

2017

Independent Audit of the ASA's Commitment to Good Regulation

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1. Executive summary

- 1.1 For 55 years the Advertising Standards Authority (ASA) has worked with the UK business to ensure good quality and responsible advertising that serves the needs of business and the consumer. This audit has been commissioned by the ASA as part of its drive to ensure that it continues to do so. The ASA has offered open access to its procedures and practices, and has demonstrated great strengths as a modern regulator handling high volumes of case work very efficiently. The task is complex; the legal context is complex and so are the matters under consideration. The work is time sensitive and there are pressures from business where time is money. Sometimes judgments are called for in what are matters of taste as well as probity. The organisation as a whole rides these difficulties well, remembering that it serves, first and foremost, the interests of the consumer and the public. This audit takes a thorough look at the work, and should be seen as a tool to take the ASA forward. Any criticisms should be seen in the light of a robust, busy modern and committed regulator and workforce.
- 1.2 As a non-statutory regulator the ASA is not obliged to sign up to the Regulators' Code and chooses not to. Instead it publishes its *Commitment to Good Regulation (CTGR)*, much of which mirrors the Regulators' Code. In the course of this review I have looked at both the CTGR and the Regulators' Code. They are a good match. The principles of good regulation (keeping a light touch, efficiency, transparency, and accessibility) are the lynch pins of both Codes. The CTGR delivers effectively against the principles of that Code and while there is some detail that could be improved, it largely fulfills, and in some aspects exceeds, the standards set out there. The five commitments within the CTGR reflect the main priorities of a regulator.
- 1.3 There is reluctance within the advertising community to relinquish self-regulation, which has served it well in the past. The ASA fears that any step nearer the statutory Code would put self-regulation in jeopardy. There has been pressure from the department of Business Enterprise and Industrial Strategy (BEIS) for a change of status and statutory oversight to bring the ASA within the ambit of the Regulators' Code and one or two high profile complainants have called for an end to self-regulation. But advertisers are clear. They believe self-regulation is about self-restraint and they are committed to ensuring that advertisements are not misleading, harmful or offensive. I only

found two examples of matters raised expressly in the Regulators' Code that are not explicit in the CTGR: promoting organisational development, and publishing its risk assessment framework.

- 1.4 One of the great strengths of the ASA is excellent case management. The system is transparent, responses are clear and timely and quality assurance is embedded. Moreover, the online cases service for Council members is comprehensive and accessible.
- 1.5 There were a number of strengths expressed during meetings with those I met including "good engagement with the informal process" and compliments about the prioritisation approach. There was also recognition that even when unpopular decisions are taken by the ASA, it is the role of the ASA Council to apply the rules agreed by the business in the CAP and BCAP Codes.
- 1.6 There were, however, a number of areas of concern expressed during meetings with business compliance representatives in particular. Concern was expressed about speed and a perception that complaints handling had slowed down over the past 18 months. Turnaround times have slowed in 2016 from average speed performance in 2015, but not markedly so. Another was the perception of a lack of expertise of the executive and their apparent reluctance to seek expert help given the wide range of issues they deal with. This was said to be true especially in technical and scientific areas. The "many faults of fact" in recommendations checked with advertisers in the first draft of a Council report was offered as evidence of this. There was also concern that information about reference made to external experts was not always shown in the recommendations and a high profile example was given.
- 1.7 One of the most prominent concerns I heard from business compliance representatives was about lack of information. This included not being able to see all of the material available to Council members and not knowing the detail of the final outcome – the votes cast.
- 1.8 Some did not seem to know how decisions were taken or what help and advice was available to the executive when preparing decisions for the ASA Council. However, a lot of information was available, but not known to them. The apparent hostility from

some of the business compliance representatives I met through the auspices of the BEIS seemed to be founded at least in part on misinformation. This included information about ownership of the Codes by the advertising industry and the independence of the Council, the majority of whose members are independent of the industry. One comment from a business compliance representative was “the ASA don’t understand how little people understand”. The ASA website is full and easy to navigate but it is a mistake to think that everyone is therefore aware of its contents. The ASA has a developing stakeholder engagement programme and an extension of this work could improve communication. There was also unease about what was described by some as the “narrow process for appeal” and the inability to give oral evidence at any stage of the proceedings.

- 1.9 Given the number and range of concerns raised by business compliance representatives about their relationships with and perception of the work of ASA executives, I have needed to deal at greater length with the commitments of the CTGR described in section 4.2, *We’ll engage with you*. It addresses many of the key criticisms about the role of the ASA as a regulator and what the ASA can do to respond.
- 1.10 Overall, however, the ASA is working hard to deliver against its stated CGTR which in turn aims to mirror the Regulators’ Code without the need to sign up to it. But as with any system there are changes that can help improve delivery. This audit offers a qualitative analysis of the effectiveness of the ASA’s procedures for handling complaints in how it delivers against its CTGR set alongside the concerns identified by stakeholders. Recommendations are made so that the ASA can improve its delivery against its CTGR.

2. Introduction

- 2.1 The Advertising Standards Authority (ASA) is the UK's independent regulator of advertising across all media and has been for the last 55 years. It has administered the Advertising Codes, the UK Code of Non Broadcast Advertising and Direct Promotional Marketing, and the Committee of Advertising Practice (CAP Code), since 1962. The ASA has included advertising on websites and social media since 2011 and has administered the UK Code of Broadcast Advertising (BCAP Code) on behalf of Ofcom since 2004. Together the ASA, CAP and BCAP constitute advertising's self-regulatory system, to ensure that 'every UK ad is a responsible ad'. It is committed to transparent, proportionate, targeted, evidence-based, consistent and accountable regulation. CAP and BCAP are responsible for writing and updating the Codes. CAP and BCAP members represent the advertising industry of the UK. The Codes apply to all UK advertisers and compliance with them is mandatory. The ASA's main role is to respond to complaints and to take action against misleading, harmful or offensive advertisements as laid down by these Codes through rulings on those complaints. Although complaints play a big role in the work of the ASA, since 2014 it has also begun to take a more project based approach to tackling some issues outside of the complaints-led process as part of its commitment to be more strategic and intelligence led.
- 2.2 The ASA has chosen not to sign up to the *Regulators' Code* because it is concerned that to do so would bring it within the scope of government audit and statutory regulation which, it says, would fatally compromise the independence of the self-regulatory system. The Regulators' Code was informed by the work of Professor Hodges, and published by the forerunner to the Department for Business Enterprise and Industrial Strategy (BEIS) in 2014 to ensure that statutory regulators "provide a flexible, principles based framework for regulatory delivery that supports and enables regulators to design their service and enforcement policies in a manner that best suits the needs of business and other regulated entities".
- 2.3 Neither the advertising industry nor the ASA have any desire for the ASA to become a statutory organisation, and as such they are very reluctant to be governed by the Regulators' Code. They do, however, ascribe to the principles in that Code and want to find a way to mirror them. To this end, therefore, in 2014 the ASA developed its own

Commitment to Good Regulation (CTGR) that, it says, mirrors the essence of the Regulators' Code.

2.4 Since 2014 and the publication of the CTGR, some stakeholders, in particular, some business compliance representatives, have questioned the performance of the ASA against these principles of good regulation. This is based on their perception of the ASA's processing expertise, proportionality, consistency, transparency and governance.

Structure of the report

2.5 In response, in 2016, the ASA commissioned this independent review of performance against the CTGR and promised to publish that review and respond to its findings.

2.6 The audit will scrutinise the principles and performance of the ASA, against the CTGR and by having regard to how the CTGR meets the principles contained in the Regulators' Code. This audit also takes account of the report on *Ethical Business Regulation* by Prof Christopher Hodges for complaint handling and the draft *Guidance on Small Business Appeals Champions*. Five of the six CTGR commitments will be tested against concerns raised by some business compliance representatives.

- We'll keep regulatory burdens to a minimum
- We'll engage with you
- We'll be targeted
- We'll share information
- We'll be transparent

2.7 The other commitment – the provision of training support and advice – is a service provided by CAP, Clearcast and Radiocentre and is therefore outside the scope of this audit. It does, nevertheless, contribute to the ASA's commitment to be targeted and to engage with business.

2.8 During the course of the audit I have scrutinised strategy and operations and relations with stakeholders. I have looked at performance reports, relevant operational docu-

ments, some useful correspondence with BEIS' predecessor department and evidence from the British Retail Consortium (BRC), and Hansard records of two significant recent debates in both Houses of Parliament.

2.9 I have been assisted greatly by the executive of the ASA who gave generously of their time and full access to any materials I needed.

2.10 A full list of relevant documents is appended (Annex 5).

2.11 I met a number of executives, of which two were complaint executives, two investigation executives, six senior managers, the CEO and the Chair of ASA, the Chair of AS-BOF and ISBA, representatives of the AA (Advertisers Association) and of the British Brands Group as well as the Independent Reviewer of ASA Rulings (IR). I observed case handling and decision-making meetings between the executive and the Chair of ASA in relation to weekly case discussions, and the decision process for what cases go to Council debate. I received oral and written submissions from 22 members of the business community, some of them individually. I met advertisers and media owners. I reviewed email bundles of complaints, directed at Council members for decision, and attended four Council meetings, observing a preparatory meeting with the Chair and senior team. A full list of those I met with is appended (Annex 4).

2.12 This report is structured against the five commitments to good regulation as listed and each section looks at:

- the ASA's published statements set against the Regulators' Code
- the evidence gathered
- analysis of feedback from business and other stakeholders
- recommendations

It follows the journey of a complaint from receipt to resolution.

2.13 The advertising industry involves a wide range of representatives including marketing departments and compliance managers who sometimes have different views of the ASA. In this audit I have referred throughout to those involved as business compliance managers (often lawyers) as 'business compliance representatives' and those from advertisers or agencies more concerned with the marketing of the product as 'market-

ing representatives'. The term 'stakeholder' is used generically as well as to describe members of the stakeholder engagement programme and those who are in regular dialogue with the ASA in respect of its regulatory activity. I refer to the ASA staff as the 'executive', which is the term they use for themselves.

3. The journey from complaint receipt to resolution and independent review

- 3.1 The ASA is the front-line regulator for advertising and an 'established means' for ensuring consumer protection from misleading advertising and plays a wider role in protecting the public from harmful and offensive advertisements. It administers the Codes laid down by CAP and BCAP. The ASA operates a modern complaint handling process using online and face-to-face processes to deal with approximately 30,000 complaints a year, concerning approximately 17,000 adverts (the ASA call these 'cases'.) Taking 17,000 cases as a reference point, I give below a sense of the proportions in which the ASA delivers outcomes against different categories of cases in percentage terms. All such percentages are necessarily, approximate. Detailed statistics are available in published annual reports.

Initial assessment/early resolution of cases

- 3.2 Many complaints and the cases to which they relate are closed after an initial assessment (where the complaint is obviously not relevant or meritorious or clearly outside the scope of the Codes). These cases collectively are called *No Additional Investigation* cases. Approximately 12% of cases are found to be *Outside Remit* of the ASA and the turnaround target for these cases is 10 days. For those cases that are in remit, 65% are found to need *No Additional Investigation* after an initial assessment by an executive and with no referral to the ASA Council. In these cases the ASA does not routinely contact the advertiser to notify them of the existence of this unmeritorious complaint unless they need more information to make the initial assessment. Again, in these cases the target for closure is 10 days. In around 1.5% of cases which are more marginal, the executive asks the Council to confirm if they agree that no Code rule has been broken. These cases are referred to as *No Additional Investigation after Council Decision* (NAICD) cases. The turnaround target for this category is 25 days. Both the complainant and advertiser are always made aware of the decision in NAICD cases.

3.3 Using a prioritisation process, the complaints teams also identify a further category of cases *Advice Notices* where there is a breach of the rules and a case to answer, but where the issues are minor and where it is considered the advertiser could quickly put the issue right or it is otherwise considered proportionate that the case be closed without a full investigation. In these cases an Advice Notice is sent to the advertiser which provides them with an explanation of what they need to put right and the ASA closes the case on this basis, notifying the complainant accordingly. Around 6% of cases are closed using this approach and these have a 20-day turnaround target.

Investigated cases

3.4 The remaining cases are then forwarded for more in-depth work by the investigations team. This team decides which complaints to deal with as an *Informal Investigation*, the executive writing to the advertiser to raise the issue of the potential Code breach with them. If the advertiser agrees to change their advertising, the executive decides whether to accept their assurances and to close the case on that basis without a formal ruling; 12% of cases are closed in this way and the turnaround target is 35 days. The procedures direct the executive to resolve informally where it is appropriate to do so. All cases concluded using an informal resolution are listed on the website.

3.5 In the final category of cases the investigation team will pursue a *Formal Investigation* leading to a Council decision and formal ruling which is published on the ASA website. The ASA Council rules on all formal cases, of which there were 606 in 2016 or about 3.5% of the total caseload of the ASA. There are two turnaround targets for these cases: 85 days for standard and 140 days for complex cases. A summary of the evidence and the advertiser's response and supporting materials is made available to the Council. The majority (currently about ten cases a week based on current workloads) are generally made available to Council through a secure online portal each week. A small number are escalated for discussion at a full monthly Council meeting where the executive present their recommendations (currently between two and six cases per meeting). In all cases, the executive makes a recommendation to *Uphold* or *Not Uphold* the complaints/issues raised in the case and Council members give a *Final Ruling* on that recommendation.

ASA Council decisions and independent review of Council rulings

- 3.6 Once the Council has made its decision, the parties are notified of the outcome and given a publication date, which will be some two weeks following the decision. A party to the complaint who wishes to challenge the Final Ruling can write to the Chief Executive (CE) asking that he suspend the ruling from publication, pending a request to the Independent Reviewer of ASA Rulings (IR). In considering such requests the CE applies an 'exceptional circumstances' test as defined in the ASA's own complaint handling procedures.
- 3.7 Whether or not they ask for a ruling to be suspended in this way, advertisers and complainants who are not happy with the Council's decision can submit an application to the IR, who examines the file, reviewing the process undertaken, the arguments and / or substantiation put forward by the interested parties (the advertiser and the complainants) and the rationale for the decision. Since 2015, the ASA has also been able to refer flaws in Final Rulings to the IR for corrective action where it identifies an issue itself but where a complainant or advertiser has not engaged the IR process themselves.
- 3.8 What is often described as an appeal is in fact a review. The IR will have a letter from the party applying for review giving their rationale for why they think the substance of the Final Ruling and/or the process by which the decision was made was flawed. The IR asks the CE for his response to the request for review. The IR consults two assessors (the Chair of the ASA and the Chair of ASBOF) if he intends to recommend that the Council consider a case again. In about a fifth of cases accepted, the IR asks for further investigation and can, exceptionally, ask that an advertisement should be suspended pending review. The Chair or CE or, if he happens to be unavailable, a senior member of the team takes this decision. When a case is re-investigated the IR oversees the executive to correct any flaws, investigates the issues further and presents the case back to Council. In some cases where no further detailed investigation is required he will re-present the case back to the Council himself. In all cases he sees all the paperwork from the parties including the representations the party wishes to make arguing for a change in the ruling. The outcome of the independent review goes back to a full Council meeting, which the IR attends.

4. The ASA's Commitment to Good Regulation (CTGR)

4.1 *We'll keep regulatory burdens to a minimum*

4.1.1 The ASA's published statement

"We're committed to discharging our regulatory duties in the most proportionate and least burdensome way possible, in line with the principles of good regulation.

The ways we do this include:

- *Our use of informal resolutions: in 2013, of 18,525 ads subject to at least one complaint, 13,385 were not subject to detailed investigation and of the 4,690 that were, three-quarters were informally resolved.*
- *Our operation of a persistent complainant's policy and taking a tough line on vexatious complaints.*
- *By encouraging inter-party resolution*

Under the ASA system, the most significant policy changes come from the industry via the CAP committees: the 'self' in 'self-regulation'. For example, the Advertising Association represents 27 trade associations, professional bodies and other large businesses. The Incorporated Society of British Advertisers (ISBA), also on the committees, has over 400 members representing nearly all the UK's major advertisers.

Consequently, the committees have a clear imperative to avoid imposing unnecessary or disproportionate regulatory burdens that would, in effect, fall on the industry they directly or indirectly represent. To help steer the right path, the committees have set out clearly the key elements they will consider when assessing potential evidence-based changes to the advertising codes to ensure that any regulatory change is necessary and proportionate."

4.1.2 Assessment of the CTGR against the requirements of the Regulators' Code

- a) The ASA does not control the CAP or BCAP Codes, which are the main regulatory instrument for the advertising industry. What the ASA does is administer and help enforce the Codes and complaints of Code violation. Keeping regulatory burdens to a minimum in this context, means ensuring the most effective processes for complaint handling and resolution. The parallel principle in the Regulators' Code is that regulators should avoid imposing unnecessary burdens through their regulatory activities, choosing proportionate approaches based, for example, on business size and capacity. They should ensure that their officers have the capacity to support those they regulate.
- b) In my view, the CTGR does for the most part mirror the Regulators' Code, with the exception of explicit acknowledgement of the size or capacity of the advertiser, and of the injunction within the Regulators' Code to "support or enable economic growth for compliant businesses and other regulated entities". However, to a large extent the evidence shows that the ASA goes some way to meeting these standards, without spelling them out in the Code.

4.1.3 Evidence gathered

- a) In the course of the audit, given the volumes of complaints and the cases that follow, I saw evidence of efficient case handling. The ASA has for many years aimed to settle the majority of complaints informally and in 2015 introduced a prioritisation process, in accord with the expectation of minimising the costs and economic impact of compliance. Of those cases needing a formal ruling, only a small proportion is escalated to face-to-face-Council meetings where full discussion might be necessary. More than 90% of complaints are now made through the website, others come by email or on the telephone.
- b) As explained above, once complaints are received and their scope determined, complaints executives can recommend closure without detailed and time consuming investigation, although sometimes some preliminary investigation is required to enable them to do so. Complaints executives routinely make decisions based on experience and

the nature of the issue. Differentiation takes place in relation to the size or complexity of the advertiser in considering what level of regulatory intervention is most appropriate for the issue raised, an expectation of the Regulators' Code.

- c) There is a range of written guidance, published rulings quality and control processes and team support to help executives interpret the Codes. There is inevitably the possibility of some different interpretation of the Code by individual executives, but that is the nature of the ASA's role.
- d) The ASA's triage system for handling complaints is an important aspect of how it ensures regulatory burdens are kept to a minimum. It is therefore useful to highlight the main features of case outcomes that address proportionality. As noted above, there are three categories of case which result in early resolution for an advertiser where no Code breach is identified. These are dealt with by the complaints executive teams.
- The first, *Outside Remit* where, for instance, the complaint is not about an ad, as defined by the Codes, or is subject to another jurisdiction.
 - The second, *No additional Investigation* where the executive takes that decision on his or her own initiative on straightforward matters.
 - The third is *No Additional Investigation after Council Decision* (NAICD). Typically, these cases are where the issue is more marginal, is largely subjective, or where the case concerns a high-risk area such as gambling, alcohol or other such 'hot topic', as they are described by the executive. In 2016, there were 258 NAICD cases. In 27 of those cases the Council disagreed with the executive and asked for the case to be investigated against the executive's recommendation that it should be closed.

All of these outcomes describe swift and proportionate disposal of straightforward cases with minimal burdens, if any, imposed on businesses in their processing.

- e) There are three categories of case which result in either an informal or formal resolution.
- At the complaints stage the executive now use *Advice Notices* as a tool to informally resolve minor breaches of the Code with minimal intervention and with the aim of helping advertisers to comply through education and support rather than punishment or censure. These were developed in response to the ASA's five-year strategy '*Having more impact being more proactive*'. Following the introduction of a prioritisation process in 2015 a clear set of principles was developed with a written framework of key questions for the executive to consider suitability together with a deprioritisation assessment tool. When a case is closed using an Advice Notice, helpful guidance on how to put their advertising right is sent to the advertiser and the complainant is told that the issue has been raised with the advertiser. No further check is made for compliance thus keeping regulatory burdens to a minimum in an appropriate category of cases. These cases are not reported to Council nor are they published in any way.
 - The allocation of more serious cases which require detailed assessment to the investigations executive teams is based on their experience and on their current workload. The average caseload for an investigations executive is about 25 cases, typically settling two or three a week. They resolve the previously mentioned categories of informal and formal investigations. *Informal Investigations* are always executive decisions. In a significant number of cases where a formal route has been selected, an informal solution can be substituted part way through the process. The executive has access to a list of published reasons to agree or offer an informal resolution. Given the varied and subjective nature of their decisions, I felt that there could be better internal guidance on the acceptable features of an informal settlement to ensure consistency.
 - In *Formal Investigations*, the complainant and the advertiser are given structured opportunities to comment on the record. In general, there is a presumption that the executive will reduce the issues of complaint to not more than three per case, consulting with complainants as necessary to decide which issues

best represent the concern. This policy was introduced to minimise the risk of complainants issuing excessively burdensome multi-point complaints (one case I saw that pre-dated the introduction of the policy had 22) and is another example of the ASA applying the principle of reducing regulatory burdens.

- f) For competitor complaints, before the ASA will consider the complaint, they expect the parties to have made an attempt at resolution between themselves. This is described in the ASA's 'Inter-Party Resolution' process and was established in order to promote proportionate outcomes between commercial and other competitive entities as well as driving parties towards responsible behaviour in the making of competitive complaints about one another.
- g) In any complaints handling business it is the front-line staff who take the brunt of the difficult contact with customers. There are not infrequent occasions when the complaints executive is dealing with assertive and sometimes aggressive complainants which can involve abuse. The ASA has a clear 'Unacceptable Contact Policy' to protect staff and to ensure that business is not adversely affected. The policy also serves an important purpose in ensuring that any unreasonably persistent or vexatious complainants may be identified and, if necessary, restricted from making complaints if they are considered to be becoming disproportionate. The ASA runs a weekly report to identify whether there are any patterns in complaint receipts that would suggest a complainant needs to have access to the complaints process restricted. Given the importance of this policy it would be useful if the ASA ensured that knowledge of it was embedded in their induction for new staff and ongoing training. Front-line staff need to be aware of the policy which sets out clearly the terms on which complainants might be restricted in some circumstances.

4.1.4 Analysis of feedback from business compliance representatives/ other stakeholders

- a) Business compliance representatives, at a meeting arranged by BEIS, expressed concern over the length of time the ASA takes to reach judgment. They said that decisions have a serious impact on planning time across the retail sector for which there is a commercial cost. From my observations, however, the ASA had a well-developed case handling system, with cases referred for Council decision online on a weekly basis.

Cases are loaded into a secure online portal on Thursday afternoon for Council members to comment on and return by Tuesday morning. Decisions on the outcomes of online deliberations are then signed off by the Chairman each Wednesday. More complex cases are presented to a face-to-face Council meeting held monthly (except during August). Rigorous time targets are set for cases handled by the executive. The average speed achieved for all Formal Investigations in 2016 was 77 days and for Informal Investigations, 28 days. This compares to 75 days in 2014 and 68 days in 2015 for Formal Investigations; and 26 days in 2014 and 26 days in 2015 for Informal Investigations.

- b) In recent years productivity targets have been introduced, representing a considerable shift in culture. This was regarded highly by the industry body ASBOF, which funds the ASA. The management is efficient but talking to the executive their experience was that the load on them had increased. They referred to the relentlessness of a system that shows 'out of time' complaints as red and those nearing the end of their allotted time as orange. The inability to 'reset the clock' after planned absence days or illness of two or three days clearly adds a pressure to the workload, a not uncommon feature of complaints handling organisations. What is important is managing the tensions between quality and quantity. Some business compliance representatives and former ASA executive team members were concerned that the pressure to keep on top of targets might put quality at risk. There is, however, a trigger alert to 'refer up' to a senior executive in order to ensure that no difficult or lengthy case is left dormant. While not fail safe it reduces the risk of an executive compromising on quality and possibly missing important facts because of time targets. The tension between quality control and pressure of time and throughput is a common feature in complaint handling processes.
- c) Business compliance representatives frequently commented that the executive and the Council are too subjective and have a tendency to gold plate their processes, applying higher and sometimes different standards from those required by law. The maximum harmonisation nature of the consumer protection law concerned requires the CAP and BCAP Codes and the ASA's administration of them, to be neither more *lenient* nor *stricter* than the law. The ASA decides on a case-by-case basis, what is or is not misleading where the presentation of various different elements of an ad (text, graphics, voiceover) combine to deliver a particular message to the consumer.

- d) Informal resolution and the prioritisation process introduced in 2015 have meant resources can be targeted at more complex cases and at areas of greater potential detriment where it can have greater impact. The possibility of the ASA extending help with informal settlement for inter-party disputes, perhaps through mediation, was suggested. Some business compliance representatives, however, suggested informal resolution was impractical because of the fear of sharing some confidential commercial information that might need to be shared.

4.1.5 Recommendations

- a. Draft updated internal guidance on NAICD decisions and how to settle informally and make more visible to assist executives.
- b. Explore the possibility of extending support for informal settlement in inter-party complaints. The ASA might consider offering mediation to help settle cases without the need to resort to a formal investigation.
- c. Embed awareness of the Internal Complaints Procedure in staff induction and training plans.

4.2 *We'll engage with you*

4.2.1 The ASA's published statement

“When applying the rules, the ASA is committed through its published procedures and standards of service to be:

- *Accessible to industry*
- *Effective in meeting the needs of our customers, whether members of the public or industry*
- *Open about our procedures and our decision making, and accountable for our performance. Our rulings are published, in full, on our website: www.asa.org.uk*
- *Clear about the reasons for non-compliance with the rules and, when we take action, provide an opportunity for a dialogue.*

Our complaints handling policy details what happens if we receive a complaint about an ad. If a complaint is upheld, we have a clearly publicised route for advertisers to request a review of an ASA Council decision through the Independent Reviewer of ASA Adjudications, currently Sir Hayden Phillips.

We also have a published complaints handling policy that explains how advertisers or members of the public can make a complaint about the ASA if they are unhappy with our service.

We track our success against our published procedures and standards of service through advertiser and complainant satisfaction surveys. In 2013 we achieved an 81% satisfaction score from advertisers, against a target of 60%.

To meet our commitment to developing effective long-term relationships with business stakeholders, we've created a Stakeholder Engagement programme. Businesses who participate in the programme are given a dedicated Stakeholder Engagement Manager. Information about how to join the programme is on our Website.

Engagement also extends to the committees. If consulting on potential changes to the rules, the committees will make their consultations clear and open by:

- *involving, as far as possible, everyone whose views should be considered*
- *clearly setting out any proposed Code changes and explaining the policy considerations underpinning them*
- *considering all consultation responses to understand the possible effects of the proposal and inform the decisions about changing the Codes*
- *publishing the outcome with an explanation of how responses helped shape it.*

While industry is intimately involved in all policy-making through the sovereign decisions of the committees, CAP is committed to developing new and improved ways to involve the wider industry and other stakeholders in its code- and guidance writing functions, e.g. through pre-consultation work with affected businesses.”

4.2.2 Assessment against the requirements of the Regulators' Code

- a) The parallel principle within the Regulators' Code states that regulators should provide simple and straightforward ways to engage with those they regulate and hear their views and their contributions on policy, including dialogue. They should engage with stakeholders before changing policies in order to consider impact. The ASA meets this principle in relation to its procedures which are clear and available on its website. They

publish their rulings and they track and publish success against their standards of service in regular satisfaction surveys achieving high scores when compared to other regulators handling complaints. A clear published complaints handling policy explains how members of the public or advertisers can complain about an advertisement. A stakeholder engagement programme (SEP) has been developed to ensure that the demands of the Regulators' Code for simple and straightforward ways for regulators to engage with those they regulate.

- b) The Regulators' Code also says that a regulator should provide an impartial and clearly explained route to appeal against a regulatory decision, and that no one who is involved in making the decision against which the appeal is being made should be involved in considering the appeal. In stipulating an independent review as its process for appeal, the CTGR is in line with the requirements of the Regulators' Code. There are, however, some questions of implementation, which are discussed below.

4.2.3 Evidence gathered

- a) The ASA is responsible for engaging with businesses in its role as advertising regulator. CAP and BCAP are responsible for engaging businesses in policy making and potential changes to the advertising rules.
- b) The executive only engages substantively with the advertiser if they think that the complaint raises an issue under the Codes. The aim is minimal intervention at the minimum level required to ensure future compliance with the Code.
- c) Following the ASA's Process Review of 2009 to 2012, a SEP was introduced to improve communication with key advertisers, trade bodies, consumer and pressure groups, regulatory partners and media owners. The group has grown from 30 to 90 in the first six years.

- d) In formally investigated cases, draft recommendations are sent to the advertiser and the complainant with a time constraint of five working days. If a response is returned with substantive comment then the executive is required to reconsider and if necessary change the recommendation. If there is a change, the recommendation is returned to both sides. Advertisers are able to check the recommendation and make representation if they believe something is missing including, in some circumstances, submission of a 1000-word document to be presented to the Council when the case is decided. The executive can make use of a separate note which is used to provide a procedural commentary to Council. This Note to Council is not shown to either side. If the case online results in a split view, and the decision is carried over to a vote in the following week using the online portal, this information is shared with the complainant and the advertiser. They are sometimes, but not always, promptly made aware if the case is referred to a Council meeting following Council disagreement or other points raised by them in the online processing of the case. This should surely be a standard procedure.
- e) Those cases which the executive decide to bring to a face-to-face meeting of the Council are likely to include those with high risk profiles, those setting a precedent or likely to affect significantly a whole sector, or where borderline decisions have been taken online and where different points of view have been generated. They might also include small groups of cases for Council to consider together for reasons of consistency. Approximately ten cases a week are sent to Council online although the numbers are always demand led. Members cannot see one another's comments before making their own determination. Where members are not sure, they record those concerns. Where a decision is unanimous, that is the decision. If the decision is not unanimous, the Chair may seek further discussion with the investigating team's manager, almost always in weekly face-to-face meetings. The Chair checks on the strength of view held by Council members and may accept a majority decision.
- f) There is no written guidance as to which cases are to be brought to Council for discussion, which could leave the Chair's role exposed to perceptions of influence. While I have no evidence at all of any improper contact, the role of the Chair in this could be open to inappropriate influence and some consideration needs to be given to procedures to protect against any perception of this possibility. Written guidance would help.

- g) Any Council member can at any time ask for a case to be discussed at full Council. Very few cases go to a full Council meeting for debate (average six a month although this number is demand led). At one Council meeting I attended there were just two new cases which were both debated in the presence of the IR, who had been at the meeting earlier to present his case reviews. While there is no evidence of influence there is certainly the possibility and perception that the IR's views could be prejudiced if the case came to him at a later date.
- h) Where there is a split vote, the Chair holds a casting vote, which he uses from time to time (about seven times a year). While Council debate is strong and robust the pivotal role of the Chair is clear.
- i) Final rulings are adopted as the collective responsibility of the whole Council whether decisions are taken online or at a full Council meeting and it is for this reason that the ASA does not reveal the individual voting outcome on a case or the voting record of an individual Council member.
- j) The senior CAP/BCAP executive and the Chair of the CAP and BCAP Committees attend the casework Council of the ASA and answer questions on the Code and related legislation. The separateness of their role from the ASA needs to be clearly defined at Council meetings to avoid any confusion, particularly when observers are present. Currently the Chair of the ASA takes a pivotal role in the decision-making process of the Council and then acts as one of two assessors to the IR.
- k) There are currently said to be two grounds for independent review of an ASA Council ruling: (1) a substantial flaw in process; or (2) a substantial flaw in the rationale of the ruling or if additional evidence comes to light following the ruling that could not reasonably have been shared sooner. The second is in two parts and might be more clearly shown as such: (a) any flaw in adjudication; and (b) the presentation of any new evidence. The 'flaw in the rationale' is based on objective and subjective criteria and the bar is seen as set very high by compliance managers. The IR receives a response from the senior team/CEO and if necessary consults lawyers or the parties themselves before deciding whether or not to accept a case for review, but has absolute discretion whether or not to follow their views in recommending that the case is

sent back to Council for further consideration. The Chair also has delegated authority to agree minor changes made by the IR in making his recommendation.

- l) The IR in discussions with me said he has always found the senior team of the ASA to be extremely helpful and not at all defensive when asked to give an opinion on the merits of a review request and/or recommendations made by him.
- m) In all cases the IR will present his view of the cases before him in written form to his two assessors. While the assessors' behaviour is exemplary, neither can be seen to be independent. While the assessors' behaviour is exemplary, neither can be seen to be independent. As already mentioned, one is the Chair of the ASA Council who has already been involved in all decisions, and the other the Chair of ASBOF (the body that collects the arms-length funding for the system) who also appoints the IR and the Chair of the ASA. Whether or not this adds value, it undoubtedly adds to the perception of the ASA as a closed shop and it contravenes the Regulators Code.
- n) Marketing representatives commended the good practice recently observed of the ASA initiating reviews of its own decisions where the Council ruling may be flawed, but where neither the advertiser nor the complainant has requested a review. The ASA also conducts an annual review of its independent reviews for quality and learning purposes, which it might consider publishing.
- o) Complainants have recourse to the IR of ASA Rulings in NAICD cases or where there has been a formal ruling. For cases that do not result in a formal investigation or NAICD, complainants (including business complainants in competitor complaints) dissatisfied with the ASA's response to their complaint may instead make a 'complaint about the ASA'. Such complaints are referred to the executive or their manager in the first instance and then a member of the senior team if the first response does not resolve the concern raised. The senior manager will assesses whether the executive dealing with the complaint has made the correct decision and met the requisite service standards. If not, remedial action will be undertaken including referring a *No Additional Investigation* case outcome through the NAICD process, if warranted. Although this policy is used frequently, I could however find no statistics or outcomes of these internal complaints. Recording them would be useful in order to monitor trends and for learning purposes.

4.2.4 Analysis of feedback from business compliance representatives/ other stakeholders

- a) There is concern that when considering a complaint the executive makes its recommendation subjectively and has limited contact with the advertiser or business concerned. Business compliance representatives are not convinced that arguments are well thought out by the executive and are keen to present the facts themselves. They do not believe that cases are presented to Council with balanced arguments and quote the published process as a “summary of advertising parties’ arguments in defence of the advert and a draft assessment and rationale for that assessment”. They believe the executive should present the detailed arguments to the Council that the party to the complaint wants to include.
- b) The recommendations for Council decision making that I have seen appear to be balanced, and the executive work hard to ensure this. The investigations team liaises closely with both the advertiser and the complainant throughout the investigation. Advertisers are asked to provide the rationale supporting their advertising approach and the claims they have made. But in business-to-business cases there is a perception that there is not a level playing field. However, whilst it used to be the case that the complainant could submit evidence that would not be shared with the advertiser which might have fed such perceptions, the advertiser is now able to see any evidence put before the ASA from the complainant.
- c) In exceptional circumstances, advertisers and complainants are also able to submit a further 1000-word submission to be seen by the Council alongside the case papers when the case is decided. This fact, however, did not seem to be known or understood by some business compliance representatives and it may need to be made clearer in published advice. Advertisers and complainants are able to comment on the factual accuracy of the recommendation and the advertiser and complainant should always be given information if an expert body was consulted, which body it was and what their views were.
- d) Business compliance representatives asked for a more constructive dialogue on guidance and a stronger process that they can engage with. The CAP Copy Advice team offers this service, which is used regularly by some of the larger non-broadcast adver-

tisers and is a point of reference for the executive as part of the informal process. The work of the Copy Advice team has grown in response to need, is highly regarded and well used, although its role is advisory. The team confirmed that part of their role was to give a view on how the ASA Council would respond to a challenge as to whether a particular ad was compliant with the rules. In this way an informal check is available to the business, who could alter their advertisement accordingly.

- e) One criticism from business compliance representatives was that advertisers do not know how many complaints against them are rejected. This is information sometimes shared with those involved in the SEP, but it is information that could be made routinely available. Once a year the ASA sends advertiser-updates to 100 larger companies that tell them in detail the outcome of all complaints received about them. Although it might be expected that information circulated by the ASA might be shared between marketing representatives and business compliance representatives in the same organisation, clearly this information is not always reaching all the appropriate people in these organisations, and this is a problem the ASA should try to address further.
- f) The SEP was established to broaden and deepen relationships and understanding on both sides and in doing so help to dispel myths about the ASA. SEP membership is by invitation. It includes Citizens Advice and Trading Standards representatives and the BRC. Each organisation meets its own dedicated stakeholder manager at least once a year. This is a constructive move, and warmly welcomed by many stakeholders for whom this approach has made a major difference. But it is not yet delivering for some of its members. The BRC remains one of the ASA's harshest critics.
- g) There was an assumption, raised in debates in the Houses of Parliament, that the CAP and BCAP rules were a creature of the ASA and not independently drafted by the CAP and BCAP committees. There was criticism of the close working arrangements of the staff teams of the respective organisations, described by one critic as "having no true separation or independence of functions". The ASA engages with business compliance representatives, advertisers and the companies they represent through its relationship with the BCAP and CAP committees, but it is the committees who are responsible for writing the Codes after public consultation, and not the ASA. The role of the ASA is to administer the Codes and to seek compliance. Both the CAP and BCAP ex-

ecutive teams and the ASA executive share an office space and the same systems and support services, such as HR and facilities. Indeed one member of the senior team has a dual role to ensure consistency of decision making in case work and the ASA Director of Advertising Policy and Practice (who is also Director of CAP/BCAP in which role he is accountable to the Committees of Advertising Practice) is accountable to the CE of the ASA. While close cooperation is clearly sensible, and advice and adjudication are separate activities, I could see why such proximity had fed a perception of a lack of independence from some quarters.

- h) The Chair and CEO regularly meet with senior representatives of the advertising industry. One stakeholder suggested that the informal meetings of the Chair and CEO with the advertising industry should be available to the business compliance representatives, perhaps eventually together. The contact of business compliance representatives with senior executives at the ASA came largely through meetings with members of the BRC. Broader communication of this kind across a wider range of stakeholders could promote a more trusting relationship with the ASA.
- i) Mainstream media and advertisers commonly send their non-broadcast materials to the CAP Copy Advice Team, which offers non-mandatory advice to non-broadcast advertisers to check for a match with the CAP Code. Business compliance representatives gave examples of decisions to uphold complaints after advice to the contrary from the Copy Advice Team or in the case of broadcast media, Clearcast. The Copy Advice team takes direct account of how they think the Council will react to an advertisement and they acknowledge that this changes over time depending on the membership of the Council which inevitably changes as society, standards and prevailing views change over time. But it is a fundamental tenet of the system that holds that copy advice or pre-clearance advice cannot bind the hands of the ASA Council.
- j) Business compliance representatives also felt that Clearcast, which pre-clears broadcast advertising, had toughened its stance because of decisions made by the ASA Council. This is the case in situations where an ASA ruling suggests that the pathway to clearance needs amendment. Both organisations must have regard to the BCAP Code in carrying out their respective regulatory functions in the self-regulatory system.

- k) The business compliance representatives I spoke to felt that fewer advertisements are now accepted by Clearcast because of the rulings made by the ASA, so that the ASA was influencing instead of simply implementing. That is the case and part of the role of the independent regulator. Business compliance representatives say that the ASA should not need to apply a different or higher set of standards. The ASA cannot apply a different standard to the law which underpins misleading advertising. These laws derive in large part from EU directive which are maximum harmonisation provisions. But it is the application of tests of decency, honesty and truthfulness, on a par with legality, to which the industry is committed and for which it pays.
- l) Business compliance representatives also claimed that in some ASA judgments, Clearcast clearance was disregarded. Although Clearcast clears TV advertisements to fulfill broadcasters' legal obligations under the Communications Act 2003, it needs to respond to the activity of the regulator in order to ensure that advertisements that breach the rules are not aired. However, if the ASA were to be bound by pre-clearance decisions it would compromise its independence. Clearcast clearance is insisted upon by the major broadcasters, but the ASA is seen by some to have only limited regard for that clearance. The ASA administers the BCAP Code which is the advertising industry's own standards. Variances in interpretation of these standards between Clearcast and the ASA are routinely captured, analysed and, if they reveal inconsistency of interpretation of the BCAP Code, discussed by the ASA and Clearcast. The ASA seem to be taking this on board. They publish internally the number of times the ASA has overturned or disagreed with a Clearcast and Radiocentre position and keep this under review. The ASA may wish to talk to Clearcast and Radiocentre about working together to publish this information. Broadcast advertisers must still satisfy Clearcast and Radiocentre that their ads comply with the Code. Good communication between Clearcast and Radiocentre and the ASA is integral to good regulation.
- m) During the course of the audit, business compliance representatives also commented on what is sometimes excellent CAP advice and guidance, but advice on seasonal issues comes too late. An example was the information on Black Friday: excellent content but issued too late to be useful. Businesses were planning their campaigns in May and the guidance was issued in early November just before the event. In terms of

complaint handling, they acknowledged the overall faster processing for ASA investigation of seasonal advertisements in recent years, though commented on one complaint about an advertisement from Christmas 2015 that had taken until the end of September 2016 to conclude.

- n) Business compliance representatives see the grounds for review by the IR as very narrow and too focused on the conduct of the investigation rather than whether the Council made the right decision. The IR sees the whole file and is able to correspond with both parties directly on their own evidence and submissions made during the course of his investigation. They believed that whilst a party can supply the IR with further information to match the two grounds for review they believe that 'you do not get a fair crack at making your own case'. They want to be able to present their case themselves. Another idea raised with me was whether support might be provided for the IR from a professional clerk to advise on code matters and consistency. Other ideas mooted were for the presentation of hearings in exceptional circumstances and in complex cases, perhaps those between competitors. One suggestion was that the ASA look at systems in use in other countries. This might include the presentation of written submissions to a 'hearing officer' with a limited time to file, supplemented by a chance to make time limited oral presentations. There could be the possibility of charging a fee for this level of review. This is based on a model seen in the USA. The 'hearing officer' would then present their report either direct to Council or via the case manager. There was also the suggestion of a three-person panel. The danger of this is an increase in time and therefore cost and the nearness to a judicial process. The system was built, at least in part, to avoid costly court cases and to provide guidance to advertisers through published guidance and judgments, which it does. It is also important to note that a final appeal to the courts is available through Judicial Review and that this opportunity has, although only rarely, been taken up. The IR himself believes that the system of review is expedient and works. He does not see any advantage in a three-person panel.
- o) BEIS has produced draft guidance for the 'Small Businesses Appeals Champion' stating that a regulator should have a process to challenge an unfair decision or enforcement action and identifies a number of helpful criteria against which the independent review processes can be reviewed. The independent review process, as currently

agreed, meets many of these, although perceptions of operational independence and opportunities for a second opinion before making a formal 'appeal' (request for review) are areas worthy of further consideration.

- p) There were many ideas floated with me about how to improve and develop the independent review process, including oral hearings, panels and a clerk to the court for the independent review. While in general the independent review process works it would nevertheless be useful to see the ASA look more broadly at the independent review processes and good practice in other jurisdictions.

4.2.5 Recommendations

- a) The membership of the SEP should be reviewed and possibly extended to include a wider range of advertisers and business contacts, and consideration given to more regular communication to all through a newsletter.
- b) The Chair and CEO take steps to open attendance at their informal meetings to business compliance representatives.
- c) The dual roles of some members of the executive and the roles of the representatives of CAP and BCAP at Council made more explicit on the website.
- d) The IR should be present only for those parts of the meeting that concern his reviews.
- e) Clarify that the Independent review process is a three-part, not two-part test for accepting, cases namely: (1) 'additional relevant evidence' alongside (2) a 'substantial flaw in process'; *and* (3) a 'substantial flaw in the Council's ruling'.
- f) Establish clear protocols to safeguard the independence of the chair in relation to accepting cases for Council discussion.
- g) The Chairs of the ASA and ASBOF should no longer act as assessors to the IR.
- h) ASA should publish its annual review of independent reviews.
- i) The ASA should conduct a review of good practice in independent review and appeal processes in other UK regulators and in advertising regulators in other countries and consider improvements it might make.
- j) The ASA should consider how to make published complaints handling procedures more visible and accessible, for example, to draw better attention to the 1000-word submission process.

- k) Consider how to make data on complaints more likely to reach business compliance representatives as well as advertising and marketing directors.
- l) Record numbers and outcomes of complaints received under the ASA's Internal Complaints Procedure.
- m) Consider with Clearcast and Radiocentre whether the annual TV and Radio ad analysis report can be published.
- n) Parties to a complaint should be informed if a case is presented online but is held over for a vote online for an alternative outcome or if it is held over for a Council discussion.

4.3 *We'll be targeted*

4.3.1 The ASA's published statement

“When considering rules and guidance, CAP understands that judgments necessarily involve a considered assessment of a range of risks, including the risk of conflict with the law and the risk of failing to act.

Consequently the committees choose from among a range of possible interventions, such as rules guidance or training, according to what they deem proportionate and appropriate based upon an assessment of the best available evidence. The ASA is committed to targeted and proportionate regulation. We do this through, for example, the use of Informal Resolutions where possible and through encouraging inter-party resolution.

Around 75% of complaints received by the ASA raise no issue under the Codes and we will typically answer those complaints without the need even to contact the business or the advertiser.

Where potential code issues do arise, we aim to resolve them with the advertiser through persuasion and consensus where possible. When considering enforcement action, we take into account all relevant factors including how often an advertiser sought our help and advice. Action is targeted towards those who are unwilling or unable to comply with the rules.

Importantly the ASA does not consider that inaction in the face of a clear breach of the Advertising Codes, even if the detriment is small or limited, is the same thing as being proportionate or targeted. Where breaches have been identified by members of the public or by business, we believe it is right to try and secure compliance, albeit through proportionate means.

However, how we do this matters. Through the ASA's new five-year strategy we're exploring how we can be impactful where it counts most by targeting more resources on area of greater potential detriment, and fewer resources where detriment is less."

4.3.2 Assessment against the Regulators' Code

- a) The Regulators' Code states that regulators should take an evidence-based approach to determining the risk incurred at every stage of its decision-making process. It expects a regulator to target its resources accordingly, to take account of the compliance record of an advertiser and to choose the most appropriate response required to deliver proportionate results. It asks that a regulator should publish, annually, its risk assessment framework (risk register).
- b) The ASA has laid out the way in which it meets these requirements in its five-year plan. The plan highlights support for advertisers to create responsible adverts, which sits within the self-regulatory system as a function carried out by CAP. The ASA's five-year strategy records how resources are being shifted to spend more time on issues that matter most to the public, and refers to work on trends in complaints, research, and problems on a sector or issue basis. It does not, however, publish its risk register.

The Regulators' Code also seeks assurance of the effectiveness of regulatory activities. The ASA publishes detailed satisfaction surveys, which is noted in 4.2.1 above, which includes advertisers' satisfaction with the ASA. In 2016 overall satisfaction stood at 77%.

4.3.3. Evidence gathered

- a) From my observations about complaint resolution (which is the ASA's responsibility in the regulatory system), the well-established process of *Informal Investigation* and the more recently introduced prioritisation principles, contribute most significantly to targeted and proportionate regulation. Informal resolution seeks to resolve matters through persuasion and consensus, a feature of Prof Hodges work on the model of Ethical Business Regulation (EBR) which says the "regulation will be most effective where it is based on the collaborative involvement of all parties". The ASA's annual reporting shows that the proportion of investigated cases resolved informally has steadily increased from 74% to 83% over the past five years.
- b) The prioritisation principles set as a result of the five-year strategy go to the heart of the latest drive towards a targeted and proportionate service. The five-year strategy itself has as its main purpose the aim of enabling the ASA to get better at targeting big issues that affect consumers and society and move away from over-servicing smaller issues.
- c) As a result of this strategy the ASA is taking a broader view of areas of public concern and issues guidance to reduce consumer detriment as well as routinely checking in with itself internally on how consistent it is being in decision making. Examples include the work on vloggers, broadband pricing and speed and the booking costs of travel agencies. Internal checks on consistency and proportionality include focused fact-finding projects to address trends in complaints received, for example, the use of religious imagery, the depiction of unhealthily thin models, which help it to ensure it is drawing the line in the right place. It also tackles serious market-wide issues at a very broad level which are not only initiated by the complaints received. A recent study considers gender stereotyping where changing public attitudes might impact on cases in the future and together all these examples are evidence of the five-year strategy in action.
- d) The ASA Council is required by EU law to comply with 'the average consumer and transactional decision tests', as well as other relevant law as derived in EU directives

in all decisions relating to misleading advertising. In addition, it looks at complaints against prevailing views of harm and offence, which it does through the application of its own expertise, reference to publicly available research and periodic 'taking the temperature' of public opinion (e.g. harm and offence research 2013). In doing so it takes the view that the number of complaints received for a single advertisement should not be determinative of whether a complaint is meritorious.

- e) It is interesting, for instance, to note that the Council upheld none of the complaints in the recently published top ten most complained about advertisements. This does call into question whether the ASA is always drawing the line in the right place when it considers advertisements that might be causing serious or widespread offence to the public. This might be something for the Council to consider further. The Council might also consider publishing the top ten most complained about misleading adverts.
- f) There has been a drop in overall customer satisfaction levels (i.e. this takes into account the customer's perception of the *handling* and *outcome* of their complaint), from 55% in 2015 to 48%* in 2016. (Note: only the unweighted figure was available at the time of report publication and so may be subject to change.) While there may be a number of factors at work, it would be interesting to consider further, in harm and offence case, if there is any correlation with the popularity of complaints not upheld and if so what account of it Council needs to take.
- g) The ASA provides quality assurance through its Quality Strategy and an annual quality work plan. The quality strategy for casework targets consistency, communication, risk and continuous improvement. Quality management is delivered through departmental guidance on 'what good looks like', but executives that I spoke to were not always clear that this guidance was available. The job description of some executives includes providing technical support and supervision of higher risk casework and there is oversight of more complex work by the senior team. I did, however, see one case which after being passed to the IR was acknowledged by the CEO and Director of Complaints and Investigations to have missed significant facts. While no quality assurance system can guarantee 100% success, it is of significance because the results of the complaint are made public before the review takes place.

- h) Consistency is achieved through routine searching for similar cases before making recommendations, training and guidance for executives on interpretation of technical aspects of the Code and executives whose job description includes providing technical support and supervision of higher risk casework. A collation of ASA rulings by topic into an online database of CAP advice, case review meetings and access to the CAP Panels for industry advice is available to executives and to Council members working online. Advice on these matters is available from the CEO, his senior staff team and the Director of CAP/BCAP at face-to-face meetings of Council. Having witnessed a disagreement emerging at a Council meeting, a business compliance representative suggested that a senior clerk, who had not been involved in any of the cases, might be employed to give direct advice on these matters. However, having attended a number of Council meetings it is clear that advice is available to Council members albeit through a range of CAP/BCAP and ASA senior colleagues.
- i) As noted above, an annual review of Upheld rulings against TV ads cleared by Clearcast and radio ads cleared by the Radiocentre is published which identifies potential areas of difference in interpretation of the BCAP Code with those bodies. The annual review of independent review cases likewise analyses any quality issues seen in those cases alongside a plan for remedial action to address any emerging themes.
- j) The ASA collects evidence to determine risk through information gathering, information sharing with other regulators through the SEP and participation in other partnerships (e.g. the Consumer Protection Partnership), and from the CAP/BCAP industry panels. A business's compliance record may impact decisions about the level of intervention made, and the most persistent offenders may be referred to Trading Standards for sanction. Protocols in place for risk management include a high impact case register, 'ownership' of knowledge in technical areas, oversight of the most complex cases by senior team members and referral of high risk or controversial cases to a face-to-face meeting of the ASA Council. Greater resources are targeted towards the more complex and technical cases, with cases coming before the ASA Council online receiving scrutiny from at least one member of the management team and those coming to a full Council meeting by several.

4.3.4 Analysis of feedback from business compliance representatives/ other stakeholders

- a) Some stakeholders are concerned that too much time and money is being spent on generic policy work diverting resources from casework. The controversy surrounding the work on broadband pricing and concerns that the ASA might be making new rules on broadband pricing by the back door when that is a role for CAP and BCAP, and some concern about the current work on gender stereotyping were given as examples of issues that might be better dealt with by CAP/BCAP committees. The 'industry' it was said, 'did not want to be dictated to by the ASA'. This is a matter that is now being resolved.

- b) Business compliance representatives do not believe that the work of the ASA is targeted but think it is broadening and that the ASA is attempting to be expert in all areas, because they cannot see how specific expertise is called on when required. They say, for example, that decisions go further than the government's 'Pricing Practices Guidelines' with the ASA acting on 'gut feel' of the customer perspective and say that sometimes appears as if the ASA 'makes up new rules as it goes along'. While I saw no evidence of the creation of 'new rules', executives deal with each complaint on a case by case basis and ask themselves what they need to know to determine a breach of Code in each instance. They described their role as balancing 'consumer understanding' with 'technical interpretation'. "The art" it was said, "is trying to position yourself in that space." The executive can seek the advice of the Industry Advisory Panel (IAP) or the Promotional Marketing and Direct Response Panel (PMDRP) and do so particularly if broader ramifications might be drawn from their decision. There is no written guidance for the executive on whether to seek panel advice. The decision is likely to come from a conversation with another executive or a senior member of the team. On enquiry I was told that what is needed is 'taught' in induction and reinforced through 'ongoing training' but there were suggestions that additional and earlier training would help.

4.3.5 Recommendations

- a) Industry should be informed more broadly of the projects and research studies underway in the ASA and given a chance to contribute. Studies targeting wider generic issues would be of significant interest to the advertising world.

- b) The 'what good looks like' guidance should be checked for accessibility and promoted more thoroughly to ASA staff.
- c) The ASA should publish its strategic risk register.

4.4 We'll share information

4.4.1 The ASA's published statement

"The ASA system is committed to working effectively with other regulators where necessary, to avoid duplication or inconsistency.

To achieve this we've case handling principles, reciprocal mechanisms or memoranda of understanding with a number of other regulators and key stakeholders including the Gambling Commission and the Financial Conduct Authority. In 2013, we agreed new case handling procedures with Trading Standards; the NTSB for England and Wales, DETNI in Northern Ireland and COSLA in Scotland which, together, act as our legal backstop. We're also committed to consistency with the advertising pre-clearance bodies, Clearcast and the RACC.

Whilst the ASA has seen little evidence that its work is inconsistent with other enforcement bodies (e.g. Trading Standards), we've introduced steps to make it easy for business to highlight inconsistent regulation should it occur. If neither the CAP consultation process nor the ASA complaints handling process are appropriate means of registering concerns, businesses can make their voice heard through a dedicated page of our website encouraging stakeholders to bring matters of inconsistency to our attention.

<http://www.asa.org.uk/Industry-advertisers/Consistency.aspx>

Any concerns will be acknowledged within five working days. If we agree that a valid point of inconsistency has been identified, we'll make it our priority to tackle it."

4.4.2 Assessment against the requirements of the Regulators' Code

- a) The ASA fully meets the requirements of the Regulators' Code in the efficient use of the material it collects from those it regulates. It also has memoranda of understanding with a range of other regulators to minimise duplication.
- b) The Regulators' Code requires the publication of guidance and information and mechanisms for consulting those they regulate to ensure that the information meets their needs. The ASA does this well.
- c) The Regulators' Code asks the regulator to create an environment where those they regulate feel able to seek advice without fear of triggering enforcement action. The ASA commits itself to providing an accessible service, but the view of the ASA by business compliance representatives suggests that the environment is not yet one that puts them at ease.

4.4.3 Evidence gathered

- a) The ASA has developed case handling principles and reciprocal referral mechanisms with a number of key regulators. These include the Gambling Commission, the Financial Conduct Authority, the Food Standards Agency (FSA), the Competition and Markets Authority, the Portman Group, the Medicines and Healthcare Products Regulatory Agency and PhonePaid Services Authority. It has agreed new case handling principles with Trading Standards in England and Wales and the related bodies in Scotland and Northern Ireland.
- b) The CTGR document itself is a little out of date in factual terms and consideration should be given to it being reviewed annually to ensure that statistics and other information contained in it remains up to date and that it reflects the current ways in which the ASA meets its own commitments.
- c) The ASA has guidelines on checking with other regulators as to which body should lead on a case. Council is shown any advice from other regulators and if it is crucial to

the decision, it will be summarised in the recommendation. The advertiser does not always seem to know which body is consulted on the case or why.

- d) The ASA recognises that advertisements compliant with the guidance of other regulators are much less likely to fall foul of the advertising codes, but it is possible to comply with that guidance and still be in breach of the CAP and BCAP Codes. The ASA has put in place processes to avoid conflict, or perceived conflict, with other sources of advice. They invite dialogue with the authority and routinely ask the advertiser for details of any primary authority assured advice. The ASA has developed a policy for cases where it believes that the advice from the Primary Authority is wrong and seeks advice from regulatory delivery at BEIS before presenting the case to Council. The situation has only arisen once.

4.4.4 Analysis of feedback from business compliance representatives/ other stakeholders

- a) The ASA has been accused of making its decisions in a vacuum and not taking into account the views and principles of other regulators. I found no evidence for this. Businesses concerned about consistency with other regulators can raise their concerns through a dedicated page on the ASA website.
- b) There was criticism that the ASA did not pass complaints directly to more specialist regulators, In particular, food industry representatives felt that Primary Authority advice should be sought on these sometimes complex matters. Occasionally, representative trade bodies were suggested as reference points. However, while these bodies might be a useful source of information for the ASA and they are consulted, they are not part of the agreed self-regulatory process. Some business compliance representatives thought that the ASA should ask the advertiser if they have sought Primary Authority advice and that the ASA should seek that advice itself where appropriate. However, I found that the ASA does seek this information. This is a good example of the misinformation that needs to be rectified. The ASA sits on and contributes to the Food Standards and Labeling Expert group and has referred technical matters to that group on occasion.

- c) The ASA has two major formal relationships with statutory regulators, Ofcom and Trading Standards. From my conversations it seems that business compliance representatives did not seem to understand the changed relationship between the ASA and Trading Standards that followed the demise of the Office of Fair Trading. Trading Standards is now simply the backstop for non-broadcast complaints. The relationship with Trading Standards and with those of other regulators are contained in memoranda of understanding, and published on the ASA website, but more might need to be done to explain the structure to some business compliance representatives. The Codes are detailed and their relationship with the law and guidance from other regulators such as the FSA, the Portman Group, Gambling Commission, etc. is a key aspect of how the ASA and CAP work to develop and administer them. It should reassure business that decisions are not made on partial information or confusion.

- d) Business compliance representatives are not convinced that the executive always has the knowledge to determine a fair assessment. There were a number of comments about the lack of expertise. They said significant corrections were often needed when advertisers were shown a summary of the case at the first stage of the process. Some executives will have specialist knowledge and all are able to consult formally or informally with other independent sources of expertise, e.g. Trade Associations and other regulators. While there are protocols and guidelines for formal consultation with experts, which covers both commissioning and disclosure, it may not always be the case if an informal view is sought.

- e) Business compliance representatives are keen to present the facts themselves. As reference to external bodies is not the norm, a formal expert report is commissioned in very few cases. This is particularly the case when a complaint concerns complex technical or scientific issues (12 out of 606 in 2016). The rare occasions for which an external report is sought may feed a wider concern about the expertise within the ASA executive. When formal technical advice is sought, the ASA executive shares the name of the expert, their credentials and the full content of their report to both parties. Where informal advice is sought this may be reported in the recommendation but this does not seem to be so in all cases. Failure to disclose this information may have led

to some distrust of the thoroughness of the executive's investigation. Given its broad remit the ASA cannot be an expert in all areas.

- f) At the decision-making stage the ASA also relies on the expertise of its Council members who always have sight of the advice given by any experts where the issue is complex, scientific or technical. There are individuals and panels of experts available and their details are on the website, but this is not an exclusive list. There is guidance to executives on when and how to seek external technical help. There is no written guidance for seeking informal advice. The matter may be referred to a more senior member of the team. The advertiser is given information if an expert body was consulted, which body it was and what their views were. The business compliance representatives I spoke to suggested that the established panels of experts that already exist through BEIS and sponsored by the regulatory delivery unit, the Regulatory Delivery Business Expert Groups, might be a source of help. The ASA already participates in the Food Standards and Labelling and Focus Group and the Consumer Protection Panel. Although CAP sits on the Primary Authority Supermarkets Group, the ASA might consider its own involvement.
- g) The ASA is seen as a very powerful organisation. Some business compliance representatives expressed concern about commenting on or criticising the work of the ASA. Individual members and business compliance representatives were anxious that the Chatham House rule would apply. They were concerned with what they considered limited access to the adjudication process and many spoke of the "fear of challenging the decision of the ASA Council". They had, they said, "no rights of audience", which when challenged prompted the answer that they would like to be able to present their case in person. They felt they were presumed 'guilty' before investigation; a view of which I found no evidence and that the ASA "reverses the burden of proof". The Codes do reverse the burden of proof. But the advertising business is introducing unsolicited material to the public domain. The burden of proof therefore should be on them to prove that it's not misleading, harmful or offensive, and not on the public to prove that it's misleading, harmful or offensive.

4.4.5 Recommendations

- a) Advertisers should always be told when an expert opinion is being sought about their advert, from whom and shown what is said.
- b) Clarification is needed about the way in which the difference sources of expertise are consulted and when.
- c) While descriptions are published in the Code section on the ASA website under the heading 'how the system works' the ASA should go further in helping business compliance representatives to understand the role of the Industry Panels.
- d) The Council and the executive should review and update the CTGR regularly.
- e) The ASA should seek to be represented on the Primary Authority Supermarkets Group.

4.5 *We'll be transparent*

4.5.1 The ASA's published statement

"The ASA has made a commitment to being a transparent organisation through our published procedures and standards of service, the ASA is committed to:

Being accessible to members of the public and the advertising industry

Resolving complaints without due delay, whilst recognising that complex complaints can take longer than average

Being effective in meeting the needs of our customers, whether members of the public or industry

Delivering a high quality and professional service

Being open about our procedures and our decision-making and accountable for our performance.

Industry and consumers can judge the ASA's performance against these commitments in our annual report and our annual statement (performance in the first half of the year)

and through our quarterly updates. More information on how transparent we are can be accessed at:

www.asa.org.uk/General/Transparency.aspx

4.5.2 Assessment against the requirements of the Regulators' Code

- a) The ASA publishes clear standards on how they provide information, how they can be contacted, their complaints handling procedures, results of performance against their service standards and data relating to complaints about them. A complaints handling policy ('Making a complaint about the ASA') is published explaining how complaints can be made, and complainant and advertiser satisfaction surveys produce excellent results with positive scores of over 77% overall satisfaction from advertisers and 62% overall satisfaction with the ASA's service from customers (which asks customers to exclude the outcome from their assessment of the ASA).

4.5.3 Evidence gathered

- a) The ASA has made a commitment to being a transparent organisation and publishes its procedures and standards of service including how it is accessible to members of the advertising industry and to the public. However, the Council decision-making process is not fully transparent. Business compliance representatives did not know that the majority of Council decisions were taken online. The norm for Council decision making is through the weekly distribution of cases through a confidential Council member portal. Only a few cases, between two and ten a month on current workload trends are referred to a face-to-face meeting of the Council for a full debate. This fact is not in the public domain. I could not find a procedure to guide the executive on which cases to escalate to full Council discussion.
- b) It is not possible for an advertiser to see the comments made by Council members or to know the voting score for or against their advertisement. As already noted, although there is a quorum for attendance at face-to-face meetings (four lay and two industry members) there is no guide to a minimum number of votes to be cast where there is only a small quorate Council present. By this I mean that if there are absentees or

Council members conflicted out from voting for a Council meeting or for the Council online portal then a majority score of one in a meeting where only six Council members are present and involved is treated in the same way as a majority of one in a meeting of the full Council of 13 members. There is, therefore, the possibility in a tight vote in a small quorate Council of a decision being taken that might have been different had there been more members present.

- c) Because of this concern I looked for any pattern of relationship between close voting and referral to the IR. During 2016 only two of 34 cases referred to the IR had been a close vote (one or two votes), but there were a small number of cases where the numbers of Council members voting was ten or less, i.e. some voting scores recorded as five/three or six/four. There is therefore little evidence that cases where the voting is close or where the quorum is small are those that go on for independent review or are those that get overturned on independent review. However, to the businesses whose advertisement they represent, the decision taken that swings on these marginal voting outcomes could be very significant and costly if it results in the wrong outcome. The ASA should consider further how it handles these cases, in particular where a close vote in a smaller quorate Council has occurred online which means those decisions will have been taken without the wider executive and Council community present to discuss the case, as occurs in a meeting.
- d) More material tends to be made available for face-to-face meetings of Council than online because the issues tend to be more complex in discussion cases. Council members dealing with cases online have full access to drop down menus and links to all the resources they need. Business compliance representatives believe they should have full access to everything presented to Council and have opportunity to add to it. The only significant material that is not currently shared with the parties is the Council cover paper for discussions and the Notes to Council for Council online cases. These typically contain procedural and background information on the case, for example, standardised wording reminders of the legal tests that the Council has to apply in misleadingness complaints so as to meet the requirements of consumer protection legislation. In my view both parties could be shown all such material except anything that is covered by legal privilege or is 'commercial in confidence'.

- e) An annual review of lessons learned about independent reviews is on record for reference, but for internal use only. It is not in the public domain. This is a useful document and it seems to me to be something that would increase trust in the independent review process if it was made public.

4.5.4 Analysis of feedback from business compliance representatives/ other stakeholders

- a) Business compliance representatives did not know that the majority of Council decisions were taken online. The norm for Council decision making is via the weekly distribution through a confidential Council portal with relatively few cases, between two and ten a month on current casework trends, referred to a face-to-face meeting of Council for a full debate. This is not in the public domain.
- b) Business compliance representatives believed that recommendations are sent to Council before being seen by both parties. This is not the case. There is never a recommendation leading to a formal ruling that goes to Council that has not been seen by both parties and all recommendations in all formal investigations come before Council for decision.
- c) Some business compliance representatives claimed that, in the absence of information on the closeness of the Council decision it is difficult to decide whether to seek a review based on assessment of possibility of overturning the decision. There is, in my view, a case to be argued that where a recommendation is Upheld or Not upheld, the vote should be made known to the advertiser and complainant. I recognise that this could have the unintended consequence of increasing the number of reviews and of course for as many times as an advertiser might benefit from appealing a close decision to Uphold against their ad they may find that complainants likewise appeal against more marginally Not upheld cases in such circumstances.
- d) Two business compliance representatives I spoke to were invited to observe a Council meeting at which I was present. Although the ASA has, from time to time, invited representative bodies, other regulators and occasionally observers who are regulated advertisers, this was the first time business compliance representatives had been present. Other regulators and public organisations have gone further and routinely open

their Council meetings to the public. These two business compliance representatives were concerned that the quality of debate at Council was far higher than any possible online. They said that they would be keen to know which Council decision process handled complaints against them. They felt that businesses receiving judgments online could be disadvantaged. To counter this concern, the ASA should make clear that only the most controversial cases are referred to Council meetings or those thought to have wider ranging impact. Full information of the online process should be available.

- e) Not everyone was aware of the existence of CAP's two industry panels, the IAP and PMDRP, which are panels of their peers offering advice and reassurance prior to a Council decision, including at the behest of interested parties to a case. Information about these industry panels is on the ASA website, but was not prominently displayed at the time I looked. There was concern from some I spoke to in the executive about demand if they were advertised more widely, but equal access needs to be addressed and if necessary the panels should be expanded.

4.5.5 Recommendations

- a) The ASA should publicise that as a modern regulator it conducts most of its business online and escalates only a minority of cases to a face-to-face Council meeting, for example where there is sufficient gravity or there are wider ramifications.
- b) As much process and background information as possible should be shared with the advertiser and the complainant so that all can see 'fair play'.
- c) A change to the voting quorum should be considered to address narrow voting margins where the number of Council members involved is few.
- d) The ASA should consider regularly inviting business compliance representatives to observe Council proceedings in which they are not involved
- e) Make written guidance and advice more readily available about the Industry Advisory Panel and Promotional Marketing and Direct Response Panel.

5 Conclusion

- 5.1 The ASA is a successful regulator. In the main it mirrors the Regulators' Code, and although there are a few improvements that could be made, it exceeds the general expectations of that Code. It is fit for purpose and with a few improvements will maintain the confidence of the public and the vast majority of those who complain, quite unlike many other regulators. It also has the continued support of the advertising industry, which funds it at arm's length. I was satisfied that it has demonstrated independence from any perception of a conflict of interest from the industry which funds it, with the exception of one remaining concern. This is the perception of a conflict of interest when the Chairs of the ASA and ASBOF act as Assessors to the Independent Review process. Although I found no evidence of influence by the Assessors or their undermining the role of the IR, it undoubtedly feeds a perception that this is possible.
- 5.2 It produces clear information on its website about its procedures and publishes annually the results of its deliberations and any trends it has observed.
- 5.3 It has improved the independence of its Council from those who fund it, in line with Leveson best practice recommendations, by including an independent assessor on the final panel interviews for new Council members and by continuing to ensure that two-thirds are selected from outside the industry. This could go further involving the assessor in the entirety of the recruitment process and perhaps by drawing on the experience of the Public Sector Appointments Commissioner. The Chair, however, is appointed by the funding body and this process might well be enhanced by greater public awareness.
- 5.4 Stakeholders believe that the ASA's refusal to sign-up to the Regulator's Code is evidence of its desire to do what it likes, a statement for which I found no evidence. On the contrary, the ASA seems to be so close to the Regulators' Code that it is difficult to see why that pressure on the ASA continues.
- 5.5 It is a modern online regulator with efficient systems for handling information, for case control and management and for presenting recommendations to Council, escalating to a full debate where necessary. There is perhaps more guidance that could be codi-

fied for the executive and more Council information that could be shared with stakeholders as well as sometimes to point to where guidance and policy information can be found.

- 5.6 Although the ASA has a well-developed and easy to navigate website, it has not yet managed to ensure that its information reaches all parts of the business community. The development of its SEP together with meetings of the Chair and CEO with business compliance representatives could be part of the solution.
- 5.7 It would be good to see Council meetings opened to members of the business community. The advertising industry is represented in the membership of the Council but more open access to other stakeholders could help to allay fears of the closed shop.
- 5.8 The process of independent review, allows the substance of the issues in the complaint to be reviewed. While it works efficiently there may be experience from other jurisdictions that would be useful to consider.

6. Summary of recommendations

1. Draft updated internal guidance on NAICD decisions and how to settle informally and make more visible to assist executives.
2. Explore the possibility of extending support for informal settlement in inter-party complaints. The ASA might consider offering mediation to help settle cases without the need to resort to a formal investigation.
3. Embed awareness of the Internal Complaints Procedure in staff induction and training plans.
4. The membership of the SEP should be reviewed and possibly extended to include a wider range of advertisers and business contacts, and consideration given to more regular communication to all through a newsletter.
5. The Chair and CEO take steps to open attendance at their informal meetings to business compliance representatives.
6. The dual roles of some members of the executive and the roles of the representatives of CAP and BCAP at Council to be made more explicit on the website
7. The IR should be present only for those parts of the meeting that concern his reviews.
8. Clarify that it is a three part, not two part test for accepting cases under the Independent Review process, namely: (1) 'additional relevant evidence' alongside (2) 'substantial flaw in process'; *and* (3) 'substantial flaw in the Council's ruling'.
9. Establish clear protocols to safeguard the independence of the Chair in relation to accepting cases for Council discussion.
10. The Chairs of the ASA and ASBOF should no longer act as assessors to the Independent Reviewer.
11. ASA should publish its annual review of independent reviews.
12. The ASA should conduct a review of good practice in independent review and appeal processes in other UK regulators and in advertising regulators in other countries and consider improvements it might make.
13. The ASA should consider how to make published complaints handling procedures more visible and accessible, for example to draw better attention to the 1000-word submission process.
14. Consider how to make data on complaints more likely to reach business compliance representatives as well as advertising and marketing directors.

15. Record numbers and outcomes of complaints received under the ASA's Internal Complaints Procedure.
16. Consider with Clearcast and Radiocentre whether the annual TV and Radio ad analysis report can be published.
17. Parties to a complaint should be informed if a case is presented online but is held over for a vote online for an alternative outcome or if it is held over for a Council discussion.
18. Industry should be informed more broadly of the projects and research studies underway in the ASA and given a chance to contribute. Studies targeting wider generic issues would be of significant interest to the advertising world.
19. The 'what good looks like' guidance should be checked for accessibility and promoted more thoroughly to ASA staff.
20. The ASA should publish its strategic risk register.
21. Advertisers should always be told when an expert opinion is being sought about their advert, from whom and shown what is said.
22. Clarification is needed about the way in which the difference sources of expertise are consulted and when.
23. While descriptions are published in the Code section on the ASA website under the heading 'how the system works' the ASA should go further in helping business compliance representatives to understand the role of the Industry Panels.
24. The Council and the executive should review and update the CTGR regularly.
25. The ASA should seek to be represented on the Primary Authority Supermarkets Group.
26. The ASA should publicise that as a modern regulator it conducts most of its business online and escalates only a minority of cases to a face-to-face Council meeting, for example where there is sufficient gravity or there are wider ramifications.
27. As much process and background information as possible should be shared with the advertiser and the complainant so that all can see 'fair play'.
28. A change to the voting quorum should be considered to address narrow voting margins where the number of council members involved is few.
29. The ASA should consider regularly inviting business compliance representatives to observe Council proceedings in which they are not involved.
30. Make written guidance and advice more readily available about the Industry Advisory Panel and Promotional Marketing and Direct Response Panel.