

# **More effective, efficient, cost-effective and in tune with our stakeholders**

## **The ASA's Final Response to the Process Review**

5 October 2011

Legal, decent, honest, truthful.



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# 1. Introduction

## 1.1 Independent report and ASA's responses

This paper, *The ASA's Final Response to the Process Review (Final Response)*, sets out the changes we have made, and are making, to respond to the recommendations in Berkshire Consultancy Ltd's independent *Process Review Final Report (Berkshire's Report)* of 31 March 2010.

[\*The ASA's Preliminary Response to the Process Review \(Preliminary Response\)\*](#) was published on 24 June 2010. It contains the fullest explanation of *Berkshire's Report*.

[\*The ASA's Update on the Process Review \(Update\)\*](#) was published on 6 December 2010 and [\*The ASA's Supplement to the Update on the Process Review \(Supplement\)\*](#) was published on 9 March 2011. To all intents and purposes, this paper supersedes those updates.

## 1.2 Our commitment

The Process Review is about getting better at what we do. Being more effective, efficient, cost-effective and in tune with our stakeholders. It is not just about saving money, although it has identified real savings that, together with the notional savings, are significantly more than the cost of the consultancy that triggered the review.

The recommendations we are taking forward will benefit consumers by helping to make our operations more efficient, more focused on priorities and more effective at resolving investigations quickly.

They will also benefit advertisers and other stakeholders by increasing their awareness of our operations and how we apply the Advertising Codes, enhancing two-way communication, closing cases more speedily and, ultimately, helping to improve the already high level of compliance with the advertising rules.

We expect the changes introduced following the Process Review to have a lasting effect on our work.

## 1.3 Context

On 1 March 2011, the ASA's online remit was extended to apply the CAP Code to companies' and organisations' own advertising on their own websites and in social network spaces under their control. That 'online remit extension' responded to calls from the public, society and politicians to plug the 'remit gap' online.

The public response, as measured by complaints about advertising on websites particularly, has been significant and above our forecast. Between 1 March and 23 September 2011, just short of seven months in, we received 5,531 complaints about 5,165 ads/campaigns (henceforth, cases). The totals for the period were 18,369 complaints about 14,205 cases. The more recent months have witnessed a gradual decline in the levels of complaints and cases after the very high numbers in the first two or three months. But with online remit extension complaints being 30% of the total and cases 36% of the total in that period, the public demand for the extension is clear to see.

Complementary and alternative healthcare was the most complained-about sector, in the main because of orchestrated complaint campaigns by those opposed to what they saw as 'pseudoscience'. Other than that sector, the typical profile of complaints was, to all intents and purposes, the same as in off-line media, with concerns around pricing, availability and the performance of

products in sectors like business, retail, leisure, computers and telecommunications and holidays and travel.

Almost all the complaints were from members of the public (in keeping with our 'usual' complainant profile) and a sample tells us that around four out of five of them related to advertising by small and medium sized enterprises (compared to a 'usual' figure of around two thirds). 86% of the cases related to misleading advertising claims (compared to 65% for all cases in 2010).

Over the course of the year, we have increased our headcount by a total of 10% to administer the extended remit. Those extra people have been extremely helpful, not least because changes implemented following the Process Review have meant they are all 'front-line' staff, for example Complaints and Investigations Executives who assess complaints, respond to complainants and conduct investigations. We have not needed to recruit additional managers to supervise those staff or additional staff in our Corporate Services department.

But the increase in workload has obviously exceeded that. In the 12 months leading up to 1 November 2010, shortly before the publication of our *Update* on the Process Review, we undertook a total of 174,831 'case days'<sup>1</sup>. In the 12 months leading up to 1 September 2011, we undertook 251,022, 44% more.

So we have had to account for the difference between the increase in workload and the increase in resources by doing things differently, which in many cases means implementing changes recommended by the Process Review.

Given the number and nature of complaints, and with many SME advertisers unfamiliar with the CAP Code, we have responded proportionately by seeking to resolve as many cases as possible informally. And we have introduced process changes, including prioritising complaints about complementary and alternative healthcare, adopting a 'lead' case approach in that sector and introducing Informal Contacts, to help us manage the workload. For completeness, those changes are briefly mentioned in this report, despite them not having resulted from recommendations in *Berkshire's Report*.

We are now on top of the workload in all departments, but it has had an impact on our ability to meet some of our Process Review targets. In some cases it has helped. We've been able comfortably to meet the target for resolving a higher proportion of cases informally, for example. In others it has slowed us down. We've found it hard to make significant inroads into resolving Formal Investigations more speedily, for example, and it has slowed our progress implementing changes that respond to the Stakeholder Relations and Consistency with Trading Standards themes.

Where appropriate, this report mentions the impact of our online remit extension on our ability to implement change or hit targets.

## 1.4 Highlights so far

- 36% increase in cases since our online remit extension on 1 March 2011 handled with only 10% increase in staff, in significant part due to Process Review changes. Specifically, Process Review recommendation to empower executives and free-up manager time led to cancellation of plans to recruit two new managers to supervise the new staff needed – notionally saving £100,000 a year from January 2011.
- 72% of investigations resolved informally in year up to June 2011 – an eight percentage point increase on the 12 months before. Our customer satisfaction research consistently tells us that Informal Investigations are the most popular type of investigation both with complainants and advertisers.

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<sup>1</sup> A 'case day' being one day of elapsed time for one case.

- 65% of Formal Investigations categorised as Standard as opposed to Complex in year up to September 2011 – a 10 percentage point increase on the year up to November 2010. Our target for Standard Investigations is much more challenging.
- ASA, Clearcast and RACC ‘common pool’ of cosmetics’ experts in advanced discussions with a view to launching in Q4 2011, building on the fact that there were no ‘battles of the experts’ on cosmetics evidence in 2010.
- Annual Advertiser Complaints Check-ups introduced in May 2010 and repeated in May 2011.
- Size of ASA Council cut from 15 to 13 members – saving £34,000 a year from April 2011.
- Paid-for Copy Advice Website Audits and Express Copy Advice introduced in January and May 2011 - £23,250 direct income generated by July 2011.

## 2. Changes following independent report

### 2.1 Investigations

#### *Berkshire's Report.*

- Develop firm criteria outlining the circumstances in which an informal resolution can be delivered.
- Focus on educating advertisers and increasing the number of informal resolutions.
- Choose the appropriate communication medium – would a telephone call be more collaborative and productive than e-mail?
- Implement submission limits.
- Measure and report the 'waiting time' of cases, and actively manage the progress of cases, regardless of which party is holding up the process.
- Introduce 'timetabling to conclusion'.
- Consider introducing charging for competitor complaints (perhaps with sliding scale of fees coupled with a fast-track process).

#### 2.1.1 Informal resolution

Informal Investigations usually concern minor and clear cut issues raised by one or more complainant. Working under authority delegated to us by the ASA Council, typically we request an assurance from the advertiser that relevant future ads will be amended or withdrawn, upon receipt of which we close the case down quickly, currently in an average of 25 working days<sup>2</sup>. Only bare details are presented to the ASA Council and appear on our website under the description "After consideration by the ASA of complaints received, the following companies and organisations agreed to amend or withdraw advertising without the need for a Formal Investigation...". The website lists the advertisers concerned, the date, the number of complaints, the media and the sector. No further details of the case are given.

We know from our customer satisfaction research that Informal Investigations are popular with advertisers and complainants. They are a proportionate way of resolving issues that do not warrant formal investigation.

We have sought to increase the number of cases resolved informally, particularly broadcast cases, without compromising our criteria, which ensure that consumers are protected, that decisions with significant ramifications in determining where we draw the line are published and that we are consistent in our decisions to resolve informally.

We reviewed the number and nature of Informal Investigations and have revised our criteria for resolving cases informally. See paragraph 19 of the [Non-broadcast Complaint Handling Procedures](#) and paragraph 24 of the [Broadcast Complaint Handling Procedures](#) for our up-to-date criteria.

We targeted a 5-10 percentage point increase in the proportion of both total investigations and broadcast investigations that were resolved informally.

The proportion of total investigations resolved informally in the year leading up to 1 June 2010 was 64%. They were resolved in an average of 28 working days, with 93% within target (35 working days, for most categories of Informal Investigation).

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<sup>2</sup> Figure from the ASA's business intelligence system: average of all Informally Investigated cases closed 1 Jan - 31 Aug 2011.

The proportion in the year leading up to 1 June 2011 was 72%, an eight percentage point increase. They were resolved in an average of 26 working days, again with 93% within target.

The proportion of broadcast investigations resolved informally in the year leading up to 1 June 2010 was 42%. They were resolved in an average of 34 working days, with 99% within target.

The proportion in the year leading up to 1 June 2011 was 47%, a five percentage point increase. They were resolved in an average of 38 working days, with 96% within target.

Both targets were met. The increase in the proportion of total investigated cases resolved informally freed up 10,487.24 'case days', which would otherwise have been spent formally investigating the cases. With a cost per 'case day' of £17, that works out at a notional efficiency value of £178,283.08<sup>3</sup> per year.

We will decide whether to commit to a new target in the wider context of our ongoing Business Intelligence review<sup>4</sup>, taking into account what we think is the optimum proportion of cases that we should resolve informally.

### **2.1.2 Faster Formals**

Formal Investigations follow the most comprehensive process at the ASA, typically allowing at least two opportunities for the advertiser to defend its ad and at least one for the complainant to comment on our proposed recommendation that ultimately we submit to the ASA Council. They take the longest time to complete, currently in an average of 58 working days for Standard Investigations and 99 working days for Complex Investigations<sup>5</sup>. They culminate in an ASA Council adjudication that is published on the ASA's website. The ASA has recently performed well against its turnaround targets for Standard and Complex (i.e. Formal) Investigations, but is committed to improve further, in particular in relation to the complicated, technical cases that often involve competitor complaints.

If the ASA is to reach decisions that are defensible in the Courts, it must follow a fair process. Even assuming each party to a case (including the ASA) meets every deadline, Formal investigations typically take a significant amount of time. A fast-track process, which skips various key stages, can be followed in exceptional circumstances, for example in cases of potential for significant harm, but the ASA could not successfully defend itself against legal challenge were it to treat most or all cases as fast-track cases.

Notwithstanding that, the ASA is conscious that time can be lost unnecessarily at various stages. That is sometimes the fault of the ASA, for example because of the pressure of high workload, and is sometimes the fault of one or more interested parties.

We analysed elapsed time in 10% of the cases we formally investigated in 2009 to determine who had responsibility for the case during its life cycle, for how long and how we might reduce 'waiting time'. For the avoidance of doubt, the purpose of the analysis was to improve our already effective performance: 94% of the cases sampled were completed within our existing targets.

The results of that 'Waiting time' analysis showed that the ball was in the court of our executives/managers for an average of 69 calendar days per case. That comprised an average of 15 days when cases were being assessed for their suitability for investigation and an average of 54 days when the ball was in the court of our investigating executives/managers. It was in the advertisers' court for 24 days. The analysis provided useful data on the average elapsed days, and range of elapsed days, at various key stages. It also identified that the average length of advertiser submissions - excluding attachments/studies - was four sides of A4 (with a range of 0 to 26 sides of A4). 11% of the cases had attachments/studies, ranging from one Excel sheet to 170 sides of A4.

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<sup>3</sup> Cost per 'case day' figure based on ASA's 2011 budget and ASA's business intelligence system: cases closed in 12 months leading up to 1 Sep 11. Freed up 'case days' based on cases closed in 12 months leading up to 1 Jun 2010 and 1 Jun 2011.

<sup>4</sup> Our Business Intelligence review is concerned with identifying, extracting, analysing and reporting our performance data.

<sup>5</sup> Figures from the ASA's business intelligence system: cases closed in the 12 months leading up to 1 Sep 2011.

We are focusing on reducing 'waiting' time by:

- applying limits on submissions and rounds of correspondence, where appropriate, and refusing to accept only references to studies;
- setting internal standards for completing key stages of investigations;
- setting and enforcing more challenging deadlines for external parties;
- continuing our use of 'timetabling to conclusion'. 'Timetabling to conclusion' involves ensuring that all interested parties are clear early on in appropriate investigations, i.e. difficult investigations that are, or are likely to be, robustly fought by the interested parties, of the deadlines and the ASA's intention to stick to them and
- adopting stricter criteria for Complex Investigations with a view to increasing significantly the proportion of investigated cases that attract the much more demanding Standard Investigations' turnaround target of 85, rather than 140, working days.

#### **2.1.2.1 Submission limits, rounds of correspondence and study references**

We reserve the right to apply submission limits and restrict further rounds of correspondence in exceptional circumstances, for example if interested parties are submitting unjustifiably lengthy correspondence or repeating the same arguments. The limits/restrictions will depend on the nature of the issue and the stage of the investigation, and will not have the effect of restricting unreasonably the interested parties' opportunity to defend its ad or argue its complaint.

We will not accept references to studies in support of performance claims; advertisers must submit the studies in full, highlighting relevant sections and explaining why they are relevant to the issue in hand.

#### **2.1.2.2 Internal standards**

Our 'Waiting time' analysis showed that the time taken from the day on which cases were allocated for investigation (i.e. after they had been assessed) to the day on which correspondence was sent to the advertiser for comment averaged almost nine calendar days, with a wide range. That is the one stage over which our investigating executives/managers have complete control. From 1 March 2011, we set an internal target of five working days for that stage.

We will introduce a new 'Internal Target Date - Notification', including on our case-handling system, allowing executives five working days between the date they are allocated the case and the date they are expected to send the advertiser formal notification of the complaint.

We already operate an 'Internal Target Date - Recommendation' for all formally investigated cases, that being the date by which our recommendation must be sent out to interested parties to ensure a case is closed within its overall target. The Internal Target Date for Standard Investigations was, from 1 March, shortened by five working days.

#### **2.1.2.3 External deadlines**

From 1 March 2011, we reduced the time non-broadcast interested parties have to respond to notification from us of all except 'harm and offence' cases from 10 to seven working days. Seven days was in line with our current deadline for broadcast interested parties. The deadline for 'taste and decency' cases remained at five working days. More time is allowed for complicated investigations or in other exceptional circumstances. The grounds for an extension request should be set out in writing; an extension is unlikely to be granted for longer than five working days and repeated requests for extensions are likely to be refused.

#### **2.1.2.4 Timetabling to conclusion**



We already use 'timetabling to conclusion' successfully to move on difficult, robustly defended cases. We are continuing to do so.

#### **2.1.2.5 Stricter criteria for Complex Investigations**

In the 12 months leading up to 1 November 2010, we closed 55% of our Formal Investigations as Standard Investigations. Those were completed in an average of 58 working days, with 96% in target (85 working days). The remaining 45%, our Complex Investigations, were completed in an average of 92 working days, with 92% in target (140 working days) <sup>6</sup>.

From 1 March 2011, we restricted our criteria for categorising cases as Complex. Certain types of case, for example those that we have attempted, unsuccessfully, to resolve as No Investigation after Council Decision cases, multi-media cases, competitor cases that are not being investigated under a substantiation rule, teleshopping cases and cases that are re-presented to the ASA Council for a vote, are no longer automatically categorised as Complex Investigations.

We set ourselves the target of increasing the proportion of Standard Investigations from 55% to 70%, a 15 percentage point increase, without compromising our average day turnaround performance for Standard and Complex Investigations and without significantly affecting our KPI of closing 80% of Standard and Complex Investigations within target.

We are striving to do that over two years from implementation, aiming to achieve a 7.5 percentage point increase in each 12 month period and the full 15 percentage point increase by 1 March 2013.

Six months in, 65% of the cases closed in the lead up to 1 September 2011 were Standard Investigations, a 10 percentage point increase. Those were completed in an average of 58 working days, with 95% in target. The remaining 35%, our Complex Investigations, were completed in an average of 99 working days, with 87% in target.

So while we made substantial strides towards the target of increasing the proportion of Standard Investigations, which are subject to a much more challenging target, from 55% to 70%, the benefit of that was offset by the increase in the average time spent, from 92 to 99 working days, on the remaining Complex Investigations.

#### **2.1.2.6 Overall impact of changes**

The above changes, if successfully implemented, will have a positive impact on the average number of working days within which we complete all formal investigations. That figure stood at 73 working days in the 12 months leading up to 1 November 2010. We are targeting a five working days reduction to 68 working days by 1 March 2013. That constitutes a 7% reduction. We are again striving to do that over two years from implementation, aiming to achieve a 2.5 working day reduction each year.

Six months in, the average number of working days within which we completed all formal investigations closed in the 12 months leading up to 31 August 2011 remained at 73 working days (having reduced by only 0.6 working days). The above-forecast online remit workload has made it particularly difficult to make progress against our five working day reduction target, but we hope to do so over the next 18 months.

#### **2.1.2.7 Additional changes following online remit extension**

Following our online remit extension on 1 March 2011, and in particular the substantially above-forecast level of online remit complaints, we introduced these changes:

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<sup>6</sup> Figures from the ASA's business intelligence system: cases closed in the 12 months leading up to 1 November 2010.

- a sub-category of Informal Investigations called Informal Contacts, appropriate only if we believe we can trust the advertisers concerned. In those, currently online remit, cases, we ask the advertiser to ensure that relevant future ads are amended or withdrawn, but we do not ask for an assurance and we do not publish bare details on our website. We completed 35 Informal Contacts between May, when they were introduced, and 20 September 2011;
- our Complaints Reception team limiting customer access to our telephone complaint service during busy periods;
- a 'lead case' approach to dealing with large volumes of complaints about advertising on complementary and alternative health practitioners' websites, which includes investigating only a few representative cases and ensuring wider compliance through subsequent action by the Compliance teams and
- prioritisation of complaints about advertising on complementary and alternative health practitioners' websites, subject to set criteria. For example, we might prioritise a complaint if we believe there is scope for a large proportion of the general public to respond to, and to be adversely effected by, the advertised treatment. Complaints where the complainant alleges that actual harm has resulted from the advertised treatment are always assessed carefully, i.e. they are not suitable for de-prioritisation.

## 2.1.3 Competitor complaints

### 2.1.3.1 Background and analysis

Complaints about competitors' ads are likely to arise in competitive markets. If companies cannot resolve their differences about an ad, submitting a complaint to the ASA is almost always preferable to instigating legal action. Competitor complaints made to the ASA can result in a correction to or the withdrawal of an ad, which supports fair competition and benefits businesses and consumers. However, repeated and/or tit-for-tat complaints are costly for companies, for the good standing of their sector and for the reputation of self-regulation more generally.

Our current approach to competitor complaints is as follows:

- before submitting a complaint, companies are encouraged - but not required - to attempt to resolve their differences with their competitors;
- complaints that are groundless and without good supporting information are rejected;
- companies must confirm that their complaints are not the subject of legal action, that they will not instigate legal proceedings in connection with their complaint and that they are content to be named in any adjudication that results and
- complaints that merit formal investigation are automatically assigned as Complex Investigations, to be completed within 140 days (although see 2.1.2.5 above).

We compared external and internal perceptions of competitor complaints against our actual experience of dealing with them. The  or the  below indicate if those perceptions were borne out in fact. There is a perception that in comparison to other types of complaints, competitor complaints are relatively more:

- *Commonplace*: in 2009, competitor complaints made up 5.8% (811) of the total number of cases received, 13,995.  But they accounted for 18.5%, almost one in five of all formally investigated cases (156 out of 842 formal investigations).
- *Time consuming*: in the three years covering 2007 to 2009, it took on average 15 days longer to complete a formally investigated competitor complaint case (107 days) than a formally investigated case involving a member of the public (92 days).

- *Complex*: in the two years covering 2009 to 2010, the ASA was almost three times more likely to seek expert advice in a formally investigated competitor complaint (12 of 276 cases or 4.3%) compared to a formally investigated case involving a member of the public (17 of 1,182 cases or 1.4%). Expert advice costs £603<sup>7</sup> on average. ☒
- *Expensive to administer*: in the three years covering 2007 to 2009, the average cost for a formally investigated competitor complaint was £2,070.45, compared to £2,012.40 for a formally investigated other type of non-public case and £1,780.20 for a formally investigated case involving a member of the public. ☒

There is also a perception that:

- *The ASA is used without regard to an alternative solution*: from a random selection of 80 formally investigated cases from 2009, 19 related to competitor complaints. Only one of the 19 competitors who had submitted a competitor complaint appeared to have made efforts to resolve the matter between the competitors. ☒
- *Competitor complaint investigations are stalled by the advertiser subject to the complaint*: of the above 19 cases, the ball was in the court of the complained-about company for 24.4 days compared to 24.2 days for other categories of cases. ☒
- *Competitor complaints are almost always submitted by large advertisers*: in a two year period between 2009 and 2011, the ASA formally investigated 276 competitor complaint cases. About one quarter (70) involved an ISBA member (57 were made against an ISBA member and 43 were made by an ISBA member). Most others were submitted by large advertisers that were not members of ISBA, e.g. vacuum cleaner manufacturers, airline companies, insulation companies, estate agents. ☒
- *Competitor complaints are vexatious with little prospect of being 'upheld'*: in the above two year period, 71% (196) of 276 formally investigated competitor complaints were 'upheld'. That compares to 66.5% (560) of all formally investigated cases upheld during the period, 842. ☒

### 2.1.3.2 Analysis conclusions

The perceptions of competitor complaints broadly live up to the ASA's actual experience of dealing with them.

Formally investigated competitor complaints are, on average, relatively more time consuming, complex and expensive to administer than other categories of formally investigated complaints, and they are proportionately more commonplace too.

Recommendations intended to address those findings and to deal with the fact that most competitor complaints are submitted by large advertisers without prior recourse to an alternative solution would help the ASA to process them more effectively, efficiently and cost effectively in the interests of all stakeholders.

The recommendations must be proportionate. They bear in mind that competitor complaints are proportionately more likely to result in 'upheld' ASA adjudications. Those typically result in the amendment or removal of misleading claims, which supports fair competition and benefits businesses and consumers. The recommendations should not, therefore, unduly dissuade advertisers from registering competitor complaints.

### 2.1.3.3 Recommendations

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<sup>7</sup> Based on independent expert advice sought in 2010.

The recommendations oblige companies to take appropriate steps to resolve their differences between themselves. Where that cannot be achieved, the recommendations are intended to help the ASA deal with competitor complaints effectively, efficiently and cost-effectively.

#### **2.1.3.3.1 Recommendation 1: Inter-party resolution**

Companies must normally demonstrate that they have attempted to resolve their differences with the advertiser before the ASA involves itself in the complaint. “Normally” takes into account that there may, for example, be topics that companies cannot readily discuss between themselves for legal or other significant reasons.

In the first place, the complainant should raise their concerns with the advertiser by registered post. The correspondence must provide an appropriate level of detail about the claim and the media in which the ad appeared, together with the factual basis for the complaint and, preferably, reference to the relevant Code rules; the advertiser must be able to identify the advertisement and understand what is alleged.

The complaint should be signed or authorised by a suitably senior officer of the complainant (e.g. the Chief Executive or the Legal, Marketing or Regulatory Director) and addressed to a similarly senior officer of the competitor. Prior notice should preferably be given by telephone to ensure the intended recipient is appropriate, available and aware that the complaint is being made.

The complainant should allow five working days for a response. If, at the end of that period

- the advertiser has not responded
- the complainant has other reasonable cause to believe that the advertiser will not act within a reasonable timeframe or in good faith in response to the complaint or
- the parties cannot reach an agreement

the complainant should notify the ASA who will accept and, if appropriate, progress the complaint.

Complaining companies must demonstrate that they have attempted to resolve their differences by providing the ASA with the relevant correspondence including, but not necessarily limited to, the registered letter that has gone unanswered for five working days or has not been answered to the complainant’s satisfaction.

Contact between competitors aimed at the settlement of genuine disputes about advertising claims will not normally give rise to competition law issues, but parties should seek their own legal advice in relation to competition law issues.

Twelve months after launching the Inter-party Resolution process, we will:

- survey a selection of large advertisers (some of which are known to submit competitive complaints or have been the subject of a competitive complaint) to ascertain if Inter-party resolution policy has been successful;
- compare the number of competitor complaints and the average time to resolve them against the previous period and
- report on the difference, if any, between the number of competitor complaints originally submitted and the number of competitor complaints leading to ASA involvement.

We will launch the new procedure on 1 December 2011.

#### **2.1.3.3.1 Recommendation 2: CAP Compliance intervention**

From 1 January 2012, the Compliance teams will review on a quarterly basis competitor complaint cases with a view to considering if and how CAP/ASA Executive intervention should be offered to relevant advertisers.

The quarterly review of data will involve both quantitative and qualitative analysis and may result in CAP/ASA Executive intervention, for example in the form of:

- mediation;
- signed undertakings;
- compliance advice;
- communication from an ASA director/the ASA Chief Executive or
- referral of the matter to an appropriate representative body.

#### **2.1.3.4 Proposals considered but rejected, including Competitor Charging**

We considered but rejected various other ideas, including timetabling to conclusion all formally investigated competitor complaints (which would add an unnecessary administrative layer to straightforward competitor complaint cases), instigating checks on the use of external expert advice on competitor complaint cases (which would address a problem that doesn't exist: there is no evidence that external expert advice is currently sought unnecessarily) and offering ASA/CAP mediation after a complaint has been submitted (which we were not confident would be effective if Inter-party Resolution had already been attempted, unsuccessfully).

Perhaps the most interesting proposal, highlighted in Berkshire's Report, related to charging for competitor complaints.

Our preliminary work on competitor charging revealed that Section 28(2)(a) of the Communications Act prohibits Ofcom from charging for services it is under a duty to provide. We have sought legal advice and believe that prohibition extends to us: it would be unlawful for us to charge for investigating competitor complaints about broadcast advertising, without making available an alternative free-at-the-point-of-delivery competitor complaints process. We considered introducing a charge only for complaints about non-broadcast advertising, but that would run counter to our commitment to a media neutral regulatory approach.

We presented our preliminary thoughts on a fee-based, fast-track competitor complaints process to ISBA and some of its members. We noted that the American, Canadian and New Zealand self-regulatory bodies charge for handling competitor complaints but that their legal and regulatory environments are different from ours. Their competitor complaints processes can involve oral hearings, for example. We noted that their processes place an emphasis on deterring competitor complaints whilst offering a credible alternative to formal legal routes. We informed ISBA that a fast-track competitor complaints process would need to:

- sit between a free-at-the-point-of-delivery ASA complaints process and the law courts;
- place explicit value on dealing with competitor complaints quickly;
- be independent, offer appropriate right to reply and complement the present system;
- ensure through explicit criteria that the parties and the issue are suitable to be dealt with via the fast-track process and
- be transparent and open, in principle, to all relevant parties.

We made it clear that if a complaint merited investigation, that investigation could not be completed in the exceedingly short timeframe sought by some companies. That said, there was the potential for a fast-track process to deliver significantly faster turnarounds than the 107 days on average that formally investigated competitor complaints cases presently take to complete. We clarified that exploring further the possibility of a fast-track process that met all the necessary criteria would entail significant CAP/ASA Executive resources and significant legal input. In order to justify that work, we asked ISBA to consider the findings featured in our presentation with a view to confirming their

formal interest in the CAP/ASA Executive pursuing the possibility of an alternative, fast-track competitor complaints process. To date, we have not received that expression of interest.

## 2.2 Consistency

### *Berkshire's Report:*

- Improve collaboration with Clearcast, to develop a more common interpretation of the BCAP Code which in turn will build further trust in the overall self-regulatory system.
- Introduce a common pool of experts with Clearcast and make that pool more transparent to advertisers.
- Facilitate collaboration with TSOs to reduce inconsistencies.

### 2.2.1 Improving consistency with Clearcast

Our 2010 survey of adjudications against TV ads showed that, in 2010, we formally adjudicated on 164 TV ads (compared to 229 in 2009). Of those, 138 involved Clearcast (compared to 192). In 63 cases, we 'upheld' or 'upheld in part' the complaints, essentially 'overturning' Clearcast's advice (compared to 64). We publicly 'not upheld' in line with Clearcast's advice in 64 cases (compared to 113).

Although as a percentage of all TV 'uphelds' the 'difference of opinion' figure (66%) was higher than previous years, we are not overly concerned: the absolute number of TV 'uphelds' declined for various reasons, including fewer staff monitoring Formal Investigations and more cases dealt with informally, reducing the size of the formal 'uphelds' universe from which the percentage was derived.

As has been the case every year since 2002/03, the earliest adjudications we have analysed, differences of opinion on whether ads gave a misleading impression were the most common source of disagreement. But 2010, like 2009, also featured 10 cases where the ASA and Clearcast disagreed on the evidence. Interestingly, none of those cases involved cosmetics ads, which historically has been the most likely sector for such disagreements.

The number of disagreements about the suitability of ads, e.g. when appearing in or around children's programming, fell to just two in 2010, compared to 11 in 2009 and 17 in 2008. That suggests we are generally in agreement with Clearcast on the scheduling of ads.

We and Clearcast continue to focus on the number of 'overturns', with particular emphasis on those in the area of 'misleading impression', at our routine quarterly meetings (which also involve the Radio Advertising Clearance Centre (RACC)). We are monitoring 'overturns', as well as Informals, identifying and responding to emerging problems.

We and Clearcast agreed in principle to exchange a member of staff for three months to improve collaboration and understanding of our processes. That was delayed by our online remit extension but will be re-visited again in January 2012.

### 2.2.2 Common pool of experts

We already provide Clearcast, and its experts, with an opportunity to respond to the grounds to any complaint before we consult our own expert; if we are satisfied with Clearcast's or its expert's response, we do not need to go to the time and expense of consulting our own expert.

But we have gone further in the cosmetics area, the source of a disproportionate number of 'battles of the experts' in the past (although not in 2010, see above). We, Clearcast and the RACC are in advanced discussions on establishing a common pool of cosmetics' experts. We have identified five experts who will form that pool. An 'Experts' meeting' has taken place, discussing: expert selection criteria; guidance for the development and support of claims in cosmetics' advertising; the

approach to assessing evidence for claims; areas of concern, e.g. over the level of evidence required for certain types of claim; and how the pool works operationally.

Experts from the pool continue to work on papers on two of those specific issues: the scientific basis for a particular type of claim; and the underpinning for certain clinical studies. That will further help to establish a consensus scientific view, which all members of the pool will operate to, on those key issues. The experts will attend a second Experts' meeting on that topic on 31 October 2011.

We expect the pool to start operating in Q4 2011, when we will also publish details of the experts involved.

### **2.2.3 Improving consistency with Trading Standards Officers (TSOs)**

The Berkshire Report uncovered concerns that the ASA was not acting consistently with Trading Standards when it came to misleading advertising. Acting in a consistent manner is always important, but as the 'established means' for bringing about compliance with the 'maximum harmonisation'<sup>8</sup> Consumer Protection from Unfair Trading Regulations 2008 (CPRs), we are aware of the need to act consistently with other regulators.

Our first step was to ascertain whether the concerns were based on perceptions or real cases. We collated the views of the Office of Fair Trading (OFT), Trading Standards Institute (TSI), Local Better Regulation Office (LBRO) and Local Government Regulation (LGR) on the perceptions and realities of consistency issues under the CPRs. In addition, we requested examples of inconsistencies from ISBA, the British Retail Consortium, the Confederation of British Industries, the Federation of Small Businesses, Clearcast and the RACC. We received few examples and none that indicated a problem with ensuring consistency with TSOs.

We also assessed our internal approach to ensuring consistency and found that in many instances our staff were already considering matters of consistency and were assessing advice from other regulators that had been submitted by advertisers. We recognised that we have not traditionally advised advertisers about our commitment to consistency or that we take into account other regulators' advice in the course of our case-handling.

We are committed to demonstrating the value we attach to being consistent with TSOs. Therefore we will:

- update the ASA/CAP websites with information about our approach and commitment to better regulation and consistency, including the fact that we meet with other regulators;
- post a clear and unambiguous 'drop-in' box on our websites that invites advertisers to draw to our attention examples of inconsistency so that we can respond to them;
- publish existing MOUs/case handling agreements we have with other regulators;
- include consistency and better regulation matters within our newsletters and other corporate literature and promote their dissemination amongst TSOs;
- ask Primary Authorities to encourage their clients to use CAP Services<sup>9</sup> and
- aim to establish a half-yearly co-ordination meeting between TSI/LGR/OFT/LBRO/ASA, to which relevant concluded cases could be brought for discussion about consistency.

We have already:

- ensured that our 'notification of complaint' letters to advertisers state clearly that we seek to be consistent with TSOs in our interpretation of the CPRs. The letters invite advertisers to submit any advice they have received from another statutory body, for our consideration and

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<sup>8</sup> Maximum harmonisation is a term used in the European Union. Legislation that is subject to maximum harmonisation must be met exactly by all Member States: Member States may not enforce above or below the provisions in the legislation.

<sup>9</sup> CAP's advice and training services.



- started attending regularly the TS Supermarkets Group meeting (at which supermarkets' issues are discussed).

## 2.3 Stakeholder relations

### *Berkshire's Report.*

- Clearer referencing on e-mail correspondence.
- Communicate to advertisers the number of rejected complaints that the ASA receives.
- Dispel the 'myths' held by some stakeholders through improved communication and understanding of the following:
  - The make-up and procedures of the Council
  - The relationship between the Executive and the Council
  - The route a complaint takes and the level of objectivity applied.
- Take a more collaborative approach with key stakeholders to increase the collective ownership of this self-regulatory environment.

### 2.3.1 Advertiser Complaints Check-ups

In May 2010 and 2011, we provided the top 100 advertisers (by ad spend) with a Complaints Check-up, explaining how many complaints and cases, and of which types, their advertising had attracted in the previous year. That information provides important perspective, documenting the large number of complaints and cases that we do not investigate (and about which advertisers would otherwise be unaware), as well as the invariably much smaller number that we do. We will continue to repeat that on an annual basis, coinciding with the publication of our Annual Report.

### 2.3.2 Relationship Management approach

We are introducing a Relationship Management approach to advertisers and other key stakeholders, developing better contacts and relations with them, providing earlier warning of developing issues to improve understanding of the system and, where relevant, maximise our chances of resolving cases informally. Relationship Managers will not, however, handle all cases relating to the advertisers concerned and those advertisers will be expected to liaise with the executives handling their cases in the usual manner.

There is no recommended prescriptive approach to the nature of the relationship between the ASA and the stakeholder or the tasks that the Relationship Manager will be expected to undertake, except that the stakeholder will always be offered the opportunity to participate in a structured annual review meeting.

We have identified over 100 key stakeholders who we believe are the most appropriate to be considered as suitable for inclusion under this approach. Those stakeholders will soon be invited to participate.

#### 2.3.2.1 Key functions of the Relationship Management process

- To provide opportunities for both stakeholder and the ASA to improve mutual understanding of how the other works.
- To provide opportunities for the ASA to pass on relevant information, such as recent key adjudications, key Code rules, policy changes, ASA news and advice updates.
- To enable us to provide feedback to the stakeholder on any thematic issues we have in our relationship with them.
- To provide opportunities for the stakeholder to pass on relevant information in a way that will enable easy dissemination, such as key business developments and plans, feedback on any thematic issues with our processes, and so on.

- To provide the ASA with the opportunity, where relevant, to explain retrospectively any adjudications relating to the advertiser and the implications for them.
- To provide opportunities for increased Industry Awareness engagements, for instance with the Relationship Manager and other members of ASA visiting the stakeholder and learn more about their operations and core functions, or vice versa.

### **2.3.2.2 What the Relationship Management Process will not do**

- It will not duplicate areas of advice, assistance or training already offered within the organisation, i.e. it is not a Copy Advice or pre-approval service, nor is it a forum for industry matters to be debated. An exception to that could be, say, the provision of a bespoke seminar given/organised by the relevant Relationship Manager (a service that is already offered by the ASA on request).
- As mentioned above, Relationship Managers will not necessarily deal with all cases and matters relating to the stakeholder.
- The Relationship Manager does not replace existing key contacts within the organisation. S/he will not replace a staff member with whom the stakeholder may have dealings, such as in an ongoing investigation.
- The Relationship Manager is not a ‘troubleshooter’ with whom the stakeholder can raise issues or concerns that should be dealt with through the usual channels of complaint, i.e. the executive handling the case, then his/her manager, etc. The Relationship Manager might, however, advise on how best to escalate such issues or concerns.

### **2.3.2.3 Proposed activities to be conducted by the Relationship Manager**

The Relationship Manager can develop arrangements as appropriate, within the above guidelines. The only requirement is that we offer the stakeholder a structured two way annual ‘review meeting’ that the Relationship Manager will be responsible for facilitating.

The meeting might cover developments over the previous year, such as:

- Refresher on how the system works;
- Update on changes to Code rules, policy changes, etc;
- Key adjudications in their sector/area;
- Explanation of adjudications stakeholder was party to, if appropriate;
- An opportunity for the stakeholder to present to us on their own issues and areas of interest and
- Informal Q&A for both sides.

The exact agenda, however, should not be considered too prescriptive and should instead be driven by the specific needs of both sides. For some stakeholders with whom we wish to engage but who have a limited level of involvement with us, an annual meeting might involve an exchange of letters or a telephone call, rather than a full face-to-face meeting. The approach can and must be tailored to meet the need.

The Relationship Manager will also be responsible for checking and following up on the Advertiser Complaints Check-up with their stakeholders, if appropriate.

There may be instances where a Relationship Manager is conflicted because they are overseeing a piece of ASA work to which the stakeholder is a party. In such instances, the Relationship Manager will step aside from the relationship management role if it is judged to be incompatible with their regulatory duties.

### **2.3.3 Collective ownership**

We are taking a collaborative approach with key industry stakeholders to increase the collective ownership of the self-regulatory environment. We particularly took this approach in the preparations for the launch of the online remit extension and the associated ASA ad campaign.

Our Industry Engagement Programme is underway. We are taking all opportunities to explain:

- the number and nature of complaints received by the ASA;
- our complaint handling process and the level of objectivity applied;
- our focus on resolving cases proportionately (i.e. informally) where appropriate;
- the relationship between the Executive and Council and
- the make-up and procedures of Council.

The programme will, among other things, create new content on the ASA and CAP websites to address the above points, involve presentations to individual companies and trade associations and forms an integral part of all CAP Services' presentations.

## 2.4 Management approach and systems

### *Berkshire's Report.*

- Clarify the vision, direction and purpose of the ASA that enables individuals to be aligned in their day-to-day work.
- Gain alignment across the management team regarding 'what good looks like', principles of line management, common vision of success for the ASA and how the team will work as a unit with common goals and expectations.
- Be more overt in the identification of high performance in the areas of quality, thoroughness and relationship management. Make sure that these aspects of individuals' roles are documented and rewarded as much as throughput.
- Implement a regular, structured meeting for each team with clear agendas, decision making and team performance objectives to drive collaboration and a sense of team.
- Set and reinforce a common expectation of staff performance in relation to complexity, skills and throughput.
- Expand the role of all managers to include building external relationships, educating advertisers, aligning executive competencies and increasing capability in team.
- Implement spot checking of work and, where quality is an issue, instigate further checks whilst addressing individual capability gaps over the longer term.

### 2.4.1 Clarity of purpose

We have revised our Mission. It now states: "Ensuring that advertising in all media is legal, decent, honest and truthful, to the benefit of consumers, business and society".

### 2.4.2 Tighter structure

We have introduced more structured team meetings to:

- help bring about a better mutual understanding of the purpose of the ASA;
- help teams to become more adept at driving improvement by identifying short-term goals and meeting them and
- help teams achieve greater consistency of approach.

### 2.4.3 Less supervision, more empowerment

We have focused on identifying how to reduce the amount of supervisory work many of our managers undertake, without undermining quality and thereby exposing the ASA to reputational damage.

We have identified areas where training, guidance and revised procedures will improve standards and reduce the need for managers to supervise. We have identified some levels of checking that have been removed, updating our internal procedures accordingly. Executives are being given more responsibility earlier in their careers and will continue to be encouraged to present to, and liaise directly with, the ASA Council on their cases, rather than the managers doing so on their behalf. Probation guidelines have been tightened up and clarified to give staff a clearer definition of what success looks like and to tackle any underperformance or training needs early.

We have focused on identifying how to provide managers and executives with better tools for defining 'standards' of performance that take appropriate account of differing workloads, for

example the typical time taken on a key task. The data from the 'Time-sheet' exercise has proved valuable information in that respect.

Appropriate 'Standards' of performance should:

- provide for common expectations between executives and managers of what constitutes the correct 'standard' for a given key task;
- allow managers to measure and reward high performance more easily and
- allow managers to address underperformance, for example by providing support and training to the staff concerned.

#### **2.4.4 Higher ratio of executives to team managers**

We are focused on identifying how best to use freed-up manager time to adopt more of a Relationship Management approach to top advertisers, consumer bodies, other regulators, etc (see above). We expect significant benefits in the mid to long-term, but the changes will take time to implement and embed, not least because that freed-up time, together with benefits from other Process Review changes, must enable us to tackle the increase in workload following the extension of our online remit.

We deliberately took on that workload without the two team managers, one in Complaints and one in Investigations, that we had initially thought we would need to manage it. And as it has turned out, the online remit workload has been substantially higher than we forecasted.

The result is we have increased the ratio of executives to managers by 67% in most Complaints and Investigations teams (from three executives per manager to five).

The saving of two managers delivers a notional saving of over £100,000 a year, taking into account direct and indirect staff costs.

## 2.5 Processes and internal ways of working

### *Berkshire's Report.*

- Resolve more 'not investigated', 'non-remit' complaints, Mail Order and simple responses at Complaints Reception stage.
- Build an effective interface between TracFusion and CRM [the ASA's case management and customer relationship management systems].
- Introduce an electronic standard Copy Advice request form online.
- Stop routine monitoring that has not been shown to provide value.
- Consider using a target of total time invested by case type and complexity to encompass all activities involved in managing a case to conclusion.

### 2.5.1 Process tweaks

We have introduced an 'ASA Chairman's prerogative' to overrule, where appropriate, requests from a single Council member that a case should be formally investigated (when other members have accepted that it should be closed without investigation). We targeted 75% fewer cases investigated as a result of only one comment. Since the introduction of the policy, only one of the 47 cases that were investigated following Council comment had received only one comment. That compared to 20 out of 74 cases in the same period before the policy was introduced.

We have reduced the number of political ads that are obviously electioneering (and thereby 'outside remit') that we present to the ASA Council with the recommendation that they be closed down as 'outside remit'.

We have standardised, where appropriate, the language used in our adjudications (i.e. relating to references to the Codes' rules).

We have removed some of the perceived and actual barriers to working more flexibly with Clearcast, for example when seeking to resolve cases informally at the earliest stages (i.e. before cases have been allocated for investigation) and when discussing ads amended following adjudication.

### 2.5.2 Closing cases early

From 1 September 2010, our Complaints Reception staff took on additional tasks previously undertaken by Complaints Executives. Those include:

- establishing the advertiser in 'unknown' cases;
- handling all Mail Order and Database cases and
- obtaining all ads retrievable from, for example, media monitoring systems.

Our target is that Complaints Reception will close c800 more cases than previously, with 80% within target, and undertake necessary preliminary work on a further c6,000 cases, whilst ensuring it continues to load all complaints within 24 hours with no backlogs.

Complaints Reception closed 320 more cases, with 87% of Mail Order and 84% of Database cases within target, and undertook preliminary work on c4,000 cases. We were unable to load all complaints within 24 hours for a couple of months after the online remit extension on 1 March 2011, but have since resolved that backlog.

That relative reduction of work in the Complaints teams has, of course, helped to free-up time to devote to other tasks, but it is important to note that it is the cases that require the least amount of invested time, and that are the quickest to resolve in elapsed time, that have taken on by Complaints Reception.

### **2.5.3 Technological enhancements**

In Q2 2011, we introduced an online Copy Advice enquiry form to improve customer experience and to help maximise the time we spend giving copy advice.

The new form provides customers with an easy way to upload their requests, and lessens the time we spend on administration, which means more time spent on enquiries.

The technological enhancement also allowed us to make suitable provision for a chargeable Express Copy Advice service, with a four-hour turnaround (see below).

### **2.5.4 Routine monitoring**

The CAP Compliance teams carry out various essential compliance activities, including Post-Investigation Compliance (to ensure ASA adjudications are complied with), Sensitive Sector Compliance Surveys (e.g. into food, alcohol and gambling ads) and other sector/market/thematic Compliance Surveys (e.g. into video game ads). In addition, they undertake regular routine monitoring. The following concerns only routine monitoring (henceforth monitoring).

An analysis of time-sheet data from December 2009 – January 2010 showed that the Compliance teams devoted around 30% of their casework time (25% of their overall time) to monitoring. In the period January 2009 – July 2010, 38% of cases arose from monitoring. The data suggested existing monitoring processes were reasonably efficient, giving an efficiency quotient of 1.27 (38 divided by 30).

We contacted the following organisations to find out whether (and if so, how) they proactively monitored: Ofcom, the OFT, the European Advertising Standards Alliance, PhonepayPlus, the Medicines and Healthcare products Regulatory Agency, the Financial Services Authority, the Press Complaints Commission and the Proprietary Association of Great Britain. The feedback suggested CAP devoted more resources and monitored more proactively than most of the organisations we contacted. Perhaps unsurprisingly, no model for best practice could be readily identified from the feedback.

We decided to explore a more targeted and technological approach to monitoring involving regular, random monitoring sweeps using 'keyword alerts' on a leading advertising monitoring system, together with ad hoc 'mini compliance surveys' responding to concerns raised by internal or external stakeholders. We hoped that would both increase efficiency and reduce the costs associated with regularly purchasing hard copies of the media concerned; we already held a number of licenses for the monitoring system for other reasons, so there was no additional cost there.

We targeted an increase in the efficiency quotient to at least 1.5, without any associated significant increase in problem ads picked up elsewhere (e.g. in Complaints) that might previously have been picked up in monitoring.

In the event, we missed the target of 1.5 by a wide margin; efficiency fell from 1.27 to 1.04, a decline of 18%. On both sides of the equation performance dipped: a slightly bigger proportion of compliance time was devoted to monitoring and a lower percentage of completed cases were monitoring ones.

The new data showed that the advertising monitoring system we subscribe to was, in a number of important respects, slower and more frustrating to work with than hard copies. But perhaps the key deficiency was that it did not search classified sections of media, including health and beauty



classified sections. Health and beauty ads, published by small companies but appearing in classified sections, made up around half of the teams' monitoring cases in the January 2009 – July 2010 sample.

Informed by the latest data, we now plan to extend our monitoring to include health and beauty classified ads. We will further reduce the number of hard copies monitored, using the time saved to monitor via 'keyword alerts'. We have also adjusted the relative proportions of direct mailings monitored in hard copy and electronic form.

We will trial the refined process over 2012, conducting a third time-sheet analysis towards the end of the trial. We are targeting a reduction in the proportion of overall Compliance team time spent on monitoring from 25% to 15%, crucially whilst maintaining existing levels of breach identification.

The above trial is, however, dependent on being able to secure from our advertising monitoring system provider access to all or most health and beauty classified ads for a reasonable price. At the time of writing (September 2011), that is looking uncertain.

### **2.5.5 'Time invested' target**

The 'Time-sheet' exercise contained data that have helped us identify appropriate 'time invested' standards for key stages of cases, for example drafting recommendations or analysing responses from interested parties. Those standards have been passed on to executives.

### 3. Other changes

This section addresses some of the ideas the ASA had, or received from various stakeholders, that are not covered either above or, in the main part, in *Berkshire's Report*.

#### 3.1 Structure of Council

- Review the structure of Council with a view to having identical membership of the non-broadcast and broadcast variants and, therefore, three fewer members.

We have reduced the number of Council members from 15 to 13.

From April 2011, 11 of the 12 members of each Council have sat on both Councils, with only the 'Advertising' members with non-broadcast and broadcast media backgrounds sitting only on the Council relevant to their background.

Each Council continues to contain the current one third 'Advertising' and two thirds 'Independent' members and the current mix of two 'Advertising' members with a client background, one with an agency background and one with a media background.

The annual savings from April 2011 are around £34,000 per year and the administration of Council is simpler.

#### 3.2 Review the Independent Review process

- Reconsider whether 'substantial flaw of adjudication or process' is an unreasonable test to expect advertisers and complainants to meet.
- Set-up the Independent Reviewer with remote access to TracFusion so he can access the e-file, removing the need to create a hard-copy file at considerable expense.

*Berkshire's Report* stated that the only realistic alternative to the current system would be an independent appeal panel that would create an additional layer of decision-making and increase costs with little guarantee of increased effectiveness.

We agree with that conclusion and have no plans to change the Independent Review process.

We have decided against providing the Independent Reviewer with access to TracFusion, given his continued need for hard-copy files of review cases.

#### 3.3 Deter 'outside remit' / frivolous / persistent complaints

- Make it less easy for people to complain 'on a whim', e.g. by making those who use our Online Complaints Form register first.

We launched a revised Online Complaints Form on 1 March 2011, coinciding with the launch of our online remit extension. The aim of the revision was to: update the form to reflect the new online remit; make it as customer friendly as possible; and stop complainants from making complaints that were 'outside remit'.

To help assess the effect of the changes, we analysed data on the number of complainants that abandoned the form at various points. The data showed an abandonment rate for 'outside remit' media types of 70%, for 'part inside/part outside remit' media types of 51% and for 'inside remit' media types of 36%.

The data strongly suggest that the explanatory text is having the effect of turning away would be complainants whose complaints are outside remit.

In response to the higher than forecasted level of work following our online remit extension, we introduced a policy for limiting persistent complainants in Q2 2011. That was introduced to manage a few individuals who have, in recent years, taken up a disproportionate amount of our time. With the higher than forecasted level of online remit complaints, that was beginning to have an effect on our ability to provide an excellent service to the vast majority of others. The policy allows us temporarily to restrict access to our services to those individuals who lodge more than 15 complaints in any 12 month rolling period.

As of 20 September 2011, we had applied it to seven individuals who, between them, had submitted 553 complaints in the 12 months before they were restricted (on various dates in June and August 2011), 392 of which had been submitted since the launch of our online remit extension on 1 March 2011.

### 3.4 The test for 'misleading'

- Be clearer and more transparent on key issues like:
  - the need for ads to be likely to mislead; the fact that they could mislead is not enough
  - the test we apply: is it 'balance of probabilities' or 'beyond reasonable doubt'. If the former, as seems most sensible with the caveat that it might depend on the claim, does the language we use in our adjudications reflect that? Ought we to be saying, for example, that advertisers "have not conclusively proved" a claim?

Where appropriate, our decisions on misleading cases reflect the CPRs and appropriate case law. We are acutely aware that neither the Codes nor our interpretation of the Codes can be more lenient or strict than the CPRs, which implement a maximum harmonisation Directive.

In that context, we continue to emphasise to staff and the ASA Council that ads must mislead or be likely to mislead; it is not enough that there is, say, an 'outside chance' of them misleading.

### 3.5 ASA challenges

- Cut back the number of occasions where the ASA Executive adds its own challenges to those raised by complainants.

We now add our own challenges only in exceptional circumstances, for example if there appears to be a significant breach that cannot be resolved informally.

We have communicated that to our staff and the number of ASA challenges has reduced significantly.

In 2010, there were only 10 TV cases that either resulted from Staff Monitoring or included a Staff Intervention, i.e. an additional issue or set of issues that were not raised by the complainants. That compared to 31 in 2009 and 44 in 2008.

### 3.6 Communication channels

- Reconsider the communication channels we use routinely; must we continue to send certain key correspondence by hard-copy as well as e-mail when we know the preferred means of communication is e-mail? Might there be postage savings by removing that obligation?

Our policy is to use the communication channel most appropriate to the case. Only when sending notifications of complaint, draft recommendations and final adjudications to interested parties are letters (also) sent. We believe that strikes the right balance between efficiency and formality.

We continue to encourage our staff to make more frequent use of the telephone, followed-up where necessary with written confirmation, with a view to helping to complete cases more quickly and improve relations with stakeholders.

### **3.7 Disclosure**

- Reconsider our 'disclosure' policy, particularly for cases involving non-public complainants. Might time-wasting snags be avoided were we routinely to disclose non-public complaints and subsequent communications, suitably redacted, to advertisers?

From time-to-time, we disclose the detail of such communications, suitably redacted, to opposing parties. And that is the method followed successfully by the Independent Review when he independently reviews cases.

We will continue to do that where appropriate, but we have no plans to introduce full disclosure in all investigations.

### **3.8 Media classification**

- Simplify the classification of cases, e.g. by removing the distinction between Non-broadcast and Broadcast cases.

We might benefit from very small efficiencies by making such a change, for example in terms of reducing the number of case-types, etc. But it would not deliver significant benefits, not least because there are some different procedures for dealing with broadcast cases, where main points of contact are Clearcast and the RACC, and we must report on broadcast cases as part of our contractual arrangement with Ofcom.

We have no plans to remove the distinction.

### **3.9 Cause-related marketing and planning process ads**

- Adopt a narrower remit over non-commercial advertising, e.g. campaigning ads against local planning applications.

We believe there is a public and societal interest in us applying the CAP Code to those cases. But that must be weighed up against the fact that we also believe that we invest a disproportionate amount of time in those cases. Unfortunately, the 'Time-sheet' exercise did not produce sufficient data to identify, even on an approximate basis, how much additional time. But this is a matter for CAP, which is likely to review the situation when the two year 'review' period of our online remit extension comes to an end in March 2013.

### **3.10 'Council overturns'**

- Provide data on the number of occasions that the ASA Council goes against the Executive.

In the first half of 2011, the ASA Council voted for an alternative assessment (in whole or in part) to that proposed by the Executive in 20 cases, 5.1% of the 389 formal investigations for the period. That compares to 38 'Council overturns' in the whole of 2010, 5.7% of the 671 formal investigations that year.

### 3.11 Copy Advice on ads subject to investigation

- Provide Copy Advice on issues that are subject to ongoing ASA investigation.

Copy Advice will provide advice on issues that are subject to ongoing investigation by us. For obvious reasons, that advice may have to be cautious and might amount to removing or amending the claim pending the investigation's outcome.

### 3.12 Charge for premium Copy Advice services

- Copy Advice to charge for rapid turnaround.

#### 3.12.1 Copy Advice Website Audits

On 31 January 2011, we launched a new chargeable Copy Advice Website Audits service, a tailored and expert assessment of marketing communications on websites against the CAP Code. The introduction of the service was timed to coincide with the launch of our online remit extension on 1 March 2011.

The audits identify:

- the parts of websites that are likely to feature marketing communications covered by the advertising rules;
- the broad regulatory issues raised by marketing communications on websites, e.g. price claims, health and nutrition claims, availability of goods or services, environmental claims, protection of under 18s and children etc;
- examples of marketing communications on a company's website that are likely to breach the CAP Code and advice about how to amend them and
- ASA adjudications or other information relevant to the potential breaches of the CAP Code identified on the website.

Copy Advice Website Audits are provided as a premium service. A standard audit costs £800 + VAT and takes around 10 working days to complete. As the content and depth of each website can vary significantly, the Copy Advice team undertakes audits only after confirming the scope of the request and the final amount payable. Non-standard requests that require more extensive resources are subject to an additional charge.

#### 3.12.2 Express Copy Advice

Occasionally, the Copy Advice team's customers ask for a fast-track copy advice service. We can sometimes accommodate those requests, but it's harder to do so during busier periods and it inevitably has adverse implications for other Copy Advice customers.

On 11 May 2011, we launched a new chargeable Express Copy Advice service, which delivers copy advice within four hours. Copy advice requests submitted, say, before 2pm are turned-around that same day. The purpose of the service is to regulate the flow of potentially disruptive and time-consuming last minute requests; by helping us manage our workflow, Express Copy Advice ensures we are able to deliver the best service to the most customers, whilst making suitable provision for fast-track copy advice.

The price is £240 (£200 + VAT) per enquiry or, if paid upfront through our online payment service, 15% less at £204 (£170 + VAT). We estimate that such requests could reduce to around 50 per year.

#### 3.12.3 Direct income

We have targeted direct income of £40,000 from Website Audits and £10,000 from Express Copy Advice in Year 1.

From 31 January to 31 June 2011 we undertook 25 Website Audits, generating income of c£20,000. From 11 May to 31 June 2011 we responded to 19 Express enquiries, generating income of c£3,000. Our total income was £23,250.

## **4. Summary of savings**

- 'Savings' are actual savings that have been or will be realised;
- 'Notional savings' relate to costs that would otherwise have been incurred;
- 'Notional efficiency value' is a metric that attributes a £ value to changes, allowing them to be compared. It is primarily a relative measure and so should not be confused with absolute 'Savings' and 'Notional savings'. It is derived by working out the cost per 'case day', a 'case day' being one day of elapsed time for one case, and then applying that to the number of 'case days' freed-up by a change and
- 'Income' is direct income from a charge for our added-value services.

### **4.1 Savings**

Reduction in the number of Council members from 15 to 13 = £34,000 per year from 1 April 2011.

### **4.2 Notional savings**

No managers to be recruited for the online remit extension work (two were budgeted for, prior to the Process Review) = £100,000 per year from Q1 2011.

### **4.3 Notional efficiency value**

Eight percentage point increase in proportion of investigations closed informally = £178,283.08 per year from 1 June 2010.

### **4.4 Income**

Income from premium Copy Advice services = £23,250 at 31 June 2011.

## 5. ASA response scorecard

\* Outcome colour key: green = achieved/on course; orange = only partly achieved/not yet achieved; red = not achieved; black = rejected.

Theme	Activity	Target	Outcome
<b>Investigations:</b> Informal investigations (Informals)	Increase Informals, in line with updated criteria.	5-10 percentage point increase in proportion of investigations closed informally.	Achieved: eight percentage points.
	Increase Broadcast Informals.	5-10 percentage point increase in proportion of broadcast investigations closed informally.	Achieved: five percentage points.
	Update Complaint Handling Procedures.		Achieved.
<b>Investigations:</b> faster Formal Investigations	Introduce submission limits/restricted correspondence/full disclosure.	Introduce submission limits/restricted correspondence/full disclosure.	Achieved only in part: introduced in exceptional circumstances.
	Focus on internal standards.	Introduce 'Internal Target Date – Notification' of five working days.	On course: target operational and will be automated with the next update to our case handling system.
		Shorten 'Internal Target Date – Recommendation' by five working days.	Achieved.
	Focus on external deadlines.	Shorten response deadline for most non-broadcast cases from 10 to seven working days.	Achieved.
	Continue 'Timetabling to conclusion'.	Speed up resolution of difficult, robustly defended cases.	Not yet achieved.
	Tighten criteria for Complex Investigations, increasing proportion of Standard Investigations that attract much tougher turnaround target.	Increase proportion of Standard Investigations by 15 percentage points, from 55% of total to 70%, over two years.	On course: 10 percentage points achieved.
	Speed up on Formal Investigations generally.	Reduce average turnaround time for Formal Investigations by five working days (7% reduction), over two years.	Not yet achieved: 0.6 working day reduction after six months.
<b>Investigations:</b> competitor complaints	Inter-party Resolution: competitor complainants to provide documentary evidence that they have tried to resolve their concerns direct with the advertiser before complaining to ASA.	Encourage resolution of disputes between parties, reducing number of competitor complaints and time taken to resolve.	Not yet achieved: to be introduced 1 December 2011.
	CAP Compliance Intervention: regular monitoring of competitor complaints with a view to intervening where appropriate.		Not yet achieved: to be introduced on 1 January 2012.
	Charge for competitor complaints/an expedited competitor complaint process.	Idea rejected.	
<b>Consistency:</b> with Clearcast	Use regular meetings to identify areas of concern (e.g. related to misleading impression).	Meaningful reduction in number of 'overturns'.	Not yet achieved: 'overturns' level from 2009 - 2010
	Exchange a member of staff.	Improved mutual understanding.	Not yet achieved: to be revisited in Q1 2012.
<b>Consistency:</b> pool of experts	Establish common pool of cosmetics' experts.	Common pool established and working effectively. Significantly fewer 'battles of the experts'.	Not yet achieved: new deadline Q4 2011.
	Examine remaining differences between ASA's and Clearcast's experts.	No remaining areas of difference.	Second Experts' meeting scheduled for 31 October 2011.
	Publish more information about our experts on our website.	Greater transparency.	Not yet achieved: to be published when pool is launched.
<b>Consistency:</b> with TSOs	Improve communication with TSOs through closer liaison with LBRO, TSI, LGR, OFT, etc.	Better liaison leading to greater consistency.	Not yet achieved.
	Discuss relevant cases at regular meeting with a view to encouraging consistency.	Greater consistency.	
<b>Stakeholder</b>	Introduce Advertiser Complaints Check-ups.	Advertisers to benefit from a wider	Achieved:



<b>relations:</b> various		perspective of the ASA's complaint-handling role.	introduced in May 2010.
	Introduce 'Relationship Management' approach to work.	Nominated contacts improve relations.	Not yet achieved: to be introduced on 1 December 2011.
	Launch Industry Engagement Programme, including new content on the ASA website.	Increase collective ownership of self-regulatory system.	Not yet achieved.
<b>Management approach:</b> various	Redefine ASA's mission to: "ensure that ads in all media are legal, decent, honest and truthful to the benefit of consumers, business and society."	Clearer understanding of purpose of ASA.	Achieved.
	Introduce more structured team meetings.	Support continuous improvement and consistency of approach.	Achieved.
	Change processes to reduce some checking.	More empowered executives; managers' time freed-up.	Achieved: no additional managers recruited for online remit extension work (two were budgeted for, before the Process Review).
	Give executives more responsibility earlier and encourage them to present/liaise direct with the ASA Council.		
	Tighten up probation guidelines.		
	Define 'standards' of performance, informed by data from the 'Time-sheet' exercise and the 'Waiting time' analysis.	High performers better rewarded; underperformance addressed more quickly.	Achieved.
<b>Processes:</b> various	Where appropriate, ASA Chairman to overrule a request from a single Council member that a case should be formally investigated.	75% fewer cases investigated as a result of only one comment.	Achieved: only 1 out of 47 cases, compared to 20 out of 74 before.
	No longer refer all 'outside remit' political ads to Council.	Fewer NICDs; executive and manager time freed-up.	Achieved.
	Standardise language in recommendations, where appropriate.	Clearer adjudications.	Achieved.
	Complaints Reception staff to take over from Complaints Executives all Mail Order and Database cases, the role of establishing advertisers in 'unknown' cases and the sourcing of all ads retrievable from media monitoring systems.	80% of Mail Order and Database cases (c800) to be completed within target. Complete preliminary work on c6,000 cases. Complaints Reception to continue to load all cases within 24 hours.	Achieved only in part: 87% of MO and 84% of DB completed within target; 320 cases in total. Preliminary work on c4,000 cases. Post online remit extension complaint-loading backlog resolved quickly.
	Introduce online Copy Advice enquiry form.	Reduced time spent administering Copy Advice enquiries.	Achieved.
	Introduce more targeted monitoring.	Maintain number of problem ads resolved through monitoring but reduce time spent from 25% to 15% of the teams' time.	Not yet achieved: to be introduced on 1 January 2012.
	Compliance team to make use of 'alert' functionality on our media monitoring system to track repeat offenders and recurring misleading claims.	Improve compliance.	Achieved.
<b>Other ideas:</b> various	Reduce number of Council members from 15 to 13.	Reduced costs; easier administration.	Achieved: £34,000 savings/yr from 1 Apr 2011.
	Review Independent Review process.	Idea rejected.	
	Update Online Complaints Form.	Reduce 'outside remit' (OR) complaints that make it through the front door.	On course: benchmark set with abandonment rate of 70% for OR media-types v 36% for 'in remit' types.
	Restrict persistent complainants.	Restrict those who complain more than 15 times in a 12 month period.	Achieved: seven restricted in first few months of operation.
	Ensure staff are clear about misleading test; ensure new Codes embed that.	No justified challenges that we miss-apply the interpretational framework in the CPRs.	Achieved.

Ensure staff are clear that ASA challenges should be added only in, say, cases of serious breach.	No justified challenges that we 'go fishing' for problems.	Achieved : 10 TV adjudications involving ASA challenge(s) in 2010 v 31 in 2009 and 44 in 2008.
Ensure staff use channel most appropriate to the case, normally e-mail. Only draft recommendations and final adjudications to be also sent by post.	Faster investigations; reduced postage costs.	On course.
Remove classification between broadcast and non-broadcast.	Idea rejected.	
Exempt cause-related marketing/planning ads from the CAP Code.	Idea rejected.	
Provide data on the number of occasions that Council goes against the Executive.	Better understanding of consistency between Executive and Council to lead to better decision-making.	Achieved: Council 'overturned' Executive recommendations in 5.7% of cases in 2010 and 5.1% of cases in the first half of 2011.
Ensure Copy Advice team provides advice on ads subject to ASA investigation.	Better service to advertisers, agencies and media.	Achieved.
Produce Copy Advice 'online enquiry form'.	Less time spent loading Copy Advice enquiries; more time advising.	Achieved.
Charge for Website Audits and Express Copy Advice.	Reduce substantially the number of non-essential requests for rapid turnaround of advice, making it easier for Copy Advice to manage its workload and freeing-up time for it to improve wider CAP Services offering.	Achieved: launched Jan and May 2011. £23,250 direct income by 31 Jun 2011.