be non-compliant. It is important to acknowledge that statutory regulators benefit from these co-regulatory arrangements. In the provision of our frontline regulation, the ASA system processes complaints about ads that would otherwise need to be managed by the relevant backstop regulator. For example, between 2018 to 2021, we resolved 68,225 complaints about non-broadcast ads (in paid and non-paid-for media) relating to potentially misleading claims. The overwhelming majority engaged rules reflecting consumer protection legislation, which would otherwise need to be dealt with by UK Trading Standards departments. We processed a further 63,554 cases of that type through self-initiated compliance action and we applied self-regulatory sanctions in 521 cases. By taking on this workload, the ASA system's frontline regulation frees up valuable resource for statutory regulators like Trading Standards, Ofcom, the Gambling Commission, the MHRA and others to tackle priority areas of detriment falling under their remit.
- 2.11 Funding and accessibility:** for nearly 50 years, advertisers have funded the ASA system through a 0.1% levy on their advertising spend collected by media agencies or – when spend bypasses media agencies – the media themselves. This is now increasingly supplemented by direct contributions from digital first advertisers reflecting their ad spend on platforms where the levy is not operated. (Direct mail marketers and teleshopping channels also help to fund the ASA system.) Online platforms are increasingly contributing to the ASA system and our Intermediary and Platform Principles pilot raises the prospect of a more systematic basis of funding by the largest companies in the online programme supply chain. The levy raised from all online sources has risen from 35% of the total levy in 2018, to 50% projected in 2022. Our funding provides for an independent complaints and investigations service and an advertising pre-publication advice service that are accessible and cost-free to everyone at point of use, and made available at zero cost to the public purse. In 2021, the ASA complaints and investigations service processed 43,325 complaints about 22,115 ads and took action to amend or withdraw 20,456 non-compliant ads (mostly identified through self-initiated monitoring using increasingly advanced technology, including machine learning). Our pre-publication advice service delivered 866,145 pieces of advice and training to businesses on the advertising rules.
- 2.12 Financial plan 2022-2025:** as regulation of digital markets becomes increasingly well established and our workload grows in size and complexity, the ASA system is committed to significantly enlarging its budget to respond to the capacity, technology

⁴ <https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/working-with-others.html#:~:text=The%20ASA%20has%20two%20major,is%20joined%20Dup%20and%20consistent.>

and expertise challenges that all digital regulators are facing. In particular, through an enhanced financial plan (2022-2025), the ASA system is committed to above-inflation investment to expand our workforce and deliver the expertise and technology to maximise our data science capability in particular, because the latter is key to ensuring we can act at pace and scale in our regulation of online ads. As the three-year financial plan remains a work in progress, we will be happy to share with DCMS further details as it develops. Importantly, the industry fully supports this above-inflation investment.

- 2.13 **ASA Strategy and data science:** through the ASA five-year strategy, More Impact Online, our ambition is ‘to make every UK ad a responsible ad,’ which necessitates rebalancing our resources toward proactive ad regulation more suited to the digital age. In pursuit of our ambition, the ASA system must have good sight of online ads in the automated supply chain and the capability to police and enforce ads at pace and scale. Data science and innovative use of software lie at the heart of this capability, providing the eyes and ears of our online monitoring activity and generating efficiencies in our processing and enforcement of complaint cases. The ASA system’s data science function is already delivering impact in the regulation of influencer advertising, environmental claims, crypto ads and other important areas of our work. Our data science ambition over the next three years is to scale that activity up by many orders of magnitude. We continue to use avatar and online scraping technology to police age-restricted paid online ads⁵. Our use of ‘tech for good’ has received acclaim and been extensively reported by UK and overseas news media, entrenching our position as a global flag-bearer for responsible advertising⁶. We are proud of our achievements in this vital aspect of online advertising regulation, committed to further investment in data science (a centrepiece of our three year financial plan) and determined to maximise our capability in this area for the benefit of all advertising stakeholders.

3. Categories of harm

- 3.1 From our reading of the condoc, the taxonomy of harms the government seeks to address can logically be divided into three distinct categories of harm:
- 3.2 **Category A:** harm arising from paid online ads by bona fide organisations that raise the potential to mislead, harm or offend their audience. In its taxonomy of harms, the condoc helpfully includes the following examples of ads falling into this category: ads that include false claims or otherwise mislead; undisclosed influencer advertising; ads attracting an age-targeting restriction; ads placed in contexts in which the juxtaposition between the ad and the surrounding content has the potential to cause harm or offence owing to the content of the ad; ads that harmfully discriminate on the basis of protected characteristics; and ads that exploit or inappropriately target people vulnerable to the advertised product.
- 3.3 **Category B:** harm arising from paid online ads by criminal actors, who are often based in non-UK jurisdictions. In its taxonomy of harms, the condoc helpfully includes the following examples of ads falling into this category: ads for illegal products such as drugs and weapons; ads that facilitate human trafficking and/or sexual exploitation; ads that contain Javascript to force redirects or download payloads; ads that cloak landing pages; and ads that promote investment frauds, including by featuring celebrity images.

⁵ <https://www.asa.org.uk/news/innovate-to-regulate-policing-ads-online.html>

⁶ <https://www.easa-alliance.org/news/press-release-best-practice-awards-2019/>

- 3.4 **Category C:** harm to advertisers and others involved in preparing or publishing ads arising from issues connected to the online advertising supply chain. In its taxonomy of harms, the condoc helpfully includes examples of ads falling into this category: advertising revenue lost to cyber criminals through their creation of fake traffic or misleading audience data; and brand safety concerns arising from the placement of an ad (compliant with the advertising rules) in a context that is clearly at odds with the brand's values, including ads placed on sites or alongside content that are illegal.

4. How the UK addresses these categories of harm

- 4.1 Categorising the harms in this way is crucial to assessing whether and, if so, how the UK regulatory framework for paid online advertising might need to be updated to address each harm. Currently, each category of harm is principally addressed by the following bodies and regulatory frameworks:
- 4.2 **Category A** (ads by bona fide organisations): harm arising from these ads are primarily regulated by the ASA system with the consent of the ad industry and statutory enforcement bodies, and through processes recognised by the courts and the UK government⁷. Importantly, the ASA regulates these ads by reversing the burden of proof, which requires the advertiser, publisher or other party involved in preparing or publishing the ad to substantiate how a potentially non-compliant ad complies with the UK Advertising Codes; failure to do so constitutes a breach of the rules and requires the ad to be amended or removed. Reversing the burden of proof provides for fast and effective resolution of cases.
- 4.3 **Category B** (ads by criminal actors): criminal actors behind these ads are subject to the law and potential prosecution by domestic and international law enforcement bodies; for example, the National Crime Agency, the National Cyber Security Centre, Trading Standards, the police, the FCA, the CMA, the ICO, the US Federal Trade Commission. The law in these cases typically does not provide for the burden of proof to be reversed and prosecution is subject to factors that necessarily entail detailed and lengthy investigations overseen by expert law enforcement professionals. The ASA is not a law enforcement body, and we are not constituted or resourced, nor do we have the expertise, to undertake this work.
- 4.4 **Category C:** (ads that raise industry harms connected to the online advertising supply chain): brand safety harms are typically addressed by reference to contracts involving two or more of advertisers, media agencies, publishers, ad tech intermediaries etc. The ASA is not constituted or resourced, nor do we have the expertise to arbitrate when such contractual undertakings are in dispute. The issue of brand safety, more generally, is addressed by third party companies (for example, suppliers of online verification services) and via broader industry initiatives unconnected to the ASA system. The extent to which ads in this category relate to cyber-criminal or other forms of criminal activity is a matter for relevant law enforcement bodies.

⁷ In 1989, the courts recognised that the ASA discharges a public function, when the Divisional Court found that the ASA (like, for example, the Takeover Panel) was subject to judicial review in respect of its rulings under the CAP Code - R (on the application of the Insurance Service plc) v the Advertising Standards Authority [1990] 2 Admin. L. R. 77 (QBD). The ASA's administration of the CAP Code is relied on by the Government as the 'established means' for enforcement of rules on unfair commercial practices relating to advertising, including misleading advertising and impermissible comparative advertising, reflecting the requirements of the Consumer Protection from Unfair Trading Regulations 2008 (the "CPUTRs") (see regulation 19) and the Business Protection from Misleading Marketing Regulations 2008 (the "BPMMRs") (see regulation 13).

5. Category distinctions and the OAP

- 5.1 These category distinctions matter because, in parts, the condoc incorrectly suggests the ASA system is responsible for addressing each category of harm when that it is not the case. For example, Question 13 of the condoc states:

“To what extent do you agree that the current industry-led self-regulatory regime for online advertising, administered by the ASA, to be effective at addressing the range of harms we have identified in section 3.3?” (Section 3.3 of the condoc covers the government taxonomy of harms, which includes harms that fall into Category A, B or C.)

- 5.2 As the ASA system is not the regulator of ads by criminal actors or ads that raise industry harms connected to the online advertising supply chain, the premise of the question is wrong. For these reasons, we ask government, in its evaluation of responses to this question, to appropriately limit its assessment of the effectiveness of the ASA system to how we address harms arising from paid online ads by bona-fide organisations, which mislead, harm or offend their audience (Category A harms).
- 5.3 From this point forward, we do not comment on the appropriate regulatory framework to tackle ads by criminal actors. The ASA system staunchly supports, however, appropriately funded, sufficiently resourced and suitably empowered domestic and international law enforcement bodies to undertake this task. The ASA will continue to work in partnership with participating intermediary and platform companies to deliver our Scam Ad Alert initiative, which helps disrupt such ads⁸.
- 5.4 Likewise we do not comment further on the appropriate regulatory regime to tackle brand safety harms and other industry harms connected to the online advertising supply chain.
- 5.5 Our response will henceforth focus on how we address Category A harms arising from paid online ads by bona-fide organisations.

6. Evidence of harm

- 6.1 The condoc provides limited evidence of harm arising from paid online ads by bona-fide organisations. It reflects stakeholders’ concerns about types of advertising and their potential to harm vulnerable members of the audience. There is, however, minimal evidence (that we are not already aware of and responding to) relating to paid online ads that constitute a breach, or likely breach, of the UK advertising rules as independently determined by the ASA; or a breach, or likely breach, of legal provisions underlying the rules as independently determined by relevant statutory bodies.
- 6.2 This is relevant because as a body exercising a public function the ASA system must adhere to public law in our regulation of ads. We are notably subject to the duty, in section 6 of the Human Rights Act 1998, to act compatibly with rights contained in the European Convention on Human Rights (the ECHR). Article 10 of the ECHR recognises that everyone (including advertisers) has the right to freedom of expression subject to restrictions that are necessary in a democratic society. The ASA system must apply this test rigorously to the setting of advertising rules and to the

⁸ <https://www.asa.org.uk/news/asa-scam-ad-alert-system-update-on-numbers-and-trends.html>

determination of our rulings; in doing so, it is our experience that the majority of concerns and complaints received by the ASA system do not lead to an update of the rules or guidance, or identify a breach of the advertising rules.

- 6.3 For example, of the 22,115 broadcast and non-broadcast ads and ad campaigns complained about in 2021, 18,891 (86.4%) were found not to have breached the rules. This is important context to information presented in the condoc impact assessment, which states that just under one in ten people report they have seen ads online that they believe to be harmful or misleading. We do not intend the information reflected here to be dismissive of stakeholder concerns about advertising or the good faith with which they report them to the ASA system; we state it only to recognise that concerns about advertising, and evidence presented to substantiate them do not normally equate to breaches of the rules and therefore the extent to which they equate to accepted 'harms' must be in question.
- 6.4 We note also that the condoc impact assessment acknowledges that fraud "is the category of harm for which clear evidence is available both in terms of the link with online advertising, the extent of the issue, and the monetary losses associated with it". The evidence of harm relating to ads by bona fide companies is, by comparison, not 'clear' to government and 'the extent of the issue' is not as clearly understood.
- 6.5 The condoc states that 14 respondents to the government's call for evidence (27% of all respondents) cited concerns about offensive or harmful ads. Five respondents (10%) raised concerns about misleading ads and three respondents (6%) raised concerns about non-identified ads. It is unclear from the condoc which group of stakeholders raised these concerns and what evidence they presented to substantiate them. The ASA system remains willing to assess this evidence against criteria set out in our Evidence-based Policy Making document, which help us to assess whether additional restrictions on advertiser freedom of expression might be necessary⁹.
- 6.6 However, some concerns relevant to the ASA system's remit do clearly emerge from the condoc. These include concerns about: the potential for certain types of ads to adversely affect people's body image; influencer ads that are not obviously identifiable as ads; and potentially irresponsible targeting of types of ads to vulnerable adult groups.
- 6.7 These issues reflect a snapshot of contemporary concerns about advertising, of which the ASA system is aware and is addressing comprehensively. Had the OAP consultation been conducted three years earlier or later, other issues would have been, or would be, identified. It is the nature of most, if not all, forms of regulation that there are issues-of-the-day for the regulator to address. This is perhaps especially the case for the regulation of advertising (one of the most creative of the creative industries), given the number of issues that can emerge from the ASA system extensive coverage of ads for a wide spectrum of goods, services, ideas, causes, opportunities, prizes or gifts.
- 6.8 Over the years, the ASA system has addressed potential harms relating to a large number of issues as diverse as broadband speed claims, post-conception advice services, payday loans, sexual portrayal of under-18s, and e-cigarette marketing¹⁰. In each case, the ASA system has weighed up the evidence and acted appropriately and in a timely manner to address the harm identified, for example through changes to the

⁹ <https://www.asa.org.uk/static/uploaded/cb20c00f-b559-40a2-8b5677188511b45b.pdf>

¹⁰ <https://www.asa.org.uk/advice-and-resources/resource-library/consultations.html>

Codes or guidance, clarification of existing provisions, investigations and rulings, monitoring and enforcement.

- 6.9 Accordingly, we do not consider it is reasonable to judge the effectiveness of the ASA system solely, or even mainly, by reference to the issues-of-the-day. Rather, we encourage government to take a longer-term view of the ASA system's effectiveness taking account of our track-record of acting on emerging advertising regulatory issues, very often through proactive initiatives. Notwithstanding this, the following provides brief information about how we are currently addressing the specific areas of concern emerging from the condoc. We have provided detailed commentary to DCMS about our work in each case and we will continue to do so as our work progresses.
- 6.10 **Body Image:** in late 2021, we launched a Call for Evidence to assist the ASA system to regulate ads that give rise to body image concerns¹¹. Specifically, we want to understand whether there are body image harms arising from advertising that are not already and adequately addressed by existing rules or guidance, or the ASA's independent application of them. In December 2021, the Minister for Media, Data & Digital Infrastructure cited our call for evidence as testament to our forward-looking attitude and efforts to develop standards as trends emerge in the sector, placing the ASA system head and shoulders above the rest¹². Our consultation closed earlier this year and we will imminently publish our responses to the evidence received and clarify our next steps.
- 6.11 **Non-disclosed influencer ads:** in 2021, the ASA system introduced influencer-specific sanctions to address circumstances when an influencer decides not to abide by rules that require advertising to be obviously identifiable as such. We launched a non-compliant social media influencer page and our own On-Platform Targeted Ads (OPTA) sanction, which bring to social media users' attention information on the fact of the influencer's misleading practice¹³¹⁴. We are very encouraged by the early results of the OPTA sanctions in tackling recidivist behaviours and by advances in our application of data science, which improves how we identify and tackle non-compliance at pace and scale. The ASA system is working with platforms, trade bodies, the CMA, Ofcom and overseas organisations to better address non-compliance in this important area of our work; non-disclosure in influencer advertising is a global issue. To this end, we especially welcome the government announcement to strengthen the powers of the CMA allowing it to make determinations of its own that a business has infringed the rules and fine companies up to 10% of their global turnover. The extent to which these new powers may be applied to influencer advertising remains to be seen, however.
- 6.12 **Irresponsible targeting of online ads:** On the back of several high profile ASA monitoring reports since 2018 (based on avatar and on-screen scraping technologies), which focussed on the media placement and audience targeting of online ads for alcohol, gambling and other age-restricted ads, we have launched a comprehensive

¹¹ <https://www.asa.org.uk/static/0c479f7b-e683-4f7c-82803c5fe0737811/Body-Image-Call-for-Evidence-Final.pdf>

¹² <https://www.gov.uk/government/speeches/minister-lopez-speech-to-the-advertising-standards-authority-parliamentary-breakfast>

¹³ <https://www.asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html>

¹⁴ <https://www.asa.org.uk/news/asa-escalates-sanctions-against-influencers-who-repeatedly-break-the-rules.html>

review of our Age-restricted Ads Online guidance¹⁵¹⁶. We feel confident that updates to the guidance will significantly improve its usability and its impact in appropriately limiting under-18s' exposure to these ads online. This is in addition to the work being undertaken by BeGambleAware, social media providers and the Betting and Gaming Council to reduce the number of gambling ads seen by under-18s in online environments. More specific to the concerns raised in the condoc, we are also exploring how to better prevent gambling operators from targeting (inadvertently or otherwise) adult groups, who may be especially vulnerable to problem gambling.

7. Analysis of options for regulatory reform

- 7.1 In assessing whether to update the regulatory framework for paid online ads, government must be guided by better regulation principles of transparency, accountability, targeting, consistency and proportionality. The condoc confirms that government intends "to ensure any action taken is proportionate to the problem at hand." This point merits emphasis because, as demonstrated in Section 3, 'the problem at hand' is, in fact, three distinct categories of harm.
- 7.2 It does not follow that a framework designed to address harm arising from ads by organised criminals (sometimes state-sponsored) is necessarily proportional to addressing harm arising from ads by bona fide organisations. The latter is effectively regulated by an established, frontline ASA system with over 60 years of experience and the former is currently subject to fragmented regulation involving various law enforcement bodies and self-regulatory initiatives unconnected to the ASA system.
- 7.3 Accordingly, we consider a 'horses for courses' assessment of the respective harms and existing frameworks is appropriate. In other words, a recognition that different solutions are suited, or proportional, to different problems. The assessment should also consider any new or planned-for development of the existing frameworks, for example the ASA system's Intermediary and Platform Principles pilot; see Section 2.9.
- 7.4 Seemingly at odds with a 'horses for courses' approach, the condoc asks which option, of three proposed, is suitable to address the distinct categories of harm identified: Option 1 - self-regulation; Option 2 - co-regulation; and Option 3 - statutory regulation. The ASA system considers that none of these regulatory options are likely to be suited, or proportional, to addressing all of the distinct harms reflected in Categories A, B and C.

8. Option 3: full statutory approach

- 8.1 Under Option 3, government proposes a "full statutory approach" to address the harms identified in the condoc. This would assign to a statutory regulator the responsibility to create a Code for paid online advertising, which would apply to one or more of advertisers, online publishers, intermediaries and platforms.
- 8.2 Option 3 has no provision for the appointed statutory regulator to contract out or designate its day-to-day duties (for example, authorship and enforcement of a Code) to a frontline regulator, like the ASA system. Accordingly, depending on the scope of the envisaged new Code, Option 3 would effectively force the ASA system to withdraw

¹⁵ <https://www.asa.org.uk/news/innovate-to-regulate-policing-ads-online.html>

¹⁶ <https://www.asa.org.uk/static/72a4e889-1657-43e9-bf6ac0157fa2f72c/Age-restricted-ads-online-2021-guidance.pdf>

from the regulation of paid online ads and – as we will explain - put in train a series of events that would dismantle the existing framework of advertising regulation in the UK.

- 8.3 We consider this outcome would be unwarranted, disproportionate and clearly at odds with the public interest. As it is not foreseen in the condoc impact assessment, we must assume government does not intend this outcome and, for reasons we will provide, must oppose it. It will therefore be important for government to carefully consider the likely impact of Option 3 to avoid any unintentional and potentially irreversible impact on the wider UK advertising regulatory framework.
- 8.4 The following bullet points elaborate on the impact of a government decision to pursue Option 3, which draw from information provided in this document.

End of one-stop-shop regulation and return to fragmented regulation

- 8.5 Where it has the effect of forcing the ASA system to withdraw from the regulation of paid online ads (our largest and fastest-growing source of budget income) Option 3 would render the ASA system financially unviable.
- 8.6 This is because, under this option, we would no longer have remit to regulate paid online ads and therefore we could no longer collect a levy from them. This aspect of the levy accounts for approximately 50% of the overall ASA system budget and it helps to fund our regulation of ads in other media, including ads in non-paid-for space online e.g. companies' claims on their own websites and social media channels.
- 8.7 As part of a winding-up process, we would need to hand back to Ofcom the regulation of ads carried by Ofcom-regulated TV, radio, on-demand and video-sharing service providers. Additionally, we would need to provide notice to statutory bodies of our intention to discontinue the frontline regulation of ads that fall under their remit, with significant consequences for their workload and resource allocation. Henceforth, for example, complaints relating to potentially misleading claims in non-broadcast ads would fall to UK Trading Standards teams to address; see Section 2.10.
- 8.8 Option 3 would therefore end the single point of contact (the ASA one-stop-shop) for consumers, businesses and other stakeholders, reversing two decades of public policy specifically designed to address issues arising from converged technologies and the growth in digital communications. These issues remain more pertinent today than ever. By doing so, it would see a return to the fragmented regulation that characterised the analogue era of the 1990s and up to 2004, raising significant potential for inefficiency, inconsistency and double-jeopardy in regulation; see Section 2.4.

Impact on developing areas of online regulation

- 8.9 A decision to pursue permutations of Option 3 as they apply to the regulation of platforms and intermediaries would affect the role these parties play in supporting the ASA system to secure responsible advertising online, including through emerging funding mechanisms.
- 8.10 With no role for the ASA system, it would almost certainly bring to an abrupt end the Intermediary and Platform Principles (IPP) pilot; see Section 2.9. IPP raises the prospect of a more transparent and accountable regulatory framework, and a more systematic and inclusive basis of funding by some of the largest companies in the online programme supply chain.

- 8.11 Before any decision is taken to progress with Option 3 (or indeed Option 2, which we assess in Section 9), the ASA system encourages government to consider the publication of the independent ASA final report and the overall review of the IPP pilot, both expected in Q3, 2023.
- 8.12 Permutations of Option 3 that significantly limit the ASA system role in regulating paid online ads and, therefore, the collection of an online levy, would almost certainly cause us to significantly scale back our investment in data science and technology. See Sections 2.12 and 2.13

Proportionality

- 8.13 The condoc impact assessment states that the main benefit of Option 3 is fraud reduction. It adds that, relative to the other types of harm identified, fraud is the category of most concern to the overwhelming majority of respondents to the call for evidence and also the category for which clear evidence is available both in terms of the link with online advertising, the extent of the issue, and the monetary losses associated with it.
- 8.14 As noted, the ASA system is not constituted or resourced, nor do we have the expertise to address these harms. Accordingly, we make no comment as to whether Option 3 is proportional to addressing harm arising from ads by criminal actors beyond the points made in Section 5.3.
- 8.15 Option 3 offers no compelling evidence (in absolute terms or proportional to the £452 million it is estimated to cost) as to why it would lead to a material reduction in harm arising from ads by bona fide organisations.
- 8.16 For reasons provided in Section 8, we consider there is no case to conclude that Option 3 would achieve government objectives to better equip regulators to address harms arising from ads by bona fide organisations. Further, any decision to progress with permutations of Option 3 that force the ASA system to withdraw from the regulation of paid online ads without a thorough assessment of their impact would, in our view, be reckless and put at considerable risk the consumer protections that must be afforded to UK consumers.

9. Option 2: Co-regulation

- 9.1 In practice, we understand the permutations of Option 2 effectively propose new legislation to place a duty on a statutory body to:
- a) draw up a Code for online ads and a Code replicating the Intermediary and Platforms Principles;
 - b) draw up a Code for high-risk online ads (types of ads to be confirmed) that do not already have a statutory regulator backstop and, separately, a Code replicating the Intermediary and Platforms Principles, but applied to a wider constituency of online entities (regulated parties to be confirmed); or
 - c) draw up a Code for replicating the Intermediary and Platforms Principles, but applied to a wider constituency of online entities (regulated parties to be confirmed), leaving the regulatory arrangements for the CAP Code unaffected

- 9.2 In all of these scenarios the appointed statutory body would have provision to contract out these duties to a 'fit and proper' frontline body to exercise the day-to-day regulation in each case.
- 9.3 Because Option 2 is, in effect, limited to affecting changes to the CAP Code and IPP, it is unclear how it could address types of harm that these regulatory instruments are not designed to address, for example, fraud ads, brand safety concerns and the fraudulent inflation of audience figures.

Holistic, cross-sector regulation

- 9.4 Option 2 seeks to deliver a holistic, cross-sector approach to the regulation of paid online ads. As Sections 2.7 – 2.10 demonstrate, the ASA system already delivers this form of regulation and we are taking measures, like Intermediary and Platform Principles (Section 2.9), to develop it.

Effective regulation

- 9.5 Option 2 asks whether the ASA system needs to be better equipped through new co-regulatory arrangements to better address concerns raised by respondents to the DCMS call for evidence and other potential harms arising from ads by bona fide companies.
- 9.6 We ask government to weigh up stakeholder concerns against information provided in Section 6 and, in assessing the effectiveness of the ASA system, we ask government to additionally consider Sections 2.4-2.6 and Sections 2.9-2.13, in particular.
- 9.7 Notably, we encourage government to take a longer-term view of our effectiveness, which considers the ASA system track-record of acting on emerging advertising regulatory issues, very often through proactive initiatives and increasingly through use of data science.
- 9.8 The ASA system is seen by many domestic and international stakeholders as the standard bearer for responsible advertising and a valuable asset for a global Britain. As recently as December 2021, the Minister for Media, Data & Digital Infrastructure noted that in the UK we are fortunate to boast a leading self-regulatory approach to online advertising, with the ASA system at the forefront¹⁷.

Proportionality

- 9.9 The condoc confirms government intention "to ensure any action taken is proportionate to the problem at hand." As outlined in Section 3, "the problem at hand" is, in fact, three distinct categories of harm.
- 9.10 This point merits restating because in seeking, in effect, to update the CAP Code and Intermediary and Platform Principles (IPP), it is unclear how Option 2 could address categories of harm that these regulatory instruments are not designed to address, for

¹⁷ <https://www.gov.uk/government/speeches/minister-lopez-speech-to-the-advertising-standards-authority-parliamentary-breakfast>

example, fraud ads, brand safety concerns and the fraudulent inflation of audience figures.

- 9.11 Notwithstanding, the condoc impact assessment states that the main benefit of Option 2 is “fraud reduction”¹⁸, albeit that reduction is assessed as being “small”.
- 9.12 In terms of paid online ads by bona fide organisations principally regulated by the ASA system, the impact assessment states that Option 2 is likely to result in “no change” in reduction of harm arising from offensive ads; ads for products or services deemed to be harmful, but not illegal; ads that are seen to contribute to body image concerns; mistargeting; discriminatory targeting; or targeting of vulnerable people. A “small” reduction in harm is predicted in relation to non-identified ads and misleading ads, but no evidence is provided to explain how.
- 9.13 It will be important for government to weigh up the relatively small reduction in harm forecasted to result from Option 2 against its cost, which government calculates at £147 million.

Benefits of co-regulation

- 9.14 Section 2.7 describes how the ASA system operates in co-regulation with many statutory regulators, which function as legal backstops for non-compliant ads, including paid online ads and ads in non-paid-for space online¹⁹. Our experience informs us that these arrangements can help us to address i) individual cases of recidivist behaviour and ii) sector compliance issues, and iii) act as a means to hold the ASA system to public account.
- 9.15 **Recidivist behaviour:** the ASA system rarely encounters recidivist behaviour relating to paid search, social display, open display or classified online ads, which are in scope of the condoc. If these ads are assessed by the ASA to have breached the rules, the advertiser almost always undertakes to amend or remove the ad. We have never had cause to refer an advertiser to a statutory backstop for a persistently non-complying online ad of these types. (Note: sanctions applying to influencers, a category of paid online advertising where we do see recidivist behaviour, is a developing area of self-regulation and statutory regulation involving the likes of the CMA and Ofcom; see Section 6.11.)
- 9.16 **Sector compliance issues:** we have plenty of experience of collaborating with statutory regulators like MHRA, HMRC, HFEA, Gambling Commission and CMA to jointly address sectoral non-compliance through, for example, distribution of enforcement notices, follow-up monitoring and, as necessary, enforcement²⁰. In most cases, these actions relate to ads in non-paid-for space online, especially companies’ claims on their own websites and on their own social media channels. We also work in partnership with UK media and online platforms to address sector compliance issues as they arise; see Sections 2.7-2.10.

¹⁸ Page 51, Table 13

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061202/21012022_Online_Advertising_Programme_Impact_Assessment_PUB__Web_accessible_.pdf

¹⁹ <https://www.asa.org.uk/about-asa-and-cap/the-work-we-do/working-with-others.html#:~:text=The%20ASA%20has%20two%20major,is%20joined%20Dup%20and%20consistent.>

²⁰ <https://www.asa.org.uk/search.html?q=notices>

- 9.17 **ASA system accountability:** statutory backstop oversight can provide additional reassurance to the public and advertising stakeholders that particular forms of advertising are under control, especially if transparency and accountability are found to be absent. The ASA system has long acknowledged, however, that transparency and accountability are fundamental to stakeholder trust in what we do and we are committed to these regulatory principles²¹. We believe that transparency is fundamental to public trust in regulated organisations and regulators and we see accountability as a fundamental control mechanism, integral to our regulatory framework and a vital means to avoid any societal trust deficit in regulated parties. The Intermediary and Platform Principles pilot, Section 2.9, is a significant development in widening accountability and enhancing transparency in our online regulation.
- 9.18 It is important to note that, in contrast to statutory bodies addressing fraud ads by criminal actors, the ASA system has not called on government for additional powers to address harms arising from ads by bona fide companies. This owes to the very high success rate of securing compliance in relation to paid online ads under the existing regulatory framework. As we state in Section 2.3, it is a framework characterised by fundamental interdependencies, both inherent in the ASA system and in our working arrangements with statutory regulators. Any proposal to unstitch the regulation of paid online ads from our wider work must be considered in the light of these interdependencies and the damaging consequences for consumer protection that could result.

10. Principles-based regulation

- 10.1 If government is, ultimately, inclined to legislate to update the regulatory framework for paid online ads, the condoc invites views about whether specific requirements should be placed on one or more of advertisers, intermediaries, platforms and publishers. For example, requirements relating to record keeping; self-declaration in relation to high risk ads; pre-publication vetting; on-boarding policies; customer empowerment tools; annual reporting etc.
- 10.2 We understand these measures are intended to help address serious or repeated breaches of the rules in relation to paid online advertising. The ASA system sees little evidence of such breaches relating to paid search, social display, open display or classified ads by bona fide companies. However, we are taking action to address mistargeting of age-restricted ads (see Section 6.12) and, working with the CMA and Ofcom, non-disclosed influencer advertising (see Section 6.11)
- 10.3 As a general rule, in circumstances where legislation affecting the regulation of advertisements is considered necessary, the ASA system considers it is preferable for Parliament to determine the high-level objectives and principles of regulation. These objectives should form part of the duty placed on the statutory body, which alone or through means of contracting out, would consult with regulated parties to determine the best means of achieving the objectives, including on the basis of a thorough cost-benefit analysis..
- 10.4 We would caution strongly against the inclusion of prescriptive provisions in legislation, which are likely to become out-of-date very quickly, especially when applied to the regulation of a fast-evolving digital marketing communication industry.

²¹ <https://www.asa.org.uk/news/our-commitment-to-good-regulation-1.html>

11. Next steps

- 11.1 The ASA system has welcomed the opportunity to put on the public record important information about the regulation of paid online ads and advertising regulation more generally. We hope it helps government to determine the next steps and we remain willing and open to continue our dialogue with DCMS following the close of the consultation window.
- 11.2 The consultation raises multiple potential outcomes deriving from the three options for regulatory reform. These options offer different permutations as they relate to three distinct categories of harm and one or more of advertisers, intermediaries, platforms and publishers. Accordingly, as a result of these factors, the consultation is, in our experience and relative to other consultations we respond to, particularly involved and complicated. It is difficult, therefore, to assess with any degree of accuracy the full impact of all of the potential outcomes.
- 11.3 Given this, we ask that, in planning for next steps and as necessary, government gives thought to a narrower, more focussed consultation, which allows for a more detailed inspection of the opportunities and constraints of any future proposal that government may put forward.