

6th August 2012

BY POST AND EMAIL

James Best
CAP Chairman
Committee of Advertising Practice Ltd,
Mid City Place
71 High Holborn
London
WC1V 6QT

Christopher Woolard
Group Director
Content, International and Regulatory
Development Group
Direct line: 020 7783 4626
Direct fax: 020 7981 3630
Email christopher.woolard@ofcom.org.uk

Dear James

Invitation to respond to the review of the designation for the regulation of advertising in demand programming

On 29 July 2010, Ofcom designated the Advertising Standards Authority (ASA) to co-regulate advertising included within notifiable on-demand programme services in accordance with section 368B of the Communications Act 2003.

Paragraph 13 of the Designation¹ says that: "The Designation shall be subject to a formal review by Ofcom at the expiry of two years from the date of this Designation taking effect" i.e. 29 July 2012.

To this end, the terms of the review, which have been discussed with the ASA and agreed by Ofcom's Content Board, are to:

- (a) ascertain whether Ofcom's tests for co-regulation (see Annex 1 and as set out in Ofcom's September 2009 consultation *Proposals for the regulation of video on demand services*²) are still being met, and that the ASA remains "an appropriate regulatory authority" within the terms of section 368B(9) of the Communications Act 2003 (see Annex 1 for the relevant legislative tests);
- (b) consider how ASA is discharging the designated functions and whether it is meeting the obligations and conditions set out in paragraphs 5 and 7 respectively of the Designation (see Annex 2); and
- (c) consider whether, if the tests under (a) and (b) are met, there are any aspects of the Designation that may require amendment or opportunities for further enhancements to the current arrangements.

¹ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/asa.pdf>

² See paragraph 5.18, <http://stakeholders.ofcom.org.uk/binaries/consultations/vod/summary/vod.pdf>

Ofcom welcomes stakeholders' views on the regulation of advertising included within notifiable on-demand programme services. To this end I am also writing the ATVOD Industry Forum and Clearcast, and a copy of my letter to Lord Smith of the ASA has been posted on Ofcom's website. It would be helpful if CAP could place a copy of this letter on its website, in order that CAP members are able to make representations.

I would like to use this as an opportunity to invite any formal comments from CAP on the review by 10 September. Responses are being co-ordinated by Stephanie Brook. (stephanie.brook@ofcom.org.uk).

In the light of responses to the review, we plan to publish our conclusions in the autumn.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Woolard', with a stylized flourish at the end.

Christopher Woolard

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Extracts from the Communications Act 2003 (as amended) and the Designation

1. Extract from the Communications Act 2003

Section 368C Duties of the appropriate regulatory authority

(1) It is the duty of the appropriate regulatory authority to take such steps as appear to them best calculated to secure that every provider of an on-demand programme service complies with the requirements of section 368D.

368D Duties of service providers

(1) The provider of an on-demand programme service must ensure that the service complies with the requirements of sections 368E to 368H.

368F Advertising

(1) Advertising of the following products is prohibited in on-demand programme services—

- (a) cigarettes or other tobacco products;
- (b) any prescription-only medicine.

(2) Advertising of alcoholic drinks is prohibited in on-demand programme services unless—

- (a) it is not aimed at persons under the age of eighteen, and
- (b) it does not encourage excessive consumption of such drinks.

(3) Advertising included in an on-demand programme service—

- (a) must be readily recognisable as such, and
- (b) must not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously.

(4) Advertising included in an on-demand programme service must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- (c) encourage behaviour prejudicial to health or safety;
- (d) encourage behaviour grossly prejudicial to the protection of the environment;
- (e) cause physical or moral detriment to persons under the age of eighteen;
- (f) directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;
- (g) directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
- (h) exploit the trust of such persons in parents, teachers or others; or
- (i) unreasonably show such persons in dangerous situations.

2. Extract from the Designation

5. Ofcom designates ASA to carry out the following functions:

....

(iv) In accordance with section 368C(1) of the [Communications] Act [2003], to take such steps as appear to the ASA to be best calculated to secure that the relevant requirements of the Act are complied with by Service Providers.

....

6 In carrying out the Designated Function the ASA shall exercise the following powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (i) to decide what constitutes 'advertising included in an on-demand programme service' in accordance with section 368R(3) of the Act for the sole purpose of applying the Rules and having regard to guidance that has been approved by Ofcom;
- (ii) to publish (or to have published) Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act;
- (iii) to secure that accompanying guidance to aid interpretation of those Rules is prepared and published;
- (iv) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the Rules and to require the Service Provider to co-operate fully and promptly to secure compliance with its decision;
- (v) to refer any case to Ofcom to determine whether there has been a contravention of any of the relevant requirements of the Act;
- (vi) to carry out, commission or support (financially or otherwise) research in connection with its Designated Function (section 368B(11)); and
- (vii) to use any recording, script or transcript provided to it in connection with its performance of any of the Designated Function as permitted under section 69(5) of the Copyright, Designs and Patent Act 1977 (as inserted by Regulation 12(2)(c) of the Regulations).

Obligations and Conditions

7 In carrying out the Designated Functions and in exercising the Powers set out in Paragraph 6 above the ASA shall comply with the following Obligations and Conditions:

- (i) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:

a) to have regard in all cases to the principles under which regulatory activities

should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;

- b) to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
 - c) to comply and secure that its staff comply with section 393 of the Act (confidentiality);
- (ii) following referral or appeal to Ofcom in accordance, to accept any decision of Ofcom on scope or as to whether advertising is included in an on-demand programme service;
 - (iii) to require every Service Provider to secure that advertising included in the service they provide complies with the Rules;
 - (iv) to ensure that the Rules are expressed as the relevant requirements of the Act without material additions or omissions, as follows:
 - (a) that advertising included in on-demand programme services does not contain any material likely to incite hatred based on race, sex, religion or nationality;
 - (b) that if advertising included in such a service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it;
 - (c) that advertising of the following products is prohibited in on-demand programme services:
 - i. cigarettes or other tobacco products;
 - ii. any prescription-only medicine (as defined in Section 368R of the Act);
 - (d) that advertising of alcoholic products in on-demand programme services is prohibited unless –
 - i. it is not aimed at persons under the age of eighteen;
 - ii. it does not encourage excessive consumption of such drinks;
 - (e) that advertising included in an on-demand programme service:
 - i. must be readily recognisable as such; and
 - ii. must not use techniques that exploit the possibility of conveying a message subliminally or surreptitiously;
 - (f) that advertising included in an on-demand programme service must not:

- i. prejudice respect for human dignity;
 - ii. include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
 - iii. encourage behaviour prejudicial to health or safety;
 - iv. encourage behaviour grossly prejudicial to the protection of the environment;
 - v. cause physical or moral detriment to persons under the age of eighteen;
 - vi. directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;
 - vii. exploit the trust of such persons in parents, teachers or others; or
 - viii. unreasonably show such persons in dangerous situations.
- (v) to consult with Ofcom in preparing interpretative guidance to the Rules (and any subsequent material changes to that guidance), and to obtain Ofcom's prior written approval of such guidance before publishing it or any changes to it;
- (vi) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:
 - (a) that it is provided as non-binding guidance only in order to aid interpretation of the Rules;
 - (b) that it will be the Rules themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place;
- (vii) to have in place and publish appropriate and robust complaints handling processes in order to carry out the Designated Functions, such processes to be formulated in consultation with Ofcom;
- (viii) to handle complaints received by it in accordance with its obligations in this Designation;
- (ix) to comply with the reporting obligations set out in the Schedule to this Designation;
- (x) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xi) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the Rules, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as he or she may authorise, a Service Provider has:
 - (a) failed to comply full and promptly with a decision of the ASA;
 - (b) failed to co-operate fully and promptly with a decision of the ASA;

- (c) demonstrated a repeated disregard for the reasonable requests or decisions of the ASA; or
- (d) has committed one or more breaches of sufficient seriousness so as to warrant in the ASA's opinion investigation by Ofcom;

and to refer those matters to Ofcom (together with copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom;

- (xii) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a service provider may have breached the Rules due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or to lead to disorder; and where the contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
- (xiii) to cooperate fully with Ofcom at all times, including:
 - (a) to consult Ofcom, as appropriate, in cases where there is any doubt in connection with any of the Designated Functions and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
 - (b) to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xiv) to consult Ofcom and the Association of Television on Demand (ATVOD) as appropriate in cases where there is doubt or disagreement as to whether a service constitutes an on-demand programme service for the purposes of section 368A(1) of the act or, as appropriate, in connection with any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
- (xv) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Functions for any reason and/or may no longer be able to satisfy the requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Functions and in each case to use its best endeavours to resolve any such issues promptly; and
- (xvi) in the event that the ASA no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Functions and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Functions, setting out its reasons.

Ofcom's tests for co-regulation and the statutory criteria for co-regulation

Ofcom's tests for co-regulation

In 2004 Ofcom developed a set of criteria that we would apply when assessing whether to transfer any of our functions to a co-regulatory body. These were revised in 2008 in our statement *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation*³. These criteria are listed below and are the mechanism by which Ofcom can judge the co-regulatory arrangements, including whether Ofcom retains certain functions:

| Good practice criteria to guide the establishment of new schemes | |
|---|---------------------------------------|
| Public awareness | Audit of members and schemes |
| Transparency | System of redress in place |
| Significant participation by industry | Involvement of independent members |
| Adequate resource commitments | Regular review of objectives and aims |
| Enforcement measures | Non-collusive behaviour |
| Clarity of processes and structures | |

Statutory criteria for co-regulation

Section 368B(9) of the Act states:

(9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

- (a) is a fit and proper body to be designated;
- (b) has consented to being designated;
- (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority; .
- (d) is sufficiently independent of providers of on-demand programme services; and
- (e) will, in performing any function to which the designation relates, have regard in all cases—
 - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and .
 - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.

3 General duties of OFCOM

...

³ See <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
- (b) the desirability of promoting competition in relevant markets;
- (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- (d) the desirability of encouraging investment and innovation in relevant markets;
- (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
- (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- (j) the desirability of preventing crime and disorder;
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.