



David Evans
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
3rd Floor
1 Victoria Street
London SW1H 0ET

David.a.evans@bis.gsi.gov.uk

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ASA response to the BIS consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement

1. Introduction

- 1.1 The Advertising Standards Authority (ASA) is grateful for the opportunity to respond to this Department for Business, Innovation and Skills (BIS) consultation on institutional changes to the consumer landscape.
- 1.2 The ASA is the UK self-regulatory body for ensuring that all advertisements, wherever they appear, are legal, decent, honest and truthful.
- 1.3 As a UK consumer protection regulator, the ASA has a strong interest in the Government's proposals. Advertising self-regulation operates best within an effective consumer and competition regulatory landscape.
- 1.4 The Government's preferred reform options would see the loss of the Office of Fair Trading (OFT) as a statutory backstop to the ASA system for non-broadcast advertising, and the allocation of a number of important OFT functions to other organisations.
- 1.5 We appreciate that the proposals have not yet been fully fleshed out, but this does mean that it is difficult to comment in any detail on the ramifications of the proposals.
- 1.6 We welcome the commitment by Government to ensuring the success of self-regulatory schemes such as that administered by the ASA. The ASA operates in the public interest and at no cost to the tax payer. We are grateful, in advance, for the Government's careful consideration to ensure

that the integrity of the ASA system is not undermined as a result of any changes.

1.7 Whilst we agree that the consumer enforcement landscape in the UK has not always operated to best effect in recent years, we do have some concerns about the proposals. We are not opposed to change, but are keen that any changes represent an improvement of the current system. We feel it is important to be frank about our reservations at this stage.

1.8 Our starting point is that we are in favour of an effective competition and consumer regulation regime. As the ASA is a part of that regime, we believe that a key characteristic of the regime must be an effective statutory backstop to the ASA, which has – and is perceived to have – national authority. Our primary concern is that the proposals, as outlined, leave this outcome subject to some uncertainty.

1.9 This submission provides:

- A summary of the UK advertising self-regulatory system. More detailed information can be found on our website www.asa.org.uk.
- An overview of the ASA's relationship with the OFT.
- Our views on what makes an effective consumer enforcement landscape and what this means in the context of the proposed changes.
- Our response to Question 32 'How can the threat of enforcement needed to back-up self-regulatory schemes be made credible?'

2. An overview of the ASA system

2.1 The ASA is the UK self-/co-regulatory body for ensuring that advertising in all media is legal, decent, honest and truthful, for the benefit of consumers, business and society. It does this by administering the UK Advertising Codes.

2.2 The Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are the industry bodies responsible for writing and maintaining the UK Advertising Codes. CAP writes and maintains the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing and BCAP writes and maintains the UK Code of Broadcast Advertising¹.

¹ More information can be found at www.cap.org.uk.

- 2.3 The system is both self-regulatory (for non-broadcast advertising e.g. press, poster, cinema, online, video-on-demand (VOD) services and direct mail) and co-regulatory (for TV and radio advertising). For non-broadcast advertising this means that advertisers, agencies and media have come together to write the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and have set up the ASA as an independent body to judge whether ads breach the Code. There is no formal Government involvement in the system. On the rare occasions we are unable to secure compliance with the rules on unfair, aggressive and misleading advertising in non-broadcast media we can refer advertisers to the OFT for further regulatory action under B2C and B2B laws.
- 2.4 For broadcast advertising we operate under a co-regulatory partnership with Ofcom. This means that we have a contract with Ofcom which gives us day-to-day responsibility for maintaining standards and for acting on complaints about TV and radio ads. Broadcasters are obliged to comply with the BCAP Code under their broadcast licences. Non-compliant broadcast advertisers can be referred to Ofcom. The Government's proposals do not impact upon this arrangement.
- 2.5 The Advertising Codes sit within a legal framework, which means that, where appropriate, they reflect the standards required in law, e.g. misleading and unfair advertising. However, they may also contain rules that go beyond legal requirements, such as those relating to harm, offence and social responsibility.
- 2.6 The ASA deals with more than 25,000 complaints per year and operates at no cost to the tax payer. In fact the system is entirely funded, voluntarily, by the advertising industry, by a levy on paid-for advertising.
- 2.7 The ASA is committed to upholding high standards in advertising. The system takes a 360° approach to regulation, which includes pro-active monitoring, comprehensively enforced rules and training and advice for advertisers on the requirements of the Codes.

3. An overview of the ASA's relationship with the OFT

3.1.1 Statutory backstop

- 3.1.2 In 1988, the introduction of the Control of Misleading Advertisements Regulations 1988 (implementing the Misleading Advertising Directive) provided the ASA with a legal backstop for misleading non-broadcast

advertising. This means that since this date the ASA has been able to refer businesses that refuse to comply with ASA non-broadcast rulings on misleading advertising to the OFT for further action, including the possibility of statutory sanctions. Today these referrals may be made for breaches of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs)².

- 3.1.3 The ASA is recognised by Government, the OFT and other regulators as being the 'established means' for regulating unfair or misleading and comparative ads in non-broadcast media in the UK. We have a good relationship with the OFT and follow mutually agreed Case Handling Principles. But our relationship is not formal / contractual.
- 3.1.4 This relationship is predicated on the fact that the ASA was established to regulate the vast majority of advertisers who operate within legal and regulatory limits. These businesses willingly work with the ASA and are rarely, if ever, subject to statutory sanctions via the courts. The relationship therefore recognises that there will be some businesses that do require statutory intervention, such as rogue traders. These are best dealt with by bodies underpinned by statutory, rather than self-regulatory, powers.
- 3.1.5 On the rare occasions we are unable to secure compliance with the rules on unfair, aggressive or misleading advertising in non-broadcast media, we can ask the OFT to consider taking action under the CPRs or the BPRs, in line with our agreed Case Handling Principles. The OFT can seek undertakings from a company that it will change its ads. It can also seek injunctions from the Court to prevent companies from making misleading claims in their ads.
- 3.1.6 Over the last ten years the ASA has made just 19 referrals to the OFT. In 2010 the ASA received 25,214 complaints and our work resulted in the removal or amendment of 2,226 advertising campaigns. We rarely have to refer advertisers to the OFT.
- 3.1.7 Although difficult to quantify, we know that the threat of OFT enforcement action is critical to persuading some advertisers to comply with the CAP Code. The ASA refers to the OFT in nearly all

² The CPRs prohibit unfair marketing to consumers, including misleading or aggressive advertising. Whenever it considers complaints that a marketing communication misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the CPRs.

correspondence with advertisers when taking up cases about misleading, aggressive or unfair advertising and our Compliance teams use the threat of referral to encourage compliance amongst businesses that initially refuse to comply. That threat is a key part of our armoury of sanctions. We believe the low number of referrals is testament to its effectiveness.

3.1.8 The ASA has enjoyed a good relationship with the OFT, which has respected and trusted the ability of the advertising self-regulatory system to uphold high levels of consumer protection and maintain a level playing field for the industry. That is not to say that we do not recognise there is room for improvement with the consumer enforcement mechanism at the OFT.

3.2 Other OFT roles

3.2.1 The OFT performs a number of other roles that are of value to the ASA system beyond acting as our statutory backstop. These include:

3.2.2 **Policy and market analysis** - The OFT's policy and market analysis functions can have benefits for the work that we undertake. The OFT provides invaluable advice to help CAP write the rules and guidance for misleading and unfair advertising. Market analysis work (e.g. its recent pricing study³) may also help us to interpret misleading advertising rules with reference to robust evidence of actual consumer behaviour. OFT market studies can help inform interpretation of the CPRs and BPRs and critique the available evidence allowing us more easily to base decisions on an evidence base.

3.2.3 The OFT provides a single and consistent source of guidance on the interpretation of consumer law and legal precedent relevant to our work.

3.2.4 **Single point of contact and advice** - The OFT provides us with a useful single point of contact for queries about issues of relevance to ASA investigations and consumer law. A good example is in the area of consumer credit: if the ASA receives a complaint about a technical element of a broadcast advertisement for consumer credit (e.g. payday loans), we may draw upon the OFT's expertise in interpreting the relevant regulations.

³ <http://www.of.gov.uk/OFTwork/markets-work/completed/advertising-prices/>

- 3.2.5 The ASA maintains open channels of communication with the OFT, exchanging information on a regular basis. For example, if the ASA has received a number of complaints about an issue for which self-regulatory mechanisms can struggle to enforce e.g. hand-delivered leaflets from a rogue operator, we can liaise with the OFT about its experiences and activities. Likewise, if the OFT receives complaints about an issue which relates entirely to matters that we can deal with, it may contact us as the 'established means' for gaining compliance with the CPRs / BPRs in the first instance.
- 3.2.6 **Liaison with other regulators** - The OFT currently chairs a 'consumer concurrencies' group meeting of various regulators, which the ASA attends. The aim is to improve clarity in overlapping areas of responsibility and learn lessons from international best practice. This is particularly important when businesses are increasingly operating not only on a national, but an international basis. BIS will also be aware that the CPRs derive from the EU Unfair Commercial Practices Directive, which requires countries to interpret the legislation in a harmonised manner.

4. Our views on what makes an effective consumer enforcement landscape

4.1 A strong and credible backstop supports advertising self-regulation

- 4.1.1 Not everything that the ASA does requires a legal backstop. In fact in many circumstances the standards we administer are not required by law and operate well without any statutory oversight at all.
- 4.1.2 Ultimately, the authority of the ASA both derives from and is dependent on the long-term commitment of all those involved in the advertising industry, who voluntarily created a mandatory system to which no-one can 'opt out' for fear of industry led sanctions. Even where there is statutory oversight, the significant majority of advertisers comply with the Advertising Codes and ASA rulings without the need to refer to statutory authorities.
- 4.1.3 Nonetheless, the ability to refer advertisers, in certain circumstances, to statutory backstops in the event of continuing non-compliance provides a powerful incentive for those few advertisers (who might be tempted to not comply with the ASA) to work within the framework of the self-regulatory system. An identifiable strong backstop that has national authority is, therefore, an important aspect of the self-regulatory system.

- 4.1.4 Under the Government's preferred reform option, the role of legal backstop would be transferred to Trading Standards. ASA type referrals could be made to the Trading Standards Policy Board (TSPB) to be allocated to a relevant Lead authority, or undertaken by a national team somewhere within the Trading Standards Network.
- 4.1.5 The ASA's primary concern is that whatever enforcement landscape emerges from this reform process, our statutory backstop must be adequately resourced, sufficiently well co-ordinated and, ultimately, willing to take on cases referred to it by the ASA (in line with established Case Handling Principles). Should it become apparent to a small minority of potentially rogue operators that this might not be the case, compliance with self-regulatory mechanisms may be undermined, resulting in more referrals to the statutory body in the long-run.
- 4.1.6 We have identified three priority areas that we view as crucial to maintaining an effective backstop to the ASA system: **consistency**, **funding** and **independence**.
- 4.1.7 **Consistency** - Should Trading Standards Services (TSS) become responsible for administering ASA referrals, it would be essential for the ASA to retain a single point of contact, as currently exists with the OFT, through which we would be able to refer non-compliant advertisers and liaise with about cases. This will allow for a consistent approach to ASA work. We are keen to avoid a situation whereby we have to track down cases in more than 200 different Trading Standards Services across the UK. We know that the Government has acknowledged our concerns in this area, but it is worth noting again because we already find it difficult to keep track of enforcement action across the UK.
- 4.1.8 In addition, there have already been concerns (both perceived and real) about how to create an environment of consistent consumer enforcement, as required by European legislation, within the present system of national and local enforcement. Consideration of how this will be addressed must be a top priority in the event of the loss of a single national enforcer.
- 4.1.9 If, following referral, national enforcement needs are taken on by lead or regional specialist authorities, rather than by a single national enforcer as now, then care must be taken to ensure that the CPRs and BPRs are consistently applied.

- 4.1.10 We also understand that there is a possibility of creating a lead authority for enforcing advertising cases. We would strongly question why this is needed, given the existence of the ASA.
- 4.1.11 Notwithstanding the confusion for businesses and consumers without this clarity, there is a risk that the credibility of the ASA may be undermined if advertisers are able to cite inconsistent enforcement action or issues with ‘double jeopardy’.
- 4.1.12 **Funding** – We welcome the provision in the proposals for a designated pot of money to be made available to Trading Standards in order to reduce the disincentive of local authorities to take on complex or risky cases, cases against large companies, or those types of cases referred to it by the ASA.
- 4.1.13 **Independence** – The current status of the OFT as an independently funded, national enforcer is an asset, in terms of its willingness and freedom to take on complex cases, and its independence from local pressures. The ASA itself, although funded by industry, has an arms-length funding mechanism which is designed to protect the integrity of the system. Those who fund us cannot hold us to ransom as to whether we pursue a case. Indeed, even our directly paid training and advice services are operated by CAP and not ASA, the body that administers the Codes.
- 4.1.14 An increasing number of local authorities act as a Primary Authority for businesses whose operations cross into more than one jurisdiction. Primary Authorities are permitted to reclaim reasonable costs associated with providing advice and guidance, which means that they may have direct financial relationships with those businesses. Therefore, further thought should be given to what steps need to be taken to secure the integrity of Trading Standards in the event that all enforcement rests with bodies that are seeking direct payment from local businesses. The existence of an independent, national enforcer would alleviate some of this concern.

4.2 Other important factors:

4.2.1 A strong link between consumer and markets’ activities

- 4.2.2 Consumer and markets policy and enforcement reinforce one another and over the last decade or more, steps have been taken in countries around the world to ensure that the two go hand in hand. The ASA has

operated on that basis since its inception: we operate in the interest of consumers, business and society.

4.2.3 When markets operate effectively, businesses have incentives to meet consumer protection objectives. For example in advertising, businesses that mislead, harm or offend their potential customers will lose business. For advertising to work it has to be trusted and welcomed.

4.2.4 There is, therefore, a strong case to be made for co-ordination of these consumer and competition activities. There is the danger that if a body is solely focussed on one area, then they can lose sight of the bigger picture by becoming an advocate for a particular cause – be it on behalf of business or consumers.

4.2.5 **Allowing effective advertising self-regulation to flourish**

4.2.6 The OFT has been successful in allowing the ASA the space to develop as a regulator and has consistently supported other self-regulatory schemes and we welcome the Government's commitment to continuing that support.

4.2.7 **The ability to see and co-ordinate the big picture**

4.2.8 Businesses operate on a local, national and international level. Indeed consumer protection legislation is developed and harmonised at an international level. It is vital that our regulatory regime is capable of operating in step with that fact of life. Localism can bring enormous benefits, including bringing regulation closer to the priorities of communities and becoming sensitive to the operation of businesses within a community.

4.2.9 That said, local activity is only part of the picture and it is important that whatever is in place is well-equipped to operate at local, national and international levels.

4.3A **view on the maintenance of other OFT functions**

4.3.1 As outlined in section 3, the ASA interacts with the OFT in a number of ways beyond its role as our legal backstop. We understand under proposals that these roles will be retained in some form in any future landscape, but are concerned that there exists potential for fragmentation, inconsistency and complexity if separating out these various roles to others.

4.3.2 **Market studies** – The OFT currently undertakes market research studies which the ASA inputs into and benefits from. Under the Government's preferred option, the role of undertaking 'pure' market studies is to be taken on by the Citizens Advice (with competition and mixed studies to be handled by the Competition and Markets Authority (CMA)). Whilst Citizens Advice does valuable work in their capacity as a consumer advice and advocacy body, we feel that in general such market studies are best conducted by a body that has an ongoing duty to consider the role of both markets and consumer protection in a market (see section 4.20).

4.3.3 Presently, the OFT is required to work with both businesses and consumers and come to appropriate decisions. There is a strong risk that an organisation primarily responsible for consumer advocacy and advice might be, or at least be perceived to be, biased, which could undermine our ability to benefit fully from its work.

4.3.4 **Consumer Policy** – The ASA values the OFT's experience and expertise in exercising its consumer policy functions, including at an internal level. This role maybe taken on by the Trading Standards Institute (TSI) or TSPB secretariat. Whatever body is to take on such policy functions would need to be mindful of the importance placed by the ASA - and no doubt others - on the consistency of interpretation and implementation of legislation, both domestic and that originating from Europe.

4.4 **Complexity and inconsistency in the wider consumer regulatory landscape**

4.5 The proposals might lead to a situation whereby the ASA, rather than having the OFT as a single point of contact for a number of functions, is now faced with four or five separate bodies:

- **Trading Standards** as our statutory backstop (via TSPB & LATSS)
- **TSI/TSPB secretariat** as our contact for policy issues
- **Consumer Advice** for information relating to market studies
- **CMA** for concurrency work with other regulators

4.6 We are, consequently, concerned that whilst OFT functions look set to be retained in some form, there might be a greater risk of complexity and inconsistency, which are much more likely to arise from a more fragmented regulatory structure.

- 4.7 Should OFT functions become separated out, a concerted effort would be required by the respective bodies taking on these responsibilities to understand the role and importance of the ASA system within the enforcement landscape and the need to take steps to build effective working relationships with the ASA system moving forwards.
- 4.8 Nonetheless, we recognise the potential, should Trading Standards take on a wider consumer enforcement role, of more effective and joined up work with those elements of Trading Standards with which we engage informally already - local enforcers on local compliance issues.
- 4.9 Currently, the lack of a formal relationship with local Trading Standards services means that ad-hoc compliance work against potentially rogue, non-compliant local advertisers, potentially more suited to compliance work by local Trading Standards rather than the OFT (and unlikely to meet the prioritisation criteria of the latter) relies upon the establishment of informal relationships between individual LATSS and the ASA. We would look forward to being able to utilise more constructively the professionalism of Trading Standards currently employed at local level.

5. Q32. Do you believe that an enforcement model branded as run by Local Authority Trading Standards Services would deter illegal behaviour? If not, how could the threat of enforcement needed to back up self-regulatory schemes be made more credible?

5.1 Branding

- 5.2 The loss of impact of the well-known, nearly forty years-old OFT brand could considerably weaken our 'nuclear' sanction. Of course there will be responsible businesses that will keep abreast of Government changes or will have an appreciation for local enforcement via Trading Standards. But there will be other businesses amongst whom the loss of a strong and recognisable brand could cause a detriment. For example small or medium-sized businesses that don't have the resources to keep abreast of such changes, or irresponsible businesses that won't take the time or care to understand their regulatory environment. In March this year the ASA extended its remit to cover marketing communications on companies' own websites and in other, non-paid for space under their control. This has brought a large additional number of small and medium-sized businesses under the requirements of the CAP Code for the first time.

- 5.3 Whilst we are pleased that the Government recognises the importance of a 'strong national brand' to provide a deterrent effect against sustained non-compliance, we are concerned that current proposals for an enforcement model branded as run by Local Authority Trading Standards Services, or represented by the TSPB, Joint Enforcement Board or 'enforcement squad', simply isn't a strong enough brand or likely to imply national authority and, as such, deter illegal behaviour.
- 5.4 Whilst this might be achieved by the creation of, for example, a 'National Enforcement Office' or other similar sounding institution or team within the Trading Standards network, in the event that consumer enforcement falls to Trading Standards, we urge the Government to undertake some branding and identity work to establish the right name for the body. It will need to convey its credibility as a body with national authority, but which does not mislead as to its purpose.
- 5.5 In addition, we understand that under the proposals, cases referred to the TSPB are likely to be tackled by a Lead authority with national expertise. Publicity arising from enforcement action will be greater if it publicised by a recognised body, rather than a LATSS. Indeed publicity stemming from enforcement is important for setting the public record straight amongst consumers and to educate business of what is and is not acceptable. In light of this, the new body would need to be funded, equipped and fully authorised to raise awareness of cases, including through the media, even though it might not have been the body directly taking action. Consistent messaging from a single authority would be much more likely to increase awareness and understanding of a new enforcement regime.

6. Conclusion

- 6.1 As a UK consumer protection regulator the ASA has a strong interest in the Government's proposals, and welcomes the commitment by Government to ensuring the success of self-regulatory schemes such as that administered by the ASA.
- 6.2 Whilst we agree that the consumer enforcement landscape in the UK has not always operated to best effect in recent years, we are uncertain how far the proposals, at this stage, would represent an improvement on the existing regime.
- 6.3 We believe that an effective competition and consumer regulation regime, fit for the 21st century, must recognise the interdependencies between competition and consumer issues, be able to effectively operate and co-

ordinate on a local, national and international level, and allow for effective advertising self-regulation to flourish within a legal framework. This includes an adequately resourced, credible statutory backstop with national authority.

6.4 Our concern is that the proposals leave this outcome subject to some uncertainty and present the risk of greater complexity and inconsistency within the consumer enforcement regime.

6.5 We hope, therefore, that the Government will take on board our views about what makes an effective and credible consumer protection landscape. As with any changes that are so comprehensive in their scope, we maintain that it is good practice to keep changes under review, enabling adjustments and enhancements to be made if necessary.

6.6 I do hope that you find the comments contained within this response useful. If the Department for Business, Innovation and Skills has any questions about this response, then please do not hesitate to contact me.

Yours sincerely,

Rob Griggs
Communications & Policy Assistant
Tel: 020 7492 2145
Email: robertg@asa.org.uk