

MEMORANDUM OF UNDERSTANDING FOR THE REGULATION OF CLAIMS IN THE ADVERTISING OF FOOD IN ENGLAND AND WALES

The parties to this Memorandum of Understanding (MOU) dated
are:

9 February 2016

- (1) Food Standards Agency
- (2) Department of Health
- (3) Department for Environment, Food and Rural Affairs
- (4) Advertising Standards Authority Limited
- (5) Advertising Standards Authority Broadcast Limited
- (6) Committee of Advertising Practice Limited
- (7) Broadcast Committee of Advertising Practice Limited

Parties (1) – (3) together are referred to in this MoU as the **Government Parties**, and parties (4) – (7) as the **Self/Co-regulatory Parties**.

1. **Background**

- 1.1 The purpose of this MoU is to document the arrangements in England and Wales for the continued regulation by the Advertising Standards Authority of claims in the advertising of food. It is intended that similar MoU's will cover Scotland and Northern Ireland.
- 1.2 Regulation EC 882/2004 requires EU member states to designate competent authorities responsible for the purposes and official controls set out in the Regulation, which include the advertising of food insofar as it is subject to EU law (see in particular Article 7 of Regulation EU 1169/2011 on the provision of food information to consumers, Regulation EC 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, and Regulation EC 1924/2006 on nutrition and health claims made for food). As respects food advertising, the objective of Regulation EC 882/2004 is that Member States should ensure that official controls are carried out regularly, on a risk basis and with appropriate frequency in particular to guarantee fair practices and the protection of consumer interests¹.
- 1.3 Competent authorities may in turn delegate certain tasks to a "control body", being an independent third party. In addition, Regulation EC 882/2004 is not a maximum harmonisation regulation, its express object being to lay down general rules² rather than a specific set of coordinated rules which may not be exceeded. It does not preclude recourse by Member States to self-regulation for the control of the advertising of food providing that the competent authorities maintain an appropriate level of supervisory control.

¹ Article 1(1)(b) and 3(1)

² Article 1(1)

2. **Government Parties**

- 2.1 **Food Standards Agency (FSA):** The FSA is a non-ministerial government department, which answers to Parliament through the Secretary of State for Health. In the Official Feed and Food Controls (England) Regulations 2009 and the Official Feed and Food Controls (Wales) Regulations 2009 (together "the 2009 Regulations"), the FSA (along with local Council Food Authorities acting through their Trading Standards and Environmental Health Departments) have been designated as being the competent authorities for the purposes of Regulation 882/2004, in so far as its provisions apply in relation to food law in England and Wales respectively.
- 2.2 **Department of Health (DH):** DH is responsible for policy on nutrition information on food and drinks, for food supplements, fortified foods, foods for particular nutritional uses (i.e. infant formula, follow-on formula, medical foods, baby foods and slimming foods – also known as 'foods for specific groups') and foods making nutrition claims or health claims. DH is the competent authority in the UK for notifications of 'foods for specific groups' where required and under Regulation 1924/2006.
- 2.3 **Department for Environment, Food and Rural Affairs (Defra):** Defra is responsible for the policy on general food information, labelling and composition rules that do not relate to food safety or nutritional information, including food advertising under Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers. It is also responsible, among other things, for the policy on organic labelling, labelling of red meat, milk and eggs. In the Official Controls (Animals, Feed and Food) (England) Regulations 2006, DEFRA (along with local authorities) have been designated as being the competent authorities in England for the purposes of Regulation 882/2004 in so far as its provisions apply (among other things) to food law which concerns controls on animals and controls on food that does not fall within the ambit of the Official Feed and Food Controls (England) Regulations 2009.

3. **The role of Trading Standards**

- 3.1 There are over 160³ trading standards authorities in England and Wales, responsible for local enforcement of a range of consumer protection legislation and other matters.
- 3.2 In the 2009 Regulations, local Councils have been designated as being the competent authorities for the purposes of the provisions of Regulation 882/2004 in so far as those provisions apply to food law in England and Wales. The Nutrition and Health Claims (England) Regulations 2007 provide that the competent authority for the purposes of enforcement of Regulation 1924/2006 is the local authority. In each case enforcement as regards labelling, presentation and advertising of food is carried out by the trading standards department of the competent authority for each area⁴.

4. **Self/Co-regulatory Parties**

- 4.1 The Advertising Standards Authority comprises two independent bodies, the Advertising Standards Authority Limited (ASA) and the Advertising Standards Authority Broadcast Limited (ASAB), both funded by a levy on advertising. They adjudicate on complaints about breaches of two industry codes, the Committee of Advertising Practice's CAP Code for non-

³ <http://uktradingstandards.co.uk/find-a-trading-standards-office/>

⁴ Regulations 3 and 4

broadcast advertising⁵ and the Broadcast Committee of Advertising Practice's BCAP Code for broadcast advertising⁶. Both Codes include general rules, including in respect of misleading advertising, and specific rules, including in respect of food advertising, including nutrition and health claims. Some advertising is excluded from the scope of the CAP Code, in particular point of sale displays (unless part of a sales promotion) and packaging and labelling (unless it advertises another product, or is part of a sales promotion, or the packaging appears in an ad to which the Codes apply). In some areas the Codes range more widely than the EU laws referred to above – eg the rules on offensive advertising.

- 4.2 The primary sanction if the ASA/ASAB find a breach of the Codes is adverse publicity, all ASA/ASAB rulings being published online weekly⁷, and a requirement not to run again any advertising found to be in breach. Adverse publicity is an effective sanction, with rulings ranking high on Google search results and often being picked up in the wider media.
- 4.3 In the case of non-broadcast advertising, CAP (the Committee of Advertising Practice Limited) and the ASA (which has fulfilled the role since 1962) exercise their powers with the consent of the media and advertising industry. The ASA is regarded by the Government as the non-statutory "*established means*" for resolution of complaints about unfair commercial practices in advertising and impermissible comparative advertising⁸. In rare cases where where the ASA is for some reason unable to enforce compliance with its rulings in relation to advertising where there is also a regulator with statutory powers, it will normally refer the advertiser to the relevant statutory body (eg trading standards).
- 4.4 In the case of broadcast advertising, BCAP (the Broadcast Committee of Advertising Practice Limited) and ASAB exercise powers contracted out to them since 2004 by Ofcom⁹, which has the duty to regulate broadcast programme content (including advertising, including for food) under the Communications Act 2003. One of the reasons for contracting out was to ensure a more consistent approach to advertising regulation across all media. Ofcom is ASAB's back stop if an Ofcom licensed broadcaster refuses to comply, but compliance is such that matters very rarely need to be referred to Ofcom.
- 4.5 Many cases are resolved informally by the ASA/ASAB Executive, with only more serious or difficult cases reaching the ASA/ASAB Councils for adjudication. The Councils have adjudicated on many hundreds of cases involving food advertising over the last few decades, including many rulings concerning complaints of misleading food advertising and (more recently) impermissible health and nutrition claims for foods, and have built up considerable expertise in this area. The rulings of the Councils are subject to review by an Independent Reviewer of the Rulings of the ASA Council, and ultimately to judicial review by the High Court¹⁰.
- 4.6 The CAP and BCAP Codes are drafted, and their rules are applied by ASA/ASAB, in a manner intended to reflect and be consistent with any maximum harmonisation EU laws,

⁵ <http://www.cap.org.uk/Advertising-Codes/Non-Broadcast.aspx>

⁶ <http://www.cap.org.uk/Advertising-Codes/Broadcast.aspx>

⁷ <http://www.asa.org.uk/Rulings/Adjudications.aspx?gclid=CKDLvaP0gcQCFsbJtAodwDkAzw>

⁸ See eg para 11.7 in BERR/OFT guidance adopted by the CMA at <https://www.gov.uk/government/publications/consumer-protection-from-unfair-trading-regulations-traders>

⁹ Renewed for a further 10 years in November 2014 -

<http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Statement.pdf>

¹⁰ See eg R (Sainsbury's Supermarkets Limited) v Independent Reviewer of ASA Adjudications - <http://www.bailii.org/ew/cases/EWHC/Admin/2014/3680.html>

including in respect of food advertising. Any significant changes to the Codes are subject to widespread consultation.

5. CAP and BCAP Codes

5.1 The Government Parties are content that the current Codes' rules adequately cover the areas of food advertising law and regulation harmonised by EU law, whilst reserving their right to enforce as outlined at 6.1.

5.2 CAP and BCAP will ensure that the Government Parties are consulted on proposed changes to the Codes' rules concerning claims in the advertising of foods. Specific rules for food advertising, focusing in particular on health and nutrition claims for foods and food advertising targeted at children are currently at section 15 of the CAP Code and section 13 of the BCAP Code. The Government bodies will respond in a timely manner with any comments on whether the Codes' rules adequately cover the areas of food advertising law and regulation harmonised by EU law.

6. ASA and ASAB complaint investigation procedures

6.1 The Government Parties agree that ASA/ASAB should be the "established means" for the investigation of complaints about the advertising of food, under the CAP and BCAP Codes. They agree that complaints which they receive about such advertising should normally be passed on to ASA/ASAB, but reserve the right to deal with such complaints through the relevant statutory enforcement mechanisms (eg trading standards seeking an undertaking/injunction in civil enforcement action, or a criminal prosecution), where appropriate, for example because of the seriousness of the apparent activity, or because the advertising is outside the scope of the CAP and/or BCAP Codes.

6.2 The Government Parties are content that current ASA/ASAB complaint handling procedures¹¹ provide an effective process for the resolution of complaints about broadcast and non-broadcast advertising claims for food.

6.3 ASA and ASAB will ensure that the Government Parties are kept informed of and given an opportunity to input in relation to any substantive changes to these procedures.

6.4 Where relevant, ASA and ASAB will seek to have regard to DH, Defra and EU Commission guidance, and to any Assured Advice issued by a trading standards Primary Authority¹² which is drawn to their attention, in relation to claims for foods, when investigating complaints. ASA and ASAB may at their discretion consult those and other bodies (eg the Medicines and Healthcare Products Regulatory Agency) with expertise in food and food law, where they feel it to be appropriate, either on particular issues or on a draft recommendation to the Council(s).

7. Rulings

7.1 The Government Parties will be notified on a regular basis of ASA/ASAB rulings concerning food advertising, including by virtue of being on the ASA's mailing lists. The Government

¹¹ ASA: <http://asa.org.uk/Consumers/~media/Files/ASA/Misc/Non-Broadcast%20Complaint%20Handling%20Procedures.ashx>; and ASAB: [http://asa.org.uk/Consumers/~media/Files/ASA/Misc/Broadcast Complaint Handling Procedures.aspx](http://asa.org.uk/Consumers/~media/Files/ASA/Misc/Broadcast%20Complaint%20Handling%20Procedures.aspx), both as revised November 2015.

¹² Under Part 2 of the Regulatory Enforcement and Sanction Act 2008

bodies periodically review published ASA/ASAB rulings, and if any aspect of the ASA's work causes concern, may draw it to the ASA's attention and seek a meeting with the ASA Executive to ascertain how it may be resolved.

- 7.2 The Government Parties are not in any way appellate bodies in respect of decisions made by the ASA/ASAB Executive and the ASA/ASAB Councils in individual cases. Recourse for advertisers and complainants dissatisfied with ASA/ASAB decisions is to the Independent Reviewer of ASA/ASAB Rulings, and ultimately to the Courts (on judicial review).

8. Monitoring and enforcement

- 8.1 The Government Parties are satisfied that adequate mechanisms are in place for enforcement of ASAB rulings (by means of a referral to Ofcom) and ASA rulings (by means of a referral to trading standards or FSA) in respect of the advertising of food.

- 8.2 ASA and ASAB have the discretion to challenge food advertising that potentially does not comply with the rules in the CAP Code or the BCAP Code, including rules that approximate provisions of the NHCR.

9. Communication

- 9.1 The parties agree to exchange information (to the extent permitted by law) as appropriate to their respective roles, and to meet as frequently as is necessary, including in the Food Standards and Labelling Expert Group, to discuss issues arising from the operation of the regulation of food advertising.

- 9.2 The main points of contact will be:

(a) Government Parties:

- (i) FSA: Robert Madge (Head of Legal Advisory Services, Regulatory and Legal Strategy Directorate, Food Standards Agency, Floor 2, Aviation House, 125 Kingsway, London WC2B 6NH, Tel: 020 7276 8653, email: Robert.Madge@foodstandards.gsi.gov.uk).
- (ii) DH: Noel Griffin (Team Leader Nutrition Legislation, Obesity and Food Policy, Department of Health, 6S Wellington House, London SE1 8UG, Email: noel.griffin@dh.gsi.gov.uk Tel: 020 7210 6241).
- (iii) Defra: Linda Roland (Lawyer, Animal Health, Welfare and Food Team, Defra Legal Advisers, Government Legal Department, Area 8C, 9 Millbank c/o Nobel House, 17 Smith Square, Horseferry Road, London SW1P 3JR, Tel: +44 (0)20 7238 0552, Email: linda.roland@defra.gsi.gov.uk).


(b) Self/Co-regulatory Parties:


- (i) ASA/ASAB: Miles Lockwood (Director of Complaints and Investigations, Advertising Standards Authority, Mid City Place, 71 High Holborn, London WC1V 6QT, Tel 020 7492 2240, Email milesl@asa.org.uk)

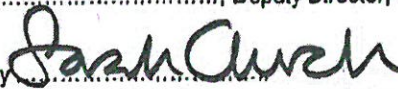
(ii) CAP/BCAP: Shahriar Coupal (Director of Committees, Committee of Advertising Practice, Mid City Place, 71 High Holborn, London WC1V 6QT, Tel: 020 7492 2114, email shahriarc@cap.org.uk).


10. General

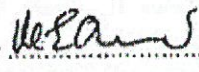
10.1 For the avoidance of doubt, this MoU does not seek to designate ASA, ASAB, CAP or BCAP as a "control body" within the meaning of Regulation EC 882/2004.


Signed by 
.....
Rod Ainsworth, Director of Regulatory and Legal Strategy, for and on behalf of FSA


Signed by  MAEVE WALSH
....., Deputy Director, Obesity and Food Policy, for and on behalf of DH

Signed by  Sarah Church
DIRECTOR, FOOD & FARMING, for and on behalf of Defra

Signed by  MILES LOCKWOOD
DIRECTOR OF COMPLAINTS + INVESTIGATIONS, for and on behalf of ASA

Signed by  MILES LOCKWOOD
DIRECTOR OF COMPLAINTS + INVESTIGATIONS, for and on behalf of ASAB

Signed by  SHAHRIAR COUPAL
DIRECTOR OF CAP, for and on behalf of CAP

Signed by  SHAHRIAR COUPAL
DIRECTOR OF BCAP, for and on behalf of BCAP