

CASE HANDLING PRINCIPLES BETWEEN THE UK ADVERTISING STANDARDS AUTHORITY (ASA) AND THE DEPARTMENT FOR THE ECONOMY NORTHERN IRELAND (DFE)

This document outlines practical working arrangements between the ASA and the DfE, which agrees to provide a legal backstop for the ASA in relation to: misleading, aggressive or otherwise unfair non-broadcast advertising impacting Northern Ireland, which falls within the scope of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and any amendments; and misleading advertising that falls within the scope of the Business Protection from Misleading Marketing Regulations 2008 (BPRs) and any amendments; which may also encompass advertising that is fraudulent within the meaning of the Fraud Act 2006.

Grounds for an ASA referral to the DfE

1. For most cases that fall within the ASA's remit, the consumer interest is likely to be best served by the ASA. If the ASA is unable to achieve compliance with the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) and it is a case within the scope of the DfE's backstop arrangements impacting Northern Ireland, it can consider referring the matter to the DfE. When the ASA is considering making such a referral, it will approach the DfE first to discuss whether a referral is appropriate.

Referral and follow-up process

2. If the DfE is best placed to deal with the issue both parties will discuss the nature of the case, the supporting evidence held and the broader market implications.
3. In the course of the ASA referring a company to the DfE the following shall occur:
 - a) The ASA must have completed its own route to compliance through appropriate sanctions before a case is referred.
 - b) Both parties will discuss and agree what materials will be submitted to support the referral and the *referral template* will be compiled by the ASA.
 - c) Once the referral has taken place, all subsequent decisions about how the referral is progressed will be taken by the DfE (with its own legal advice as necessary and appropriate). The ASA will be informed of the progress of any action that the DfE decides to take, and the eventual outcome. To this end, the DfE will provide a monthly summary report to the ASA in writing

- d) The DfE will first review the referral and determine whether the matter can be dealt with by bringing the trader back into compliance by means of direct contact with the advertiser. Alternatively, the DfE might decide to initiate a website suspension application.
- e) Should these steps not be possible or appropriate, the DfE shall make arrangements for funding, and confirm to the ASA when this is in place.
- f) Where the advertiser is in a primary authority partnership¹ (PAP), the DfE will adhere to the Regulators' Code² and the ASA will adhere to the spirit of the Code..
- g) The ASA will not take any further action against the referred party that might reasonably be regarded as prejudicing the DfE's or another body's investigation. The ASA will refer on any subsequent substantive communications with relevant parties to the DfE and will refer on any new similar complaints. On receipt of new complaints against the same advertiser, the complainant will be notified that their complaint will be passed to the DfE but that they may not hear directly from a Trading Standards officer.
- h) The DfE will provide the ASA with progress updates for referrals on a monthly basis and in writing.
- i) When the DfE is considering asking an advertiser to sign undertakings (or other similarly binding assurances) it shall discuss the content and application of those undertakings with the ASA before they are signed but the final wording used will be determined by the DfE.
- j) The DfE will communicate the final regulatory outcome to the ASA in advance of any public announcement, so both organisations' Communications teams can liaise effectively.

For cases that cannot be referred to the DfE

4. In the event that a case cannot be progressed, the DfE will first consider whether an alternative route not previously identified (e.g. referral to the Competition and Markets Authority (CMA) for cases with broader market implications) might be available. Having explored options, and on identifying when one is available, the DfE will ensure that it will contact the ASA outlining the course of action it has decided to take (with appropriate contact details and any further instructions).
5. When the DfE passes the case on to an alternative backstop better placed to deal with the case (e.g. CMA), that other regulator should be advised by the DfE to liaise directly with the ASA and provide regular progress updates on the investigation.

¹ <https://primaryauthorityregister.info/par/index.php/home>

² <https://www.gov.uk/government/publications/regulators-code>

6. If, in the opinion of the DfE, a case cannot be progressed, then this decision will be notified to the ASA and a course of action will be agreed upon. If the case cannot be progressed and there is no alternative means of referral available, the DfE will inform the ASA in writing of the reasons for this. The case will then be reviewed if new evidence comes to light or new complaints are received by the ASA. If on review the case is suitable for adoption then this will be dealt with as per 2 and 3 above.

Communications

7. For some referral cases there is a possibility of media interest. Where this occurs, the ASA, and DfE will discuss and agree a communications policy to ensure effective and aligned communication throughout the referral process. Critical points in the process are likely to be: the referral itself, the release of any signed undertakings, the outcome of any court case, the point at which responsibility for the advertiser's marketing communications is handed back to the ASA.

Other processes

8. For cases that result in the DfE (or nominated alternative organisation) receiving signed undertakings (or other similarly binding assurances), ASA shall monitor compliance with those undertakings and inform the DfE (or the nominated alternative organization) when there is evidence of serious or persistent non-compliance. At that point the DfE shall determine what further action it can take to ensure future compliance.

Freedom of Information Requests

9. The Freedom of Information Act gives persons the right to ask any public sector organisation for all the recorded information they have on any subject, this includes information held by Local Authority organisations.
10. It is anticipated that much of the information passed to the DfE by the ASA will fall within one of the following exemptions under the FOIA and will therefore not be disclosed :
 - Section 30: investigations and proceedings conducted by public authorities
 - Section 31: law enforcement
 - Section 41: information provided in confidence
 - Section 42: legal professional privilege

11. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis. In the event information doesn't fall within one of the relevant exemptions, this information will have to be released.
12. The DfE will consult with the ASA to obtain their views before deciding whether any information can be released. However, any decision to release information under the FOIA will ultimately be the responsibility of DfE as the data processor for the purposes of the FOIA, or HM Courts and Tribunals Service.

Environmental Information Requests

13. The Environmental Information Regulations 2004 (EIR) provide public access to environmental information held by public authorities.
14. The Regulations do this in two ways:
 - public authorities must make environmental information available proactively;
 - members of the public are entitled to request environmental information from public authorities.
15. When the DfE receives a request for information, it must consider whether the requested information is environmental and whether it should be dealt with under the Regulations. In most cases this will be fairly clear.
16. As with the Freedom of Information Act, The Environmental Information Regulations state exceptions that allow the Authority to refuse to provide requested information. It is anticipated that much of the information passed to the DfE by the ASA will fall within one of the following exemptions under the EIR and will therefore not be disclosed:
 - The course of justice and inquiries exception (regulation 12(5)(b))
 - Confidentiality of proceedings (regulation 12(5)(d))
 - Interests of the person who provided the information to the public authority (regulation 12(5)(f))
17. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis, and all are subject to a public interest test. In the event information doesn't fall within one of the relevant exemptions, or if it does fall within an exemption but the public interest in disclosure outweighs the public interest in not disclosing, then this information will have to be released.

18. The DfE will consult with the ASA to obtain their views before deciding whether any information can be released. However, any decision to release information under the EIR will ultimately be the responsibility of the DfE as the data processor for the purposes of the EIR, or HM Courts and Tribunals Service.