

# ASA Prioritisation Principles: Consultation Responses

Responses received from external stakeholders



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## **A private individual**

Dear Guy

I write to thank you for the opportunity to provide comment on the proposed Prioritisation principles to govern the self-regulatory work of the Advertising Standards Authority.

<http://www.asa.org.uk/News-resources/Media-Centre/2014/~media/Files/ASA/News/ASA%20consultation%20on%20Prioritisation%20Principles.ashx>

I would welcome the consideration of, in addition to impact, you consider the strategic significance of the advert in question for your new five-year strategy and long term goal that every ad in the UK should be a responsible ad. I think this temporal context is currently either missing or under-emphasised in your proposed prioritisation principles. As an aside I am still concerned about the lack of reference to equality specifically within your five-year plan, I realise you have respect for all but I think equality relates to something much more just than simply respect. I welcome the recognition of diversity in your 2014-2018 strategy.

In regard to the temporal issue, it might also be appropriate to consider in the deployment/prioritisation of your resources, the cumulative impact of advertiser(s) behaviour in question. Perhaps, through the construction of some form of continuum of enforcement or prioritisation, where specific advertisers or types of ads are routinely falling foul of your codes for good reason, this highlights whether general proactive prevention work should be undertaken or resources prioritised on this basis as a specific augmentation of the current risk principle to react to specific ads. I welcome your commitment to be more proactive rather than reactive in addressing issues of risk which will presumably be based upon an intelligence-led approach.

On this basis, in terms of better cross-regulator working I was surprised recently during correspondence about my complaint concerning News International offering a date with a page 3 model as an incentive to gamble, that the decision to uphold my complaint and others related to gambling was not routinely or as a matter of course shared with the Gambling Commission. I would have thought this sharing of intelligence would have taken place and contributed to the effective and efficient prioritisation of resources across areas of mutual interest. Especially given the current Government review of gambling advertising.

This would be covered under a strategic significance heading not solely to your own strategy outcomes but all those of partner organisations OFCOM, Gambling Commission and Consumer and Markets Authority. Enabling the prioritisation of resources jointly in the future depending on a matrix of strategic significance cost effectively.

The absence of any Impact Assessment or general financial cost, did make it hard to consider the need for some form of weighting of the prioritisation principles. Whether given the generalised costs of reacting to an advertisement but reducing detriment or the preventative spending potential of proactively addressing issues but also reducing subsequent enforcement costs.

I would in summary agree with the broad thrust of the principles they really are the only options in this regard with the exception for me of strategic significance and I would like to

see equality and diversity reflected there are proactive statement of principles rather than relying on the issue of harm and offence before committing resources. Also, it would potentially prioritise prevention and mean resources do not have to be committed to receiving/reviewing complaints over a 2-3 month window after an ad has been placed which is socially irresponsible. Also, potentially improves public confidence in your work which you highlight in the consultation as a key threat/risk to your work going forward.

In regard to the invitation to provide further comments. I would like to see the UK go further in certain forms of regulation for the industry. Given the majority of ads are now responsible and good responsible culture/practice is engrained within the industry, is it now time to move to a statutory footing for advertising regulation to address those elements of the industry who are still routinely non-compliant?

The current central principle for all marketing communications via this code-based system is that they should be legal, decent, honest and truthful. All marketing communications should be prepared with a sense of responsibility to consumers and society and should reflect the spirit, not merely the letter, of the Code. This is a very laudable position especially if the whole industry were socially responsible advertisers.

Presently the Code working on the principle that it supplements the law, fills gaps where the law does not reach and often provides an easier way of resolving disputes than by civil litigation or criminal prosecution. In many cases, self-regulation ensures that legislation is not necessary.

I would propose that whilst the self-regulatory element of arbitrating on advertising and marketing communications is not changed, that certain elements could be made statutory and that a Child and Equality Marketing Act to be introduced within the next Parliamentary session to close the gaps in the law which even the best self-regulation systems can't address even with the best of intentions.

For example, the Marketing Control Act introduced into domestic Norwegian law provides a clear indication that controlled marketing should not conflict with good marketing practice, defined freedom of expression and allowing creativity to stimulate the ethical sale of products. Their new advertising and marketing assessment places clear emphasis on whether the marketing offends, rather than in the UK where the legal gaps generally mean it must be offensive or obscene in certain cases, for the Police to act in certain contexts such as shop window displays.

This is currently an area of advertising where neither trading standards services locally or nationally, local Police forces nor ASA have any clear parameters to intervene. This leaves a situation where consumers are left to complain to shop owners and managers with no or little clear legal or regulatory recourse as with other types of marketing, advertisement or promotion, against a defined framework of general ethical and/or moral views.

The presumption would remain that the marketer and designer of the marketing shall ensure that the marketing does not conflict with the new legislation, it will not be subject to pre-checking procedures but operated on an intelligence-led enforcement system of reactive self-regulation. However, there would be clear new provision relating to the equality of all genders in advertisement and a presumption to promote equality generally and in relation to protected characteristics outlined in the Equality Act 2010. I would see this legislation as an



amendment to the Equality Act. It would also clearly state that exploitation of the body of any gender is not allowed unless clearly relevant to the product sold and also neglect the conveyance of any offensive or derogatory appraisal of any gender of any age.

The ASA self-regulation code would therefore be redrafted to facilitate an analytical framework where in determination of whether equality, gender, offence or derogation have taken place, with a clear emphasis on the scope, impact, intrusion of the marketing by reason of its design, format or scope, or other means employed. The unfairness of the practice shall be assessed from the perspective of the consumer group in question not a general public presumption in order to provide protection for vulnerable groups. However, the protection of vulnerable groups shall not affect the common and legitimate practice of making exaggerated statements which are not meant to be taken literally.

The proposal would also include special provisions for the protection of children, including taking of account of age, development and other factors that make children particularly vulnerable, enabling a strengthening of the existing code especially in relation to commercial practices not directed especially at children but which may influence children and place a presumption on the trader to foresee the vulnerability or impact of any marketing/ advertisement on children. For instance, encourages breaches of the law, dangerous behaviour, and exploitation of any genders body, suggestive or employs aggressive means relating to violence, sexuality or drugs.

These legal provisions would strengthen the current harm & offence and children sections of the code, provide marketers with legal certainty of the prevailing standards in society and significantly minimise the risk of causing harm or serious or widespread offence by introducing legal penalties for significant violations of the code.

Also, it would provide a legal framework for the control of Shop Window Displays, which as an advertisement mechanism are currently a clear loophole out with the control of the ASA, local Trading Standards services or Police. Taste and decency or offence at caused by a shop window display have to be taken up with the shop owner.

The basic premise being that if something is offensive or it makes a significant grouping of viewers when they look at the advertisement, it would not be legal and also it would provide a clear framework for consumers to challenge use of gender, sexuality and violence in any context from a t-shirt in a shop window to a billboard when it is clearly irrelevant to the advertisement of a product for sale/promotion.

Once again thank you for the invitation to comment on the prioritisation principles and to provide wider invitation to provide other comments. On the basis my comments covered the idea of a statutory footing for advertising regulation, I have also copied them to the Secretary of State for Culture, Media and Sport Sajid Javid MP and their Shadow counterpart Harriet Harman MP.

## **Alcohol Concern submission to the ASA on new prioritisation principles**

### **Harm**

We are concerned the prioritisation principles will result in the ASA investigating less examples of inappropriate alcohol advertising particularly from online sources. Evidence shows there is relationship between alcohol marketing and consumption, particularly in children and young people under 18 years old;<sup>1</sup> a relationship acknowledged in the Government's Alcohol Strategy.<sup>2</sup> Alcohol advertising is shown to reduce the age at which children start to drink and increase the amount consumed.<sup>3</sup> It is highly likely that the effects of advertising are cumulative, a dose-response relationship, the more one sees the greater the impact.

Advertising is one of many influences on consumptions levels, particularly for under-18s. The level of the effect is extremely difficult to isolate and is therefore subject to ongoing debate but regulation needs to be proportionate to the potential harm, and the scale of alcohol harms is considerable. There were 1.2 million alcohol-related hospital admissions in England in the year 2011/12<sup>4</sup> and hospital admissions for people under 30 with alcohol-related liver disease has increased in England by 117%.<sup>5</sup> Alcohol costs the country in the region of £21billion.<sup>6</sup>

### **Risk**

Public support for protecting children and young people under 18 from inappropriate volumes of alcohol advertising and inappropriate alcohol advertising content is strong. The ASA risks undermining public confidence in the entire regulatory system by overlooking or under-prioritising alcohol advertising - via any medium.

Insufficient regulation of online alcohol advertising, which is failing to respond to the volume and speed of new forms of marketing, is a particular concern. Companies break more rules on social media, more often, than via other mediums such as television. The ASA needs to be far more proactive about identifying inappropriate alcohol advertising and quicker to understand from which sources people are consuming the advertising. A system that does not place sufficient regulatory priority on the advertising of alcohol, a popularly consumed but potentially fatal drug, risks undermining confidence in itself.

### **Impact**

In many instances the ASA has sought the removal of advertising content that has broken the rules, rather than pursuing investigation that carries (however minimal) the threat of public shaming. Consequently, almost all deterrent is removed from the system. Alcohol companies which have invested heavily in online marketing, social media in particular - platforms used disproportionately by younger people – regularly push the boundaries online. Sufficient sanction needs to be deployed in all cases that get referred, without this threat marketers become emboldened to push the boundaries – see Fireball whisky. The ASA risks undermining confidence in itself as a regulator if it is not seen to be setting a consistent example.

### **Resources**

There is broad consensus that younger people should be shielded to some extent from alcohol advertising. Yet, today children 10-15 years old see proportionately more alcohol advertising than their parents<sup>7</sup> and the work of the Youth Alcohol Advertising Council (YAAC) coordinated by Alcohol Concern, has highlighted many examples of inappropriate alcohol advertising content. Alcohol Concern wants to see more resources focused on alcohol advertising to better protect younger people. We do not feel that the ASA has developed a suitably robust regulatory framework to manage the new challenges of online and social media alcohol advertising. The model is slow and retrospective, in response to a medium that moves at real time. We are concerned that online

advertising is not taken sufficiently seriously by the ASA and that the proposed prioritisation principles do not appear to address these issues.

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<sup>1</sup> Anderson, P. Foxcroft, D. and Kaner, E. *et al* (2009) *Does Marketing Communication Impact on the Volume and Patterns of Consumption of Alcohol Beverages, Especially by Young People? – a Review of Longitudinal Studies*, Scientific Opinion of the Science Group of the European Alcohol and Health Forum

<sup>2</sup> Secretary of State for the Home Department (March 2012), '[The Government's Alcohol Strategy](#)', HM Government

<sup>3</sup> Anderson, P. de Bruijn, A. Angus, K. Gordon, R. and Hastings, G. (2009) *Impact of Alcohol Advertising and Media Exposure on Adolescent Alcohol Use: A Systematic Review of Longitudinal Studies*, *Alcohol and Alcoholism*, 44 (3) pp.229-243

<sup>4</sup> North West Public Health Observatory Local Alcohol Authority Profiles for England (LAPE), online, [Accessed 19 March 2013]

<sup>5</sup> Balance, the North East Alcohol Office (2013) Worrying rise in young people with alcohol-related liver disease, online [Accessed 19 March 2013]

<sup>6</sup> Secretary of State for the Home Department (March 2012), '[The Government's Alcohol Strategy](#)', HM Government, p. 3

<sup>7</sup> Winpenny, E. *et al.* (2012) *Assessment of young people's exposure to alcohol marketing in audiovisual and online media*. Cambridge: RAND Europe



The BAcC represents 3,000 professional acupuncturists. It is accredited by the Professional Standards Authority through its AVR scheme.

The BAcC supports the ASA in its mission to protect the public from misleading claims in advertising. The BAcC has worked closely with the ASA to assist in ensuring that its standards are effectively communicated with its members and that CAP codes are upheld as part of the members' requirement to comply with BAcC codes.

### **Regarding Principle 1 - Detriment**

The BAcC welcomes the ASA's principle to free up resources that are currently being used for cases where potential detriment to consumers is low. The BAcC was disappointed that a sector review of acupuncture advertising was undertaken in 2013, even though acupuncture is a very safe intervention and there were comparatively few complaints over the past five years from the general public.

We would like the ASA, in considering potential harm or detriment to the public, also to take into account the potential detriment of not being able to advertise/offer treatments where there is limited, but not conclusive, evidence. For example, there is little treatment available for dental gagging reflux, but some small studies and considerable evidence from dentists themselves state that acupuncture treatment can assist with this. We believe that it would be in the public's interest to be informed about this treatment, and that there is a balance to be struck between the perceived detriment of offering unsubstantiated treatments and the potential detriment incurred by denying potentially valuable relief to patients in need.

### **Regarding Principle 2 - Risk**

We would like this principle to take into account issues of transparency. The risks of inaction are quite often 'amplified' by well-organised lobby groups which have the potential to skew the risk assessments being offered. We believe that the ASA might

wish to consider a public statement of how it responds to mass complaints organised by particular lobby or interest groups, and how it factors these into its risk assessment matrix.

There is, in our view, a risk that ASA will lose the confidence of industry and professional associations if it is not transparent that it has been “lobbied” by particular interest groups e.g. in meetings, even where these have not affected the outcomes. It might also be useful to have criteria for direct access; limited resources can be stretched beyond capacity by small but effectively organised lobby groups.

### **Regarding Principle 3 - Impact**

We believe that this principle could be usefully applied to existing rulings as much as to new ones. The BAcC believes that the ASA is having a considerable negative impact on the ability of professional acupuncturists to advertise responsibly and offer consumers objective and considered information about the health choices available to them.

As far as best available evidence in 4.5.2 is concerned, we are pleased that the Help Note on Substantiation for Health, Beauty and Slimming Claims is being reviewed. However, we stand by our often repeated comment that the Advertising Codes place undue emphasis on unworkable methodologies such as placebo-controlled RCTs as the only model. As we have argued previously, there should be different evidential requirements for such interventions to accommodate the wide variety of interventions which do not fit with a model developed primarily for testing tablet or fixed dose medications.

The BAcC believes the standards ASA presently endorses, and the thresholds within them, undermine the confidence held by healthcare professions in the ASA. The current position fuels an unwarranted impression that the ASA are misinformed by their informants in judging where these substantiation thresholds are appropriate.

### **Regarding Principle 4 - Resources**

It is reasonable to state that resource should be proportionate to the problem. However, the current ASA process of working with experts, while it may show budgetary rigour, lacks transparency and falls short of what many could consider best

practice. We are concerned that so much weight is given to the judgement of one person. In medical or scientific research matters the judgements of individual experts are always subject to some sort of peer-review process. While we appreciate that ASA does not have the resources to conduct peer-reviewed studies for every judgement, we believe that best practice involves ASA appointing a panel of experts to assess medical and scientific evidence, including those whose expertise in acupuncture research we recognise. Even a small panel of three to five experts would enable a more reasonable level of peer-review for these judgements which have such wide significance. This would provide greater transparency and add considerably to public confidence.

We would also propose that the identity of these experts and their qualification to act as experts should be publicly available. This would make the process of expert advice significantly more transparent and would allow for any actual or potential conflicts of interest to be identified by the public and those subject to investigation.

## **5. Questions**

5.1.1 The principles are clearly set out and understandable.

5.1.2 We would like to see new principles of accountability and transparency be included within the headline principles. This would add greatly to both government and public confidence. This would have particular relevance in identifying who is lobbying ASA, and raises the further important question of whether Freedom of Information requests would be possible for the ASA's activities. We would like greater clarity about how ASA works with Trading Standards and regulators such as OfCom and the MHRA.

5.1.3 Other comments – We have a specific concern that suitably qualified health professionals, accredited by the Professional Standards Authority, should be recognised as regulated health professionals providing treatment (rather than product-based care) and that the rules should allow greater flexibility in enabling them to describe what they do and who they treat. Professionals receiving individual care on a face to face basis are directly accountable to their patients on an ongoing basis in a way that differs from the situation that pertains to the marketing of products. The current rules serve to hinder rather than serve the public interest and presume a level of naivety in the public which we believe has long since been eroded by the greater flow of internet-based information.

**Advertising Standards Authority**  
**Consultation on 'Prioritisation Principles'**  
**Response from the British Retail Consortium (BRC)**

**December 2014**

**The BRC represents either directly or indirectly the vast majority of small and large retailers across the UK, including online, omni-channel, high street and out of town.**

**Advertising Standards Authority**  
**Consultation on 'Prioritisation Principles'**  
**Response from the British Retail Consortium (BRC)**

**Prioritisation Principles**

The BRC believes it is useful that the ASA has decided to set out some basic priorities as the context for the manner in which it will deal with issues in advertising in a more targeted manner. It should not, of course, be used as an excuse to extend the remit but rather to deal with the current remit more efficiently. Ideally it should create more opportunities to resolve complaints informally, or where the issue is a sector wide issue provide the basis on which to enable issues to be dealt with, often by others, on a sectoral basis. It is unfair to pick out individual businesses for public comment when others are following exactly the same practices.

To recap the principles are

- What harm or detriment has or might occur
- The likely risk of action versus inaction
- The likely impact of the intervention and
- What resource would be proportionate to the problem to be tackled.

While we are generally supportive we have some overall concerns.

We do not believe the ASA should set itself up as an expert on 'society' and its views and concerns. When making prioritisation decisions the ASA needs to ensure that it remains faithful to the ECJ definition of the Average Consumer as included in the Unfair Commercial Practices Directive, whether the focus is on individual consumers or consumers at large.

The latter is a challenge, due to the legislative definition, so a robust evidence base would be required when assessing if an advert does actually cause widespread detriment or harm and meets the other requirements of the definition.

We also question what is meant by the 'rules of fair competition for advertisers'. (point 4.3). This perhaps needs to be explained or qualified. Clearly if an advertisement is anti-competitive in strict legal terms there are legal avenues for dealing with this. Otherwise it needs to be totally clear what is meant.

We note the ASA is willing to work with other Regulators and bodies. We welcome this and believe that in principle breaches of the law, as opposed to those aspects of the Code that are additional self-regulatory aspects, should be dealt with in accordance with the law. This means that they should be subject to Primary Authority Advice and the procedures of the Regulators Code (whether or not the ASA has actually signed up to the Code) and an independent appeals procedure either instead of, or in addition to, the current Independent



Review. The ASA may prefer to refer these to formal regulators in order to meet these requirements or alternatively modify its prioritisation principles to take this into account.

This latter point also means that we would hope that in giving any sector wide advice or guidance the ASA would do this in co-operation with and through the TSI as the Government's nominated body for business advice. In this way it can be ensured such advice is consistent and coherent across all bodies.

In response to the specific questions that have been asked we would respond as follows.

**1. Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable?**

Principles have the advantage of being broad and non-prescriptive which allows for flexibility in how they are applied.

It is clear that the ASA needs to be able to make decisions quickly on a significant case load, reflecting a broad range of complaints. In doing this the ASA needs to be fair and proportionate, particularly on businesses that are trying to comply, whilst at the same time being seen to achieve the objective of ensuring consumers are protected from adverts that are not legal, decent, honest and truthful.

Principles do allow a degree of subjectivity, by their very nature, so in response to this question we would tend to agree, they are relatively clearly set out, however being principles the understanding of them very much depends on the perspective of the person viewing them.

Looking at the principles themselves.

**- *What harm or detriment has or might occur***

An example would be underwear adverts – complaints are frequently made that they offend the viewer, and adversely affect how women are perceived in society.

The content of the advert is dictated by the product that is being depicted.

The extent of this harm differs depending on the point of view of the person exposed to the ad, hence the reason why some feel compelled to complain, and others (the advertisers in particular) feel it is a legitimate means of portraying the product, and perhaps a majority in the middle that have no strong view either way (which is indicative of there being no significant or widespread harm)

In this case the prioritisation principles will draw heavily, as the consultation has suggested, on factors that bring some objectivity to the decision making process – the target audience, the locality of the advert, customer research data, all of which will result in better prioritisation decisions.

The criteria for defining harm and detriment, will vary across the range of adverts that are posted – harm and detriment is different for matters of taste and decency, compared to misleading matters. The CAP code deals with a number of scenarios that cause harm in its text, setting apart adverts that may cause harm through exposure of material that is distasteful or indecent, personal harm due to adverts that encourage dangerous or unhealthy behaviour, or adverts that cause financial harm by distorting the economic behaviour of consumers.

The challenge will be for the ASA to apply these new principles when making prioritisation decisions in a consistent and predictable manner.

If not there is a risk that there is a loss of transparency as to the reason for some matters to be pursued and others not, and, as the question implies, a lack of understanding as to the decision making process by those that observe the process in action.

The answer may be a “principles plus” approach where the principles are set out and there is a clearer indication of the matters that are considered for each of the sections that the ASA covers, in particular a clearer articulation of what harm and detriment means in terms of misleading adverts.

We are concerned that this should not mean an assumption that a complaint about a big business automatically means significant harm or detriment because more customers are affected.

- ***The likely risk of action versus inaction***

Taking a risk based approach to deciding on what action is appropriate is welcomed.

The ASA already is very good at closing a significant number of complaints at an early stage, and dealing with a number informally, which is to be applauded.

This indicates there is already a culture operating where inaction (taking no action at all) is a credible response to a complaint without creating a risk to consumers or to the market.

Applying these new principles will hopefully promote this further. We would suggest that the principle should not be limited to action and inaction. There is “third way” explored in the final principle which is “alternative actions” – utilising other stakeholders to achieve an outcome.

We would encourage a move away from the traditional approach of complaint – investigation – adjudication, but a focus on raising standards, and this could be achieved by alternative means, so it is not inaction on behalf of the ASA but employing alternative strategies that sit outside of the ASA.

- ***The likely impact of the intervention***

Impact is important. A situation to consider (and this crosses over to the previous principle on assessing the risk) is where an advert has run its course – a retrospective full investigation may not be appropriate, compared to a situation where an advert continues to be run or is likely to be repeated.

We know that sometimes many investigations take months to conduct and the result is published when the advert has finished long ago. We would suggest a better impact would be achieved by seeking alternative routes to drive compliance if they are available – Trading Standards primary authority partnerships, accessed through the use of the regulatory backstop process that the ASA operates in conjunction with Camden trading standards.

We do not agree with the statement in 4.5.1 that in all cases the intervention against a single advertiser is likely to help clarify a sector – wide standard or support potential sector compliance action. Where the matter is one where the CAP/BCAP code works alongside statutory regulations and legislation this may not be as likely as with other situations.

An intervention against one advertiser may make an example of that retailer and send a signal to the sector., This could be unfair if the sector fails to take heed, which is a problem as ASA adjudications do not create a legal precedent, and sometimes the full implications of the impact of a single decision is not being assessed across the whole sector.

Again the principle needs to be supported by some level of detail in the supporting explanations to have transparency as to the objective by affected stakeholders

- ***What resource would be proportionate to the problem to be tackled?***

This point echoes those already made, that the principles based approach could signal a move to a very different way that the resources of the ASA are deployed, if indeed the conclusion is the resource deployed is that of the ASA.

The explanatory text on this principle is more clear and we would welcome the suggestion that other regulators can assist in achieving outcomes.

**2. Do you agree with the prioritisation principles? If not please explain why and provide any suggestions you may have for different principles or approaches**

Generally we support the idea of setting out prioritisation principles. The principles identified and the explanatory text help to give some clarity as to how those will be deployed.

Specific comments on the principles are as follows

- ***What harm or detriment has or might occur***

As identified in Q 1 We would suggest that there is a clearer indication of the criteria for harm or detriment, perhaps expanding the points in 4.3.2, or refining those points to be clearer for harm arising from the specific matters covered by the ASAs remit.

- ***The likely risk of action versus inaction***

This appears to be the approach that other regulators have taken, move away from dealing with every matter of substance that comes across the threshold, moving towards intervention only in the most serious cases, or where there is a history of failure to comply. For other matters a collective approach should be taken to work in conjunction with other agencies to who are empowered to raise standards, through providing guidance and support to business and advice to consumers about making good well informed choices – this very clearly ties up with the third principle on how resources can be best deployed (and when other regulators resources can be called upon)

- ***What resource would be proportionate to the problem to be tackled***

This point is very interesting ,ie the idea that resource could be deployed in a different manner – such as raising standards across the sector operating at a higher level rather than dealing with complaints.

We are particularly interested in the idea that the ASA should be prepared to pass issues to other regulators, or work in conjunction with other regulators, where there are other regulators operating in that space.

A clear example of this is the Unfair Commercial Practices Directive (UCPD) that encourages resolution of matters through established means, enforcement being the last resort.

The ASA are an established means for dealing with matters covered by the UCPD and the associated UK regulations, but they are not the only established means or regulator in this space and objectives that relate to sector wide compliance could be delivered through other regulators.

Examples of how this could be delivered are

- Trading Standards Institute have the responsibility for issuing advice to business, demonstrated through the launch of the Business Companion website and their activity with regards to the review of the Pricing Practices Guidance
- The primary authority principle that has created an opportunity for closer partnership between business and trading standards, greater transparency and certainty for business through assured advice, a more direct dialogue to drive compliance between regulator and regulated.
- Market wide interventions by the Competition and Markets Authority
- Greater utilisation of the trading standards “back stop”,

Business would support a model where the ASA made greater use of its enforcement partners. The criticism is that the ASA is too focused on the detail of individual complaints, investigations and adjudications rather than the broader picture. There is no doubt that ASA adjudications are reviewed carefully by businesses, as an opinion on regulatory matters, a view on how the code and in effect the law is being interpreted (where the matter is one that comes in the scope of legislation as well as the CAP code)

The issue is that the ASA interpretations do not set a legal precedent, and whilst the intervention has a direct impact on the advertiser (through the undertakings given to not repeat the advert in the same format) the ASA has limited scope to disseminate the output across the sector.

In fact there is a resistance to this, bearing in mind there are other regulators in dialogue with businesses regarding what compliance looks like – TSI through guidance, trading standards authorities (in particular through primary authority partnerships), other regulators such as the Financial Conduct Authority, Medical and Healthcare Products Regulatory Authority etc.

There is an appeal therefore for the ASA working with these partners, as it could leverage a broader range of options to drive compliance and business would be comfortable with this because that activity would be conducted under the checks and balances that statutory regulators operate under – the regulators code, and if enforcement action is required the rules of evidence, rights of audience and appeal etc.

### **3. Do you wish to provide any other comments?**

No further comments



11 December 2014

ASA Prioritisation Consultation  
Advertising Standards Authority  
71 High Holborn  
London WC1V 6QT

**Contains Confidential Information**

Dear Sir or Madam

**ASA consultation on new Prioritisation Principles**

Thank you for extending the time for us to contribute with this response.

We would welcome the opportunity to discuss this more, individually or as part of any working group because we believe could contribute further with more time.

**Executive summary**

- Sky supports prioritisation to enable the ASA focus its efforts in areas where it can make the most impact.
- We consider that the ASA should prioritise unfair, misleading and aggressive practices by using the standards that it is required assess those by reference to under law.
- Consumers and advertisers should be able to understand both the Prioritisation Principles and how they are applied for transparency and accountability.
- Consumer and industry confidence in the ASA and wider regulatory system must continue to be secured.

Please contact me if you have any questions or disagree with any of the above.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Aidan Feeney', is written over a faint, stylized blue line that forms a large, open loop.

**Aidan Feeney**  
Senior Legal Advisor  
British Sky Broadcasting Limited

## Consultation Response

**British Sky Broadcasting Ltd, Grant Way, Isleworth, Middlesex TW7 5QD**

Call 0870 240 3000 Fax 0870 240 3060 Visit Sky.com

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**Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable?**

1. No. Sky considers that the ASA and its stakeholders require more detail to understand and apply these principles in a way that is transparent, accountable, proportionate and consistent – following principles of ‘better regulation’.<sup>1</sup>

**If not, please explain why and provide your suggestions for improvement.**

2. We consider that consumers, advertisers and the ASA require more detail in the areas below to ensure consistent and predictable outcomes and confidence in the ASA and wider regulatory system:

Principle One: Harm or detriment

3. Consumers, advertisers and the ASA need greater certainty on the criteria for identifying “serious or widespread detriment” because it is important that we avoid uncertain or inconsistent case by case decisions as to whether complaints should be investigated, or investigations should be referred to the ASA Council.
4. Producing internal guidance (referred to paragraph 3.3 of the Consultation) will not be sufficiently transparent or accountable to consumers and advertisers, who cannot assess or challenge individual decisions without understanding the criteria against which they are made.
5. The legal framework can help assess harm or detriment in unfair, misleading and aggressive practices, which should be prioritised by reference to the legal test of whether trader or the ‘average consumer’ is take a transactional decision he or she would not have otherwise taken.
6. We would be happy to support and participate in any further discussion or guidance on how consumers, advertisers and the ASA should apply these principles in practice.

Principle Two: Risk

7. We think it would be helpful to state that the risk referred to is the risk of the harm identified by principle 1 because that is not formally expressed.
8. Consumers, advertisers and the ASA need greater clarity to understand:
  - 8.1. whether ‘advertising practice’ refers to individual ads or can address patterns of behaviour that risk undermining industry confidence in the ASA or wider self-regulatory system; and
  - 8.2. when an “advertising practice risk[s] undermining consumer or industry confidence in the ASA or wider regulatory system”.

---

<sup>1</sup> Each of the Legislative and Regulatory Reform Act 2006, [Enforcement Concordat](#) and [Regulators’ Compliance Code](#) establish good enforcement principles that may assist the ASA by expressing criteria for creating robust prioritisation principles.





9. [REDACTED]
- 9.1. [REDACTED]
- 9.1.1. [REDACTED]
- 9.1.2. [REDACTED]
- 9.2. [REDACTED]
10. [REDACTED]
11. [REDACTED]
12. Lord Smith noted in his submission to the Leveson Inquiry into the culture, practices and ethics of the press that "Without industry backing, the ASA would not, ultimately, be able to function, and regulation of non-broadcast advertising would be required to be undertaken by a statutory body (to enforce the CPRs) with the regulation of broadcast advertising reverting to Ofcom".<sup>2</sup>

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<sup>2</sup> [Witness Statement](#) dated 16 September 2011 and made by The Rt Hon. Lord Smith of Finsbury to the Leveson Inquiry into the culture, practices and ethics of the press



13. Therefore, any prioritisation principles must be robust, transparent and consistently applied to ensure that the pursuit of efficiency by informal resolution does not harm the self-regulatory system.
14. Repeating our comments at paragraph 4 above, consumers and advertisers must have sight of the guidelines by which these principles are applied to assess whether the ASA is proportionate and consistent in its decisions and ensure that the ASA is efficient, transparent and accountable in its actions.

Principle Three: Impact

15. Consumers and advertisers need greater clarity to understand the criteria used by the ASA to assess "a successful outcome in a particular timeframe".<sup>3</sup>
16. For example, [REDACTED] decisions [REDACTED] could:
  - 16.1. achieve "successful outcomes" defined by a short term internal efficiency and obtaining change to individual ads; and
  - 16.2. harm "successful outcomes" defined by long term values of promoting self-regulatory diligence by advertisers and confidence in the self-regulatory system achieved by publically holding advertisers to account and the adverse publicity generated by upheld adjudications.
17. Without clear definitions of success, consumers and advertisers cannot assess whether the ASA is proportionate and consistent in its decisions and the ASA cannot be transparent and accountable in its actions.

Principle Four: Resources

18. We cannot assess what resource would be appropriate without understanding what the ASA considers to be a "successful outcome" (see paragraph 16 above).
19. It is unclear from the Prioritisation Principles generally whether they are intended to be independent heads of assessment or are interrelated principles that are not truly distinct.
20. If the principles are intended to be distinct, it is difficult to see how lack of resource could independently justify not investigating an issue causing significant harm in context that the ASA acts as an 'established means' to enforce consumer law.
21. If the principles are intended to be read together, it would be clearer to consolidate those where possible and remove any duplication. For example, resource appears relevant only where harm or detriment (principle 1) is very low.

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<sup>3</sup> Paragraph 4.5.1





**Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

22. We support the principle of prioritising to enable the ASA focus its efforts in areas where it can make the most impact.
23. We do not consider that the List of ASA Prioritisation Principles and key questions expressed at Annex A can fully achieve the ASA's aims without further detail and supporting information. The ASA recognises this at paragraph 3.3 of the consultation.
24. In so far as the prioritisation principles are used to assess unfair, misleading and aggressive practices, they must be fully aligned with the legal framework, which is subject to European maximum harmonisation requirements, and because any derivation will add potential for confusion, additional layers of process that could certainty for consumers and advertisers and risk reducing the ASA's effectiveness as an 'established means' of enforcing the law on unfair commercial practices.
25. We advocate simplifying the principles to the greatest extent possible for ease of application and to as closely as possible follow the wording of the legal framework the ASA applies in exercising its duties to ensure consistency, predictable outcomes and promote consumer and industry confidence in the ASA and wider regulatory system.
26. We have contributed a prototype framework to apply the underlying law within the spirit of the prioritisation principles at **Annex 1** to this response. We would be happy to assist in the further development of this framework in so far as that can help the ASA deliver the prioritisation principles.

**Do you wish to provide any other comments?**

Principles of good enforcement

27. The ASA should ensure that its prioritisation principles reflect generally recognised principles of better regulation.
28. Section 21(2) of the Legislative and Regulatory Reform Act 2006 creates the primary obligations for named regulators (including Ofcom) to exercise their functions,
  - 28.1. "in a way which is transparent, accountable, proportionate and consistent"; and
  - 28.2. in a way that is "targeted only at cases in which action is needed".
29. [REDACTED]  
[REDACTED]  
[REDACTED] we consider that the principles are essential because the authority of the ASA system both derives from and is dependent on the long-term commitment of all those involved in the advertising industry.
30. Each of the Legislative and Regulatory Reform Act 2006, [Enforcement Concordat](#) and [Regulators' Compliance Code](#) establish good enforcement principles that may assist the ASA in developing its prioritisation principles, to the extent that those have not already been considered.



#### Enforcement of the CPRs

31. The Advertising Codes cover a range of materials, from near pure-self-regulation of harm, offence and social responsibility in non-broadcast advertising to self-regulation of unfair, misleading or aggressive practices that are backed by a legal framework under the CPRs.
32. Where a legal framework applies, the ASA's administration and enforcement must reflect the standards required in law and we have proposed suggestions to help achieve that at paragraph 26 above.
33. It may assist the ASA to consider whether aspects of the Advertising Codes that are and are not backed by a legal framework for which it is an 'established means' to enforce should be given equal priority. Currently the two are not distinguished in the List of ASA Prioritisation Principles and key questions. We have not been able to fully consider this in the time available and as such do not express a view on whether any conclusion on this would be appropriate.

#### Scope and remit

34. Sky has observed some investigations into sales promotions fulfilment that allow scope for the ASA to adjust and prioritise its activities (e.g. individual consumer issues concerning offer fulfilment post sale).
35. Sale promotions are unfair, misleading or aggressive practices to the extent that they cause consumers to make transactional decisions that they would not otherwise make, but not otherwise unfair commercial practices for which the ASA is an 'established means' to investigate and enforce. Consistent with this, the CAP Code does not apply to "private correspondence, including correspondence between organisations and their customers about existing relationships or past purchases".
36. Where it is possible to quickly establish that advertising was diligently prepared and that a complaint has arisen from fulfilment errors that were not reasonably foreseeable, we consider that there is scope to deprioritise and refer consumers directly to the advertiser to resolve the matter as a customer service issue.
37. If several complaints are made, that may increase the inference that the advertising and its supporting processes were not diligently prepared and as such we consider that consumers would continue to be adequately protected in the appropriate forum (as applicable).

#### Prioritisation by information resolution

38. It is harmful to the self-regulatory system and damaging to the ASA's ability to prioritise that advertisers can currently refuse to agree a resolution with competitors, continue to advertise a claim for several further weeks and later informally resolve to make changes with the ASA with no material consequence (for example, because an advertising campaign may have run its course).
39. For the reasons described at paragraph 9.1.2 above, it is critical to industry confidence in prioritisation principles that informal resolutions achieve immediate effect.

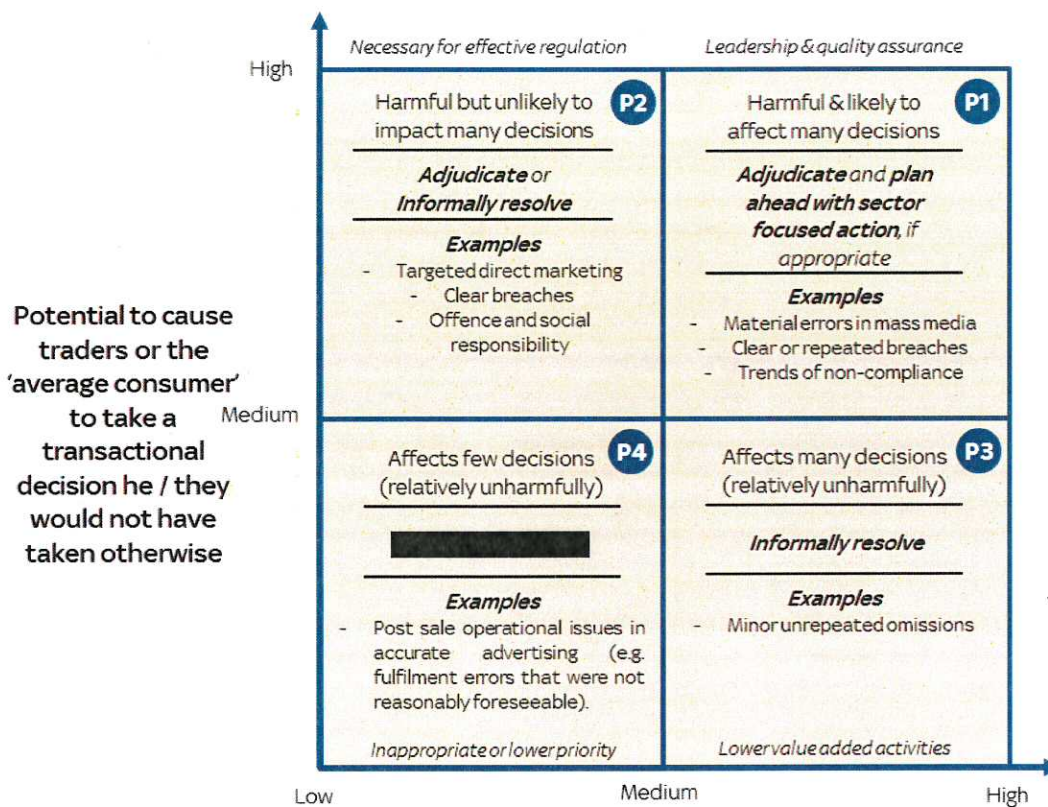


40. For the self-regulatory system to be effective, consumers and advertisers must have transparent and predictable outcomes delivered by the application of consistently applied and well explained principles that ensure a level playing field for all advertisers.





## Appendix 1: Sky complaints analysis



(Note that this test is not recognised by the legislation and should, therefore, be used only to prioritise investigations and to assess whether a breach has in fact occurred. Within the legislation, the 'average consumer' is an individual within an affected group)

Dear Sirs

## ASA Consultation – Prioritisation Principles – BT Response

I write in order to respond on behalf of British Telecommunications plc ('BT') to the above consultation. For ease of reference, I have reproduced the questions set out in the consultation below and provide our response alongside each question. Whilst we feel that the overall objectives of the consultation are clear, there are a few areas where we feel a little more clarity would be beneficial.

- 1. Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable? If not, please explain why and provide your suggestions for improvement.**

### Harm or detriment

What **harm** or **detriment** has or might occur;

- *To what extent are consumers or society experiencing, or likely to experience, serious or widespread detriment as a result of a potentially misleading, harmful, offensive or otherwise irresponsible ad or advertising practice?*
- *To what extent does or might an ad or advertising practice undermine the rules of fair competition for advertisers?*

- (1) Where the ASA is made/becomes aware of repeated complaints about an advertiser, each of which individually may not have caused sufficient detriment to trigger an investigation, at what point does the cumulative effect of the potential breaches become sufficient enough to elicit investigation? As a market leader, BT's ad campaigns are often scrutinised heavily by our competitors and the general public, but if some of our less well-known competitors are able to continuously breach the rules this certainly undermines the rules of fair competition. BT would welcome clear guidance as to exactly which 'rules of fair competition' are being referenced and an acknowledgement that where those rules are not being adhered to, swift action will be taken by the ASA.

### Risk

The likely **risk** of action versus inaction;

- *What risk is there to consumers, advertisers or wider society from taking action or not taking action?*
- *Does an ad or advertising practice risk undermining consumer or industry confidence in the ASA or wider regulatory system?*

- (1) As per our response to proposed principle 1, BT would welcome recognition that repeated potential breaches by a single advertiser that individually may not be seen as sufficiently detrimental do pose significant risk to consumers, advertisers and wider society and that such breaches also risk undermining confidence in the ASA/wider regulatory system.

### Impact

The likely **impact** of ASA intervention

- ***What would be the likely impact of ASA intervention or non-intervention?***

N/A

## Resource

What **resource** would be proportionate to the problem to be tackled.

- *What are the complexities associated with delivering a successful outcome?*
- *Are the resources that are likely to be required for a successful outcome proportionate to the problem and the likely impact on consumers, society, or advertisers?*
- *Is the ASA the right body to act; alone, in partnership or not at all?*

- (1) The key questions supporting this principle do not take into account the varying financial commitments made by advertisers in respect of campaigns across different media. Whilst the reference to fair competition for advertisers (in proposed principle 1) is welcome/necessary, BT would welcome acknowledgement within the principles that prominent, expensive ad campaigns (for instance TV/outdoor) require more careful consideration than 'below the line' campaigns and that the ASA will allocate resource accordingly.
- (2) The consultation does not address what the ASA propose will happen in the event that it decides that the resource necessary to tackle a problem is not 'proportionate' to the chances of delivering a successful outcome?
- (3) BT would welcome further clarity as to how the ASA would assess whether it is the right body to act, how it will decide whether to act in partnership with another regulator and which regulators the ASA will consider referring to.

## **2. Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

- (1) We agree with the proposed prioritisation principles but (as set out above) would suggest further guidance be added in order to improve clarity around how they will be interpreted.

## **3. Do you wish to provide any other comments?**

N/A

## **Channel 4 Response to the Advertising Standards Authority's consultation on their Prioritisation Principles.**

Channel 4 welcomes the opportunity to comment on the ASA's consultation on the principles which will guide their work and regulatory priorities.

Channel 4 is a publically owned, not for profit, public service broadcaster entirely funded by commercial revenues, the vast majority of which are derived from advertising. Advertising is therefore central to enabling Channel 4 to fulfil its public service remit and obligations, including financing our investment in a diverse range of high-quality UK originated content.

In 2013 Channel 4 invested around £430m in UK originated content across all of our services, supporting 367 independent production and digital media companies from across the UK. This investment has resulted in an unprecedented level of creative success yielding eight BAFTAs, two Oscars and the prestigious Channel of the Year award for Channel 4 at the Edinburgh television festival.

Advertising plays a key role in sustaining this investment and indeed the investment of other commercially funded PSBs. As such Channel 4 believes that the principles the ASA use to guide their priorities should be carefully considered, evidence based and should seek to deliver benefits to both Viewers and Broadcasters.

Channel 4 is broadly supportive of the approach the ASA lays out in their consultation document. However we would encourage the ASA to consider including a greater emphasis on the importance of working closely with broadcasters. We believe that a close working relationship between broadcasters and the ASA is vital to ensuring the ASA can meet their core ambition *"to make every UK ad a responsible ad"*.

Channel 4 believes that broadcasters will play a key role in ensuring that only responsible ads are aired and as such we believe that the ASA should prioritise not just working with advertisers and consumers, as they correctly identify, but should also seek to take the proactive step of partnering with and supporting broadcasters as they seek to implement and adhere to the relevant regulatory frameworks and codes of practice.

Channel 4 has actively sought to develop and build closer relationships with the ASA to foster a collegiate rather than adversarial relationship and we have been encouraged by the progress of this relationship. We believe the ASA should reflect the importance of developing these kinds of close working relationships with broadcasters in its prioritisation principles.

Channel 4 believes a closer relationship between broadcasters and the ASA would be extremely beneficial for all parties. We believe the ASA should provide a guiding hand for broadcasters attempting to work within the ASA's framework and comply with voluntary codes of practice, especially in incidents where the correct course of action may be open to interpretation. This guidance would provide broadcasters with the tools needed to better comply with codes, help deliver the ASA's ambition of making every UK ad a responsible ad and in doing so more effectively protect viewers from irresponsible or misleading ads.

## **Answers to Specific questions raised in the consultation.**

**1. Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable? If not, please explain why and provide your suggestions for improvement.**

Yes, Channel 4 believes the prioritisation principles and their accompanying explanations are clearly set out and understandable.

**2. Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

Yes, Channel 4 agrees with the principles laid out. However as outlined above, we believe it is important that the ASA seeks to work closely with broadcasters in attempting to deliver their ambition to make every UK ad a responsible ad, and we would like to see the ASA place a greater emphasis on the importance of this relationship in its prioritisation principles.

**3. Do you wish to provide any other comments?**

Channel 4 takes our responsibility for transmitting suitable advertisements to viewers of all our channels and services very seriously. We have introduced a number of internal procedures to help guarantee that the appropriate advertisements are shown to the appropriate viewers, and ensure that all of our adverts are matched against suitable programmes. Channel 4 is committed to developing a strong working relationship with the ASA and we believe that this kind of relationship is essential to ensuring that every ad that is broadcast is appropriate and responsible.

**December 2014**







ASA Prioritisation Consultation  
Advertising Standards Authority  
Mid City Place  
71 High Holborn  
London  
WC1V 6QT

24<sup>th</sup> November 2014

Dear Sir/Madam

## **Consultation on Prioritisation Principles**

### **Information about The DMA (UK) Ltd**

The Direct Marketing Association (UK) Limited (DMA) is Europe's largest trade association in the marketing and communications sector, with approximately 1,050 corporate members and positioned in the top 5% of UK trade associations by income.

The DMA represents both advertisers, who market their products using 1 to 1 marketing channels, including email, mobile, social media, advertising mail and inserts, and specialist suppliers of 1 to 1 marketing services to those advertisers - for example, advertising agencies, outsourced contact centres etc.

The DMA also administers the Mailing Preference Service, the Telephone Preference Service and the Fax Preference Service. On behalf of its membership, the DMA promotes best practice through its DMA Code, in order to maintain and enhance consumers' trust and confidence in the direct marketing industry.

The Direct Marketing Commission is an independent body that monitors industry compliance. Please visit our website [www.dma.org.uk](http://www.dma.org.uk) for further information about us.



## Consultation

The DMA welcomes this opportunity to contribute to this consultation on how the ASA will pursue its 5 year strategy – Having More Impact, Being More Proactive. The ASA's purpose over this period is to make advertisements responsible, setting its ambition to make every UK ad a responsible ad.

## Consultation Questions

### Question 1

**Do you consider that the Prioritisation Principles and their accompanying explanations are clearly set out and understandable?**

The DMA agrees that the Prioritisation Principles are clear and understandable. The accompanying explanations help illustrate how they will be applied on a case by case basis.

### Question 2

**Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

The DMA believes that the ASA fulfils its roles as lead authority on advertising and prime supporter of good UK advertisers and is confident in its aim to do these better. The DMA knows that funding for the ASA is not unlimited and is encouraged that although already believing themselves sufficiently resourced, cost effective and targeted, the ASA are striving to ensure they carry out their responsibilities as effectively as possible in terms of both their budget and time.

The DMA supports the prioritisation principles and the way these will be used by the ASA to best ensure UK advertising is responsible. The 4 principles working in co-operation should determine where best the ASA can direct its resources to upholding the Advertising Codes to protect consumers from misleading, harmful, offensive or irresponsible advertising practices.

The DMA are pleased to see the principles covering not only the harm or detriment that an ad may cause, but will also look at the risk of intervening or not and the impact such intervention may have. The ASA must have regard to whether their involvement in a case is likely to have the desired effect of preventing irresponsible marketing.



The DMA look forward to the introduction of the prioritisation principles in spring 2015 and will continue to work with the ASA to help make the advertising industry in the UK the best in the world.

**Home Retail Group Ltd**

PD/ASA/281114

28<sup>th</sup> November 2014

ASA Prioritisation Consultation  
Advertising Standards Authority  
Mid City Place  
71 High Holborn  
London  
WC1V 6QT

Dear Sirs

**Prioritisation Principles**

Home Retail Group is a leader in the retail sector, both on the high street and on line, and is more familiar through its brands of Argos, Homebase and Habitat.

We welcome the opportunity to comment on the Advertising Standards Authorities proposal to introduce new prioritisation principles to guide its activities.

We have provided feedback to the British Retail Consortium, to help in the compilation of their response, but would like to take the opportunity to emphasize a few key points.

The hope will be the use of principles will create more opportunities to resolve complaints informally, or where the issue is a sector wide issue drive better outcomes across the sector, rather than individuals being singled out in published adjudications.

To recap the principles are

- What harm or detriment has or might occur
- The likely risk of action versus inaction
- The likely impact of the intervention and
- What resource would be proportionate to the problem to be tackled.

By using principles the ASA can be flexible and reactive they do however allow a degree of subjectivity, by their very nature. The challenge will be for the ASA to apply these new principles when making prioritisation decisions in a consistent and predictable manner.

It is reassuring to see in the text that these principles are supported by some explanatory text, we would encourage this to be complemented by additional text to ensure prioritisation decisions are truly transparent.

Taking the individual principles

- What harm or detriment has or might occur

The potential for harm will vary depending in the type of advert, and with regards to commercial practices there needs to be a clear focus on the "average consumer" test set in EU law.

We would hope that there is clarity that the size of the business is not an overriding factor in the level of detriment or harm.

- The likely risk of action versus inaction

Taking a risk based approach to deciding on what action is appropriate is welcomed.

The ASA already is very good at closing a significant number of complaints at an early stage, and dealing with a number informally, which is to be applauded.

This indicates there is already a culture operating where inaction (taking no action at all) is a credible response to a complaint without creating a risk to consumers or to the market. We hope that the principles will create further opportunities for matters currently resolved formally to be dealt with formally (possibly with the assistance of other agencies – see the fourth principle)

- The likely impact of the intervention

Impact is important, and can be achieved through means other than the traditional model of complaint – investigation – adjudication.

This may have an impact on the advertiser but does not necessarily clarify the situation for the sector.

In addition the impact can be lost or reduced if it has taken a significant amount of time to reach a decision – particularly if the issue is seasonal or the advert has long since been withdrawn.

- What resource would be proportionate to the problem to be tackled?

The principles should signal a move to a very different way to interact with the market – achieving greater overall impact and managing risk can be achieved by alternative strategies.

We have always advocated that better outcomes would occur if the ASA were work more closely with the statutory regulators, in fact going further passing matters where there is a clear matter of mutual interest and legal definition to the “back stop” trading standards service, or other appropriate statutory regulator.

This would open greater possibilities of utilising routes to compliance such as primary authority, or sector wide guidance issued by bodies such as the Trading Standards Institute.

Business would support a model where the ASA made greater use of its enforcement partners. The criticism is that the ASA is too focused on the detail of individual complaints, investigations and adjudications rather than the broader picture.

Once again thank you for the opportunity to comment on the proposals

ASA Prioritisation Consultation  
Advertising Standards Authority  
Mid City Place  
71 High Holborn  
London  
WC1V 6QT



01 December 2014

Dear Sir/Madam

### Introduction

The IPA is the professional body for advertising, media and marketing communications agencies based in the United Kingdom. We have over 300 agency brands within our membership.

As a not-for-profit membership body, the IPA's role is two-fold: (i) to provide essential core support services to its corporate members who are key players in the industry; and (ii) to act as the industry spokesman.

### General Comments

We agree that the ASA should spend less time tackling ads that cause little detriment or harm and concentrate its resources in order to better protect consumers and reassure them that they can trust the ads that they see and hear.

It is important that the ASA prioritises its approach to its regulatory objectives in a balanced way, taking into account the rights of consumers not to be misled or harmed by advertising on the one hand and of advertisers to continue to develop new and innovative methods of responsible marketing communications on the other.

Our response is brief since the principles "are not exhaustive" and are intended to act only as a guide. We have not responded to each question but, rather, commented on the principles, generally.

### Principles

#### Principle 1: Harm or Detriment

"We will consider what **harm** or **detriment** has or might occur."

Both explanatory bullet points seem sensible. With regard to paragraph 4.3.1 (and as noted above), we support the principle that the ASA should take into account the rights of both consumers and advertisers.

With regard to paragraph 4.3.2 (and as noted above), we would ask that the ASA also considers the potential impact on new, innovative methods of marketing communications.

#### President

Ian Priest

#### Hon. Secretary

Tom Knox

#### Hon. Treasurer

Maggie Frost

#### Director General

Paul Bainsfair

#### Secretary

Tom Mott

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Principle 2: Risk

"We will balance the likely **risk** of taking action versus inaction"

We support the principle of considering this risk and welcome the ASA's approach of including advertisers as well as consumers in the prioritisation process. We also support the need to ensure that nothing undermines confidence in the ASA or the self-regulatory system.

We wonder whether explanatory paragraph 4.4.1 is sufficiently clear, however? For example, how will an ad or practice be identified as indicative of a trend towards bad practice? It also seems at odds with a key purpose of the principles - to focus resources where most needed - to take action if an ad or practice is limited in extent or impact and if the chances of having a decisive impact are slim.

Principle 3: Impact

"We will consider the likely **impact** of our intervention"

We note the reference to trade bodies and would welcome further opportunities to work with the ASA and assist in the regulatory process.

Principle 4: Resources

"We will consider what **resource** would be proportionate to the problem to be tackled."

We are unsure what determines a "successful outcome" and wonder whether it may be clearer to remove references to "successful outcome" in the first two bullet points. We do agree that the questions posed in the second and third bullet points are sensible, focussing on the ASA's own resources and whether or not it and/or another is the right organisation to deal with a particular issue.

Other Priorities

We support any initiative that will strengthen the credibility and integrity of advertising regulation and enable consumers to trust the self-regulatory system and therefore the ads that they see and hear.

**Conclusion**

The IPA supports the ASA's initiative to seek greater clarity in how it prioritises its workload so that it can focus its resources on matters of importance both to consumers and to the industry. Consumers must be able to rely on the ASA to protect their interests and advertisers and agencies must be able to trust the ASA to take a considered, sensible and balanced approach to how it manages its work. Doing so against a set of guiding principles should assist the ASA in allowing the industry to continue to innovate and flourish within the self-regulatory framework and in demonstrating to consumers that they can have faith in the industry and in advertising in the UK.

Yours faithfully

Richard Lindsay  
Director - Legal & Public Affairs



## **Response to ASA consultation – PRIORITISATION PRINCIPLES**

### **Response submitted by Mark Scott, Marketing Agency Director, on behalf of the National Trust.**

The National Trust is a registered charity with the core purpose of looking after special buildings and places for the benefit of the nation. We operate using advertising and mainstream marketing activity, and we have recently seen the growth of the ASA's influence into other areas of digital content.

#### **The reason for making this submission:**

The Trust has had limited direct contact with the ASA; the majority of our marketing being reviewed by Clearcast. However, we would welcome the opportunity to engage further with the ASA and to look for support and guidance.

As a large organisation caring for around 500 special places we have a central team that provides marketing and advertising advice to properties; it is really important that we give the clearest advice to those properties about how to interpret and apply guidance regarding digital content and marketing. We welcome flexibility for decision-makers but are concerned that without publically available guidance on how decisions are reached, there is a risk that the subjective opinion of one individual case handler at the ASA could have large knock-on consequences, with limited transparency.

We have therefore responded to this consultation as the guidance and application of the principles will need to be fully understood in order that we can work within the ASA's framework.

#### **1. Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable? If not, please explain why and provide your suggestions for improvement.**

The principles do appear to be clearly set out and form a logical structure for the ASA's approach.

We welcome the principle that requires the ASA to consider its own impact and resource alongside the concepts of risk and harm. There may be further dialogue or support that could be provided to an organisation or a business sector when the impact of knock-on consequences and impact are considered. Sometimes one advisory suggestion, based perhaps on one complaint, with little harm or risk, could have very significant ramifications for a business.

However, if the principles are to reflect the balance between the consumers and the benefit of advertising that is set out at the start of the document, on their own, they appear to lack the stated requirement that regulation should be "proportionate" and "pragmatic". The principles themselves may go some way to achieving this approach, in terms of considering harm / detriment, risk and impact, but the lack of overarching guidance or direction of approach leave the principles open for fairly subjective interpretation.

It is not clear from the consultation whether the principles are to be considered together, are capable of being applied on an individual basis, or could indeed departed from altogether.



The key issue will be in achieving consistency of approach in application of the principles between the different individuals reviewing each complaint or issue.

The additional supporting internal guidance for operational decision making will therefore be very important in achieving such consistency. It would seem sensible that the ASA should share this guidance publically in order for a greater understanding of how the principles are applied. So much of the interpretation of content will be subjective that further expansions of the key questions listed at Annex A would be helpful in allowing organisations to get a feel for how matters will be interpreted before developing their own content.

Clarity could be provided around what is considered “marketing communications” and what would be “other content”. This distinction is not clear in the consultation.

Clarity could also be provided over what would be considered “serious” – perhaps some examples or key issues that the ASA considers when assessing seriousness.

We note that other Regulators publish their “enforcement policies / principles” and allow discussions with those they are regulating about whether proposed action is in line with their policy or why they are taking a particular approach. Is it the intention of the ASA to do likewise and publish the final “principles” and guidance as their own enforcement “policy”?

**2. Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

As previously stated, we consider that the principles seem logical – but currently are still open to a wide degree of interpretation and application. This could leave them effectively as being for “illustrative purposes only” rather than providing a strong and clear organisational approach.

**3. Do you wish to provide any other comments?**

A clear prioritisation of approach is to be welcomed.

As the remit of the ASA has extended from “adverts” to more general marketing material perhaps the ASA could review the current 7 day time frame that is applied for all responses? The application of the “principles” set out may enable the ASA to take a more flexible approach to time frames depending on the risk / harm / impact assessment.

November 2014

# theNightingale Collaboration

## **Prioritisation Principles** *Advertising Standards Authority*

Alan Hennes  
Director

Maria MacLachlan  
Director

13 August 2014

[www.nightingale-collaboration.org](http://www.nightingale-collaboration.org)  
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## Introduction

This is our response to the ASA's consultation on its Prioritisation Principles.

The focus of the Nightingale Collaboration is on so-called complementary and alternative therapies and the claims they make to the public in their advertising.

We do this because we are concerned about the claims distorting the ability of members of the public — particularly those not familiar with health matters — to make fully informed decisions over their healthcare needs.

We have had considerable success in challenging the claims made by various practitioners, particularly on their websites through the ASA itself, the MHRA, Trading Standards and other statutory regulators.<sup>1</sup>

Complementary and Alternative Medicine (CAM) — or therapies — have, by definition, not been proven to work, or have been proven not to work. The ASA stands out as the only body that is national in scope and has both the remit and the will to oversee the advertising claims of a community of practitioners that is essentially defined by non-acceptance of the scientific evidence in respect of its practices.

In our view this work, especially since the extension of your remit to cover online advertising, has had a major impact on the claims made by alternative practitioners, at least in public. Substantial progress has been made, but the task is Sisyphean and the good work will almost certainly be undone overnight should the ASA deprioritise this particular area.

We are aware that several communities of alternative practitioners are actively lobbying for exactly this. This would be a disaster for the general public if they were given free rein to make whatever claims they liked with impunity.

We are responding to the consultation by addressing each of the principles identified by the ASA.

## Notes

1. *We use the term 'homeopathic medicine' to be consistent with the language used in various EU Directives and therefore by the Medicines and Healthcare products Regulatory Agency (MHRA). However, we believe this phrase and the word 'remedy' — as frequently used by homeopaths — are misleading terms, implying as they do, that they have medicinal or remedial effects when we understand there is no good evidence for any such effects. We believe this is consistent with the stance of the MHRA on the evidence.*
2. *We use the term 'complementary and alternative medicine' (CAM), as a short hand way of referring to a variety of products and services even though very few of them are related to any common definition of 'medicine'. We also believe that this phrase, the word 'treatment' and the word 'therapy' are all generally misleading in their own right as the products and services usually encompassed by these terms rarely have any good evidence that they are effective treatments or have any specific therapeutic value.*

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<sup>1</sup> "Results - The Nightingale Collaboration," accessed December 8, 2014, <http://www.nightingale-collaboration.org/results.html>.

## Principle one: Harm or detriment

We will consider what harm or detriment has or might occur.

To what extent are consumers or society experiencing, or likely to experience, serious or widespread detriment as a result of a potentially misleading, harmful, offensive or otherwise irresponsible ad or advertising practice?

To what extent does or might an ad or advertising practice undermine the rules of fair competition for advertisers?

In broad terms, the claims made by practitioners of CAM about helping/treating/curing medical conditions are misleading. There are, of course, a few exceptions to this, and these are generally listed by CAP in their Help Notes and guidance.

These claims can take many forms from outright, direct claims to be able to effectively cure specific medical conditions to more indirect and subtle, yet still clear, claims.

The potential to cause harm is certainly not less than for, say, a misleading advertisement for credit, but here, they fall into two categories: health harms and monetary detriment.

### Health harms

#### Direct health harms

There are widespread claims of safety which appear to breach rule 12.10 (Marketing communications must not suggest that any product is safe or effective merely because it is “natural” or that it is generally safer because it omits an ingredient in common use). This is endemic among acupuncturists, chiropractors, herbalists, naturopaths and homeopaths in particular.

Many alternative practitioners oppose any challenge to their practice on the grounds that it is “safe”, “gentle” or otherwise inherently harmless. They have no credible basis on which to make these claims, even if one considers only direct harms.

For example, there is a documented risk of death due to chiropractic manipulation of the neck,<sup>2</sup> a practice for which there is little good supporting evidence of benefit<sup>3</sup> yet chiropractors are adamant that there is no significant risk. But since they have no recognised systematic recording of adverse events<sup>4</sup> it is almost impossible to establish safety or accurately assess the risk—benefit balance.<sup>5</sup>

As another example, acupuncture is also promoted as safe despite evidence of adverse events such as cardiac tamponade<sup>6</sup> and infection.<sup>7</sup> Again, systematic reporting is absent.

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<sup>2</sup> E. Ernst, “Deaths after Chiropractic: A Review of Published Cases,” *International Journal of Clinical Practice* 64, no. 8 (July 1, 2010): 1162–65, doi:10.1111/j.1742-1241.2010.02352.x.

<sup>3</sup> B. M. Wand, P. J. Heine, and N. E. O’Connell, “Should We Abandon Cervical Spine Manipulation for Mechanical Neck Pain? Yes,” *BMJ* 344, no. jun07 3 (June 7, 2012): e3679–e3679, doi:10.1136/bmj.e3679.

<sup>4</sup> Edzard Ernst and Paul Posadzki, “Reporting of Adverse Effects in Randomised Clinical Trials of Chiropractic Manipulations: A Systematic Review,” *The New Zealand Medical Journal* 125, no. 1353 (April 20, 2012): 87–140.

<sup>5</sup> E Ernst, “Adverse Effects of Spinal Manipulation: A Systematic Review,” *Journal of the Royal Society of Medicine* 100, no. 7 (July 2007): 330–38.

<sup>6</sup> Edzard Ernst and Junhua Zhang, “Cardiac Tamponade Caused by Acupuncture: A Review of the Literature,” *International Journal of Cardiology* 149, no. 3 (June 16, 2011): 287–89, doi:10.1016/j.ijcard.2010.10.016.

Food supplements and herbal products are another area where misleading claims are very frequently seen, yet there are many instances of adulteration with pharmaceutical drugs and contaminated by heavy metals.

Unlike the harms caused by advertisements for gambling or loans, health advertisements that discourage medical treatment can result in serious and possibly permanent harm to health, including unnecessary worry and concerns for health that are not based on real health conditions.

As an example, this story taken from the Daily Telegraph discusses an advertiser against whom there have been several adjudications:<sup>8</sup>

It was a devastating diagnosis. In less than 10 minutes, the Harley Street specialist had taken a pinprick of Wendy Roberts's blood, examined it under a powerful microscope and concluded that she probably had cancer.

Miss Roberts, 40, was distraught: she had been feeling unwell and Errol Denton's apparently expert opinion confirmed her worst fears.

"He told me my blood was dirty; he said it was toxic and said there was mould in it. He said I have markers for diabetes and he had only ever seen blood like mine in a cancer patient," Miss Roberts said.

She had paid £195 for the consultation and Denton's conclusions were crippling. "I just thought I had cancer. I walked out of his clinic and into Harley Street. I could hardly breathe. I was shaking all over and I began crying."

Denton was a smooth talker and Miss Roberts did not doubt his credibility. Operating out of No 1 Harley Street, he promised that if she signed up to his treatment plan, he could cure her "toxic" blood.<sup>9</sup>

Would this patient have sought the services of the practitioner, had he not advertised them? Would it be right to allow the advertising claims of this practitioner to go unchallenged? We would argue not. But claims such as the ones made by this advertiser are rife and to not deal with them leaves members of the public open to the harms and detriment faced by Ms Roberts.

In terms of the claims made about various CAMs, we do not need to point out the prevalence and seriousness of the claims that are currently being made.

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<sup>7</sup> NHS Choices, "Acupuncture-Transmitted Infections," November 9, 2011, <http://www.nhs.uk/news/2010/03March/Pages/Acupuncture-transmitted-infections.aspx>.

<sup>8</sup> "ASA Adjudication on Fitalifestyle Ltd - Advertising Standards Authority," November 2, 2011, [http://asa.org.uk/Rulings/Adjudications/2011/11/Fitalifestyle-Ltd/SHP\\_ADJ\\_156679.aspx](http://asa.org.uk/Rulings/Adjudications/2011/11/Fitalifestyle-Ltd/SHP_ADJ_156679.aspx); *ibid.*; "ASA Adjudication on Fitalifestyle Ltd - Advertising Standards Authority," June 1, 2011, [http://asa.org.uk/Rulings/Adjudications/2011/6/Fitalifestyle-Ltd/TF\\_ADJ\\_50552.aspx](http://asa.org.uk/Rulings/Adjudications/2011/6/Fitalifestyle-Ltd/TF_ADJ_50552.aspx); "ASA Adjudication on Live Blood Test - Advertising Standards Authority," February 27, 2013, [http://asa.org.uk/Rulings/Adjudications/2013/2/Live-Blood-Test/SHP\\_ADJ\\_214202.aspx](http://asa.org.uk/Rulings/Adjudications/2013/2/Live-Blood-Test/SHP_ADJ_214202.aspx); "ASA Adjudication on Live Blood Test - Advertising Standards Authority," April 24, 2013, [http://asa.org.uk/Rulings/Adjudications/2013/4/Live-Blood-Test/SHP\\_ADJ\\_218096.aspx](http://asa.org.uk/Rulings/Adjudications/2013/4/Live-Blood-Test/SHP_ADJ_218096.aspx); "ASA Adjudication on Live Blood Test - Advertising Standards Authority," October 13, 2010, [http://asa.org.uk/Rulings/Adjudications/2010/10/Live-Blood-Test/TF\\_ADJ\\_49176.aspx](http://asa.org.uk/Rulings/Adjudications/2010/10/Live-Blood-Test/TF_ADJ_49176.aspx).

<sup>9</sup> Robert Mendick, "Duped by the 'Blood Analyst' Who Says He Can Cure Cancer," March 30, 2014, sec. Health, <http://www.telegraph.co.uk/health/10732023/Duped-by-the-blood-analyst-who-says-he-can-cure-cancer.html>.

The ASA's ruling against the Society of Homeopaths<sup>10</sup> is particularly significant, highlighting the fact that insupportable claims are endemic within certain practitioner communities, a point further reinforced by the number of individual adjudications against chiropractors.

The Society of Homeopaths clearly does not actually accept the reality-based view of its claims — a number of the adjudicated claims appear to have been presented as fact to a recent government inquiry.<sup>11</sup>

To relax vigilance at a time when such claims are only beginning to be removed, and when the advertisers clearly still believe them to be valid, would be to risk the significant progress made in recent years.

### Indirect health harms

Indirect health harm is also inadequately measured — only the most striking cases are publicised, such as Cameron Ayres, who died aged six months because his parents chose homeopathy for a treatable condition,<sup>12</sup> Russell Jenkins who died of gangrene after trying to cure an infection with honey,<sup>13</sup> and Sarah Parkinson, who died in 2003 after using yoga, meditation and acupuncture instead of chemotherapy for breast cancer.<sup>14</sup>

We cannot tell whether advertising influenced any decisions in these particular cases, but the point is well made that many CAM therapies are far removed from the safe image many adverts would lead us to believe.

But indirect health harm is not restricted to failure to treat. A subgroup of dental practitioners promote the idea, unsupported by good evidence, that dental amalgam *in situ* poses a risk to the health of the patient. This can result in costly, painful and expensive treatment, to the detriment of the patient.<sup>15</sup> Such claims are openly advertised by practitioners.

Some diseases that alternative practitioners claim to diagnose and treat do not even exist.

Adrenal fatigue, chronic Lyme disease, Candida overgrowth and several other conditions, which are entirely rejected by the medical profession and for which no objective evidence exists, are nonetheless claimed to be diagnosed and treated by many CAM practitioners. This is a particularly pernicious form of false advertising: the CAM practitioner sits in direct opposition to the patient's doctor, who will usually have no cure for the symptoms (which tend to be generic "symptoms of life"). The CAM practitioner offers diagnosis and cure — at a price and therefore to the detriment of the consumer.

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<sup>10</sup> "ASA Adjudication on Society of Homeopaths - Advertising Standards Authority," July 3, 2013, [http://asa.org.uk/Rulings/Adjudications/2013/7/Society-of-Homeopaths/SHP\\_ADJ\\_157043.aspx](http://asa.org.uk/Rulings/Adjudications/2013/7/Society-of-Homeopaths/SHP_ADJ_157043.aspx).

<sup>11</sup> "Antimicrobial Resistance – Submission from the Society of Homeopaths," November 2013, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee/antimicrobial-resistance-amr/written/3317.html>.

<sup>12</sup> "Homeopaths Warn of Further Tragedies," *BBC*, April 5, 2000, sec. Health, <http://news.bbc.co.uk/1/hi/health/702699.stm>.

<sup>13</sup> "Healer Dies after Letting Cut Foot Rot," *Metro News*, accessed December 8, 2014, <http://metro.co.uk/2008/11/17/healer-dies-after-letting-cut-foot-rot-150526/>.

<sup>14</sup> "Comic Paul Merton's Wife Dies," *BBC*, September 24, 2003, sec. UK, <http://news.bbc.co.uk/1/hi/uk/3137446.stm>.

<sup>15</sup> "Dentist Escapes Being Struck off," accessed December 8, 2014, <http://www.bedfordtoday.co.uk/news/dentist-escapes-being-struck-off-1-1093831>.

An independent review of health claims is particularly important as the users of these services tend to be very loyal to their practitioners<sup>16</sup> and engage in “benefit finding”, remembering good and not bad outcomes<sup>17</sup> but when they become seriously ill they suffer materially.

For example, those who contract cancer will often try alternative remedies first, thus delaying treatment. They present with more advanced disease, and reject proven therapies or substitute them for alternative ones, meaning that they fare worse even after controlling for later presentation.<sup>18</sup> They believe they are less likely to die than users of conventional treatments,<sup>19</sup> but the treatments they substitute are usually indistinguishable from no treatment at all.<sup>20</sup>

Given the loyalty of alternative medicine users it is hard to quantify the extent of direct harm, and this tends to become evident only through proxy markers.

One of these would be cases of “carcinoma *en cuirasse*”, extensive necrotic metastatic breast cancer that is a consequence of untreated malignancy. This was well documented in the early to mid-20<sup>th</sup> Century<sup>21</sup> but was unknown by the 1980s thanks to effective surgical intervention. Cases are again being reported in the literature in particular where patients have substituted alternative remedies for evidence-based adjuvant treatments after surgery,<sup>22, 23</sup> both by Dr David Gorski, a surgical oncologist and medical academic specialising in breast cancer). Refusal of surgery strongly impairs survival,<sup>24</sup> an entirely unsurprising finding.

Thus while the harm may seem abstract, it is nonetheless real and potentially extremely serious.

### Misleading information on conventional treatments

We frequently find information on the websites advertising CAM that give information on various conventional medical conditions and treatments. One of the most frequent of these is information on vaccines. These frequently purport to be simply giving advice — sometimes claiming to be entirely neutral. This advice, however, is frequently not in line with that

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<sup>16</sup> Forey J Furnham, A, “The Attitudes, Behaviors and Beliefs of Patients of Conventional vs. Complementary (alternative) Medicine.,” accessed December 8, 2014, <https://www.ncbi.nlm.nih.gov/pubmed/8071452>.

<sup>17</sup> “Complementary and Alternative Medicine Use and Benefit Finding among Cancer Patients.,” accessed December 8, 2014, <https://www.ncbi.nlm.nih.gov/pubmed/23777242>.

<sup>18</sup> “Alternative Cancer Cures: ‘Unproven’ or ‘Disproven’?,” accessed December 8, 2014, <https://www.ncbi.nlm.nih.gov/pubmed/15061600>.

<sup>19</sup> Lucy K Helyer et al., “The Use of Complementary and Alternative Medicines among Patients with Locally Advanced Breast Cancer – a Descriptive Study,” *BMC Cancer* 6 (February 21, 2006): 39, doi:10.1186/1471-2407-6-39.

<sup>20</sup> Juliann Saquib et al., “Prognosis Following the Use of Complementary and Alternative Medicine in Women Diagnosed with Breast Cancer,” *Complementary Therapies in Medicine* 20, no. 5 (October 2012): 283–90, doi:10.1016/j.ctim.2012.04.002.

<sup>21</sup> GEORGE H and THOMAS H, “Carcinoma En Cuirasse,” *A.M.A. Archives of Dermatology and Syphilology* 62, no. 5 (November 1, 1950): 651–54, doi:10.1001/archderm.1950.01530180040008.

<sup>22</sup> “On Refusing Adjuvant Therapy for Cancer...this Time without Alternative Medicine,” *Respectful Insolence*, accessed December 8, 2014, <http://scienceblogs.com/insolence/2013/10/16/on-refusing-adjuvant-therapy-for-cancer-this-time-without-alternative-medicine/>.

<sup>23</sup> “Alternative Medicine Use and Breast Cancer (2012 Update),” *Science-Based Medicine*, accessed December 8, 2014, <http://www.sciencebasedmedicine.org/alternative-medicine-use-and-breast-cancer-2012-update/>.

<sup>24</sup> Helena M. Verkooijen et al., “Patients’ Refusal of Surgery Strongly Impairs Breast Cancer Survival,” *Annals of Surgery* 242, no. 2 (August 2005): 276–80, doi:10.1097/01.sla.0000171305.31703.84.



published by the NHS, etc. Nor are vaccines the only area where misleading advice and information is provided in order to promote the practitioner's business.

It is the stance against vaccinations that can cause irreparable and long-term harm, and this is far more likely to fall on innocent children rather than adults making what they believe to be informed healthcare choices for themselves. But these indirect harms can go a stage further and impact seriously on others, particularly in terms of a diminished herd immunity.

### Monetary detriment

There is no doubt some CAM products are relatively inexpensive. For example, a tube of homeopathic medicine from a health shop may only cost £5. However, if a member of the public has made the purchase on the basis of misleading advertising claims, that is still a financial loss to the customer. In the words of the Consumer Protection from Unfair Trading Regulations 2008, this misleading advertising may cause or could be likely to cause "the average consumer to take a transactional decision he would not have taken otherwise". In doing this, the consumer has suffered financially.

But the products and services provided by CAM practitioners have far greater financial cost implications. For example, a session with a homeopath or a reiki practitioner may cost £50 to £100 per session. Frequently, many more than one session would appear to be required, multiplying the overall cost.

Many practitioners (particularly naturopaths) sell food supplements at significantly greater cost than is available on the high street — and the evidence shows they are rarely required.

We are also aware that some devices sold as having a medical function can cost several thousand of pounds. For instance, the device that was the subject of a complaint from us in 2012 sells for in excess of €3,000.<sup>25</sup>

Thus, the financial detriment from misleading advertising can be substantial.

### Principle two: Risk

We will balance the risk of taking action versus inaction.

What risk is there to consumers, advertisers or wider society from taking action or not taking action?

Does an ad or advertising practice risk undermining consumer or industry confidence in the ASA or wider regulatory system?

Much of what we have said under Principle 1 applies here and we believe we have illustrated the consequences of inaction against claims made by CAM practitioners.

Additionally, you will be aware of a number of individuals and organisations who have started several campaigns against the ASA, citing primarily that the ASA has no statutory powers to investigate, never mind impose sanctions.

If the ASA was to deprioritise CAM in any way, we believe that this movement will grow substantially stronger and more widespread, making compliance even more difficult in the future.

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<sup>25</sup> "ASA Adjudication on Radiant Life Technologies - Advertising Standards Authority," December 12, 2012, [http://asa.org.uk/Rulings/Adjudications/2012/12/Radiant-Life-Technologies/SHP\\_ADJ\\_210428.aspx](http://asa.org.uk/Rulings/Adjudications/2012/12/Radiant-Life-Technologies/SHP_ADJ_210428.aspx).

## Principle three: Impact

We will consider the likely impact of our intervention.

What would be the likely impact of the ASA intervention or non-intervention?

With the exception of the Cancer Act, which has been used in a handful of cases recently,<sup>26</sup> the CAP Code is essentially the only regulation that is enforced against the problematic claims of CAM practitioners.

The impact is clear. Chiropractors, for example, required investigation of any practitioner whose claims had been adjudicated as misleading by the ASA. As a result, a quarter of all chiropractors ended up under investigation, and all members of some associations were advised to remove all claims from their websites.<sup>27</sup> The ASA effectively established a benchmark used by the General Chiropractic Council as a measure of fitness to practice. This is not a small achievement.

A review of one particular alternative health magazine, *What Doctors Don't Tell You*, in late 2012, identified 54 adjudicated breaches of the CAP code and a number of others that were subsequently informally resolved. A review of the latest issue finds only a handful of breaches in the published advertisements, but several link to websites that have been adjudicated as misleading and have yet to change their content.

The impact of the ASA's work has been to materially reduce the prevalence of misleading claims in this publication, but we believe there is substantial work still to be done in removing these claims from websites, point of sale material and trade shows.

The ASA is having a significant impact on the prevalence of misleading claims, and the publicity given to misleading claims.<sup>28</sup>

A search of the adjudications database for the 12 months commencing 4 December 2013 shows 48 Upheld or Partly Upheld out of a total of 56 adjudications under section 12 of the CAP code 2012, dealing with medical claims, and a further 142 informally resolved cases. Of these 10 adjudications and 68 informally resolved cases fall under CAP code 12.2, discouraging essential treatment. 42 adjudications and 136 informally resolved cases concern failure to substantiate medical claims (section 12.1), and 4 adjudications and 5 informally resolved for section 12.6 (falsely claiming to cure disease). There will be some advertisements that fell under more than one of these three sections.

The same period for the year 2012-2013 is 61 (of 71) Upheld or Partially Upheld rulings and 176 informally resolved.

Clearly Section 12 is not the only section which applies, many claims are also adjudicated under other sections including 3.1 (misleading), 3.6 (opinion presented as fact), 3.7 (substantiation) and 13 (weight loss and diet claims).

The impact, then is, that three quarters of all medical claims in breach of Section 12 of the CAP are removed by the advertiser at the request of the ASA, 86% of claims requiring adjudication under section 12 are Upheld, and the volume of these complaints handled has reduced by a fifth.

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<sup>26</sup> Jo, "Stuff That Occurs to Me: Cancer Act 1939 Convictions in the UK," accessed December 8, 2014, <http://brodiesnotes.blogspot.co.uk/2014/10/cancer-act-1939-convictions-in-uk.html>.

<sup>27</sup> Martin Robbins, "Quacks Fly in All Directions as Alternative Medicine Regulation Fails," *The Guardian*, accessed December 8, 2014, <http://www.theguardian.com/science/2010/apr/16/quacks-alternative-medicine-regulation>.

<sup>28</sup> Martin Robbins, "Osteopathy for Asthma? The Results May Take Your Breath Away," *The Guardian*, accessed December 8, 2014, <http://www.theguardian.com/science/the-lay-scientist/2011/jun/15/2>.

This suggests an atmosphere where practitioners are becoming increasingly aware of the CAP, are largely responsive to the ASA in amending such claims, and where a large majority of claims are upheld or accepted without challenge.

Members of science advocacy organisations have been highlighting similar claims for a long time, but prior to the extension of remit by the ASA we can trace no evidence of any significant success in having them amended other than in print media, where the ASA was active.

We believe that the activity of the ASA has been transformative in this area, to the direct and tangible benefit of the public.

In the future, we can only see the ASA's positive influence in CAM advertising to increase and widen, but deprioritising CAM would undo all the improvements outlined above.

## Principle four: Resources

We will consider what resource would be proportionate to the problem to be tackled.

What are the complexities associated with delivering a successful outcome?

Are the resources that are likely to be required for a successful outcome proportionate to the problem and the likely impact on consumers, society, or advertisers?

Is the ASA the right body to act; alone, in partnership or not at all?

There are two distinct strands to the problem of unsupportable claims by alternative practitioners. One is to reduce their prevalence and prominence, something in which the ASA has a proven track record. The other is in enforcement against recalcitrant and recidivist advertisers.

The approach taken by the ASA, for example in respect of homeopathy, establishing “lead cases” and publishing clear and unambiguous guidance, allows subsequent cases to go direct to enforcement without the need for costly and time-consuming investigations.

With those rulings in place, we see the ASA's strategy of working with trade bodies and individual CAM practitioners to ensure sector-wide compliance as an effective route and a good use of limited resources. We hope that this model will continue and that further and sustained progress will be made.

There remains the issue of those practitioners who simply do not accept the reality-based view of their claims. Realistically, there is nothing short of legal action that will stop true believers in some of the more outlandish claims from publishing them. We have seen this in the cases of Stephen Ferguson and Errol Denton, both subject to adjudications and at some point listed as non-compliant online advertisers, both of whom were successfully prosecuted in 2014 for offences under the Cancer Act 1939.

It is striking that this Act, which has a “bright line” rule forbidding any advertisement to treat or cure cancer, is essentially the *only* legislative instrument that has been enforced against persistent publishers of misleading claims.

Part of the reason for this is the diffuse nature of enforcement: responsibility for consumer protection from unfair trading practices rests with Trading Standards, and this is organised at a local, not a national level. In an age of online advertising it can be hard to track down the actual location from which a given product or service is being offered. Additionally, communication and coordination between the various TS offices is not what it needs to be to be.

The ASA's partnership with Trading Standards offers, we believe, the first real hope of a unified national approach to enforcement of the law in respect of false claims by online advertisers generally and alternative practitioners in particular. It would be a shame to see this opportunity lost before any meaningful number of enforcement actions had been initiated.

If the workload is heavy, it is only because nobody else appears to be stepping up to the mark.

We do understand that the ASA is funded mostly by print and broadcast advertisers. Most alternative practitioners barely advertise in these media, and it would be understandable this has resulted in a disproportionately heavy workload given that these are advertisers who are unused to the rules and the fact that “legal, decent, honest and truthful” must be held to objective, not subjective standards. This is an argument for a revision to the funding methodology, but we believe that it would be a mistake to abandon or scale back the enterprise.

In terms of the ASA’s effectiveness, we do believe that stronger action taken against persistent or stubborn offenders would reap rewards in terms of persuading others to take their responsibilities seriously. We believe this would have desirable repercussions across the whole CAM sector and, in the long run, reduce the ASA’s workload.

We believe that, even with the agreement with Camden TS, the ASA does not have sufficient powers to properly deal with CAM advertisers. We would like to see a significant increase in the range and severity of sanctions available to the ASA, but appreciate this is outwith the scope of the present consultation. However, we would urge the ASA to investigate further avenues that could impact on compliance in this sector.

## Conclusion

Given the above, we recommend that the ASA make regulation of claims made by CAM practitioners a top priority and reject any suggestions that it be de-prioritised.

## Acknowledgements

We would like to thank Guy Chapman for his help in writing this response.

I write as CEO of the outdoor advertising trade body.

I am fully supportive of the strategy going forward.

Treating every complaint equally, while laudable, misses the point that some are far more relevant than others. And some advertisements potentially more harmful.

For what it is worth, the Outdoor industry generally is a very big fan of the ASA and finds them both fair and reasonable. We work closely and collaboratively with them. They are a very “grown-up” organisation and we respect the maturity of the positions they take, not being too reactive and always taking a measured viewpoint. We are routinely kept informed of the progress of outdoor complaints and are informed of the reasons for their decisions.

I am available for additional followup questions if you would wish to pursue that.

Best

Mike

**Mike Baker, CEO**



3rd Floor, 43-45 Dorset Street, London W1U 7NA





**PORTMAN GROUP RESPONSE TO  
ASA CONSULTATION ON PRIORITISATION PRINCIPLES**

**NOVEMBER 2014**

The Portman Group (PG) is the responsibility body for drinks producers in the UK. Our role is to:

- **Lead** on best practice on alcohol social responsibility through the actions of our member companies
- **Regulate** the promotion and packaging of alcoholic drinks sold or marketed in the UK through our Code of Practice
- **Challenge** and encourage the industry to market its products responsibly.

The Portman Group is a not-for-profit organisation funded by eleven member companies<sup>1</sup> who represent every sector of drinks production and collectively account for more than half the UK alcohol market.

**Q1 – Do you consider that the prioritisation principles and their accompanying explanations are clearly set out and understandable?**

**If not, please explain why and provide your suggestions for improvement.**

PG supports the proposal for prioritisation principles based on the number of complaints the ASA receives and the number of cases this generates each year. We welcome the intention that these principles are to strengthen the complaints system rather than to weaken it. PG recognises that an effective regulator responds to changes in society and consumer concerns in order to be fit for purpose.

The explanations, at this stage of consultation, are very high level but are clearly laid out and understandable. However, it is evident that the principles are very dependent on the definitions that will be created and how these are applied.

**Q2 – Do you agree with the prioritisation principles? If not, please explain why and provide any suggestions you may have for different principles or approaches.**

PG agrees with the proposed four prioritisation principles. We are also supportive of the concept that the ASA should not be bound by these principles alone and can take action to strengthen the credibility and integrity of advertising regulation, particularly those with systemic importance. We feel strongly that every complaint should be considered on its own merits, especially where a breach of the Code(s) has been identified; the principles should guide and not dictate the work of the ASA.

We are particularly interested in the proposal that these prioritisation principles will allow the ASA to spend more time analysing complaints trends and therefore provide insight as to how to deal with issues on a sector basis.

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<sup>1</sup> AB InBev, Bacardi Brown-Forman Brands, Carlsberg, Diageo, Heineken, Mast-Jagermeister UK Ltd, Molson Coors, Pernod Ricard, SAB Miller, SHS Drinks, Treasury Wine Estates

ASA reports show that alcohol complaints and case trends for 2012 and 2013 have been in decline. Alcohol as a product category, and by extension its advertising and marketing, is subject to its own set of advertising rules within both the CAP and BCAP Code. We seek clarification as to how the ASA will create criteria for a sector which from your own data is not at the forefront of consumer concern at the moment, but is nonetheless subject to an intense level of scrutiny from external stakeholders compared to some other sectors that are covered by the CAP and BCAP Codes.

**Q3 – Do you wish to provide any other comments?**

4.5.1 of the document details how the ASA may use more strategic action, for example, by providing advice and training events to create change in an advertising sector practice. PG would like to offer assistance if the need ever arises for the alcohol sector.

**November 2014**

## Response to the Advertising Standards Authority (ASA) consultation on 'Prioritisation Principles'

December 2014

### 1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care<sup>1</sup> promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent statutory body, accountable to the UK Parliament, and report annually to the National Assembly for Wales.
- 1.2 As part of our work we:
- Conduct research and can advise Welsh Ministers on improvements in professional regulation<sup>2</sup>
  - Promote *Right-touch regulation* and publish papers on regulatory policy and practice
  - Accredit voluntary health and care occupational registers to improve consumer protection and raise standards
  - Oversee nine health and care professional regulators<sup>3</sup> and provide annual reports on their performance to the UK and Scottish Parliaments and the Northern Ireland and Wales Assemblies
  - Conduct audits and investigations and can appeal regulators' fitness to practise cases to the courts if sanctions are unduly lenient and it is in the public interest
- 1.3 More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).
- 1.4 We welcome the opportunity to respond to this ASA consultation on its proposals to introduce prioritisation principles.

### 2. Prioritisation Principles and key questions

- 2.1 We support ASA's intent to establish prioritisation principles to be considered when allocating its regulatory resources. We particularly welcome the risk assessment approach which is being proposed and the focus on the outcome (impact) of the ASA's intervention. This is in line with our principles of Right-

<sup>1</sup> The Professional Standards Authority for Health and Social Care was previously known as the Council for Healthcare Regulatory Excellence (CHRE)

<sup>2</sup> We regularly provide advice to the Secretary of State for Health and Ministers on a UK wide basis through a joint commissioning arrangement led by Department of Health

<sup>3</sup> General Chiropractic Council, General Dental Council, General Medical Council, General Optical Council, General Osteopathic Council, General Pharmaceutical Council, Health and Care Professions Council, Nursing and Midwifery Council, Pharmaceutical Society of Northern Ireland.



touch regulation (2010)<sup>4</sup>. 'Right touch regulation is based on a proper evaluation of risk, is proportionate and outcome focussed; it creates a framework in which professionalism can flourish and organisations can be excellent. Excellence is the consistent performance of good practice combined with continuous improvement. The first law (and only) of right-touch regulation is to use only the regulatory force necessary to achieve the desired effect.

- 2.2 In relation to the application of ASA's resources we would suggest that CAP Codes and other relevant guidance in relation to advertising of health care could be reviewed in order to consider the requirement for evidence based on randomised controlled trials. We believe that such requirement is outdated and not in line with a risk assessment approach. For example, the Help Note on Substantiation for Health, Beauty and Slimming Claims currently does not reflect the standards offered by organisations that hold an Accredited Register (see more information about our Accredited Registers Programme below).
- 2.3 During the development of this programme and following consultation we considered carefully the level and type of evidence we would accept as underpinning the practice of an occupation. In line with the principles of Right-touch regulation (2010) we considered the nature and types of interventions, care and treatments that might be offered by unregulated occupations likely to seek accreditation and the type and extent of risk. We concluded that different forms of evidence were acceptable.
- 2.4 It is a requirement under our programme that organisations define the knowledge base underpinning their occupation and make this explicit to the public (Standard 6). Practitioners on an accredited register practise in accordance with standards of competence based on that knowledge base and are subject to a complaints procedure.
- 2.5 In conclusion, we believe that by ensuring that the Codes enforced by ASA are up to date and based on a proper risk assessment would contribute to ASA's aim to improve efficiency in the application of its resources. It also links to ASA's commitment to carry out more research in its field to improve regulation, have more impact and be more proactive.

### **3. The Accredited Registers Programme**

- 3.1 We explain here the Professional Standards Authority's Accredited Registers Programme which we referred to above.
- 3.2 The programme for health and care occupational registers began in January 2013 shortly after we became empowered to operate such a programme (by the commencement of section 229 of the Health and Social Care Act 2012).
- 3.3 The programme exists to provide assurance that accredited registers are well run and require their registrants to meet high standards of personal behaviour, technical competence and, where applicable, business practice. Furthermore

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<sup>4</sup> Right-touch regulation (2010) CHRE <http://www.professionalstandards.org.uk/library/document-detail?id=a3ea5638-fadf-400e-8635-47bf4b028a1f>

we require accredited registers to recognise each other's disciplinary decisions and reports concerns about their registrants to relevant agencies. This means that the perceived loophole by which registrants may leave a voluntary register and continue to practice may be avoided by only employing or using the services of people who are on an accredited register.

- 3.4 In order to be accredited under the programme registers have to meet demanding standards in the following areas: governance, setting standards, education and training, managing the register, providing information, risks and complaints handling. Organisations holding the registers have to provide evidence and demonstrate to the Authority that they meet the Accreditation Standards. To ensure that these standards continue to be met, accreditation is reviewed annually.
- 3.5 When accredited, organisations holding the registers are able to display the Authority's registered symbol (image below) and will be listed in the Accredited Registers Directory on the Authority's website. Since the scheme launched in January 2013, 16 registers have been accredited covering 24 occupations and approximately 50,000 registrants.



#### **4. Further information**

- 4.1 Please do not hesitate to contact us if you would like to discuss any aspect of this response in further detail. You can contact us at:

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