

CASE HANDLING PRINCIPLES BETWEEN THE UK ADVERTISING STANDARDS AUTHORITY AND BUCKINGHAMSHIRE & SURREY TRADING STANDARDS

Introduction

This document outlines practical working arrangements between the UK Advertising Standards Authority (ASA) and Buckinghamshire and Surrey Trading Standards (BSTS). Buckinghamshire and Surrey Trading Standards are a joint service hosted by Surrey County Council. BSTS agrees to provide a legal backstop for the ASA in relation to: misleading, aggressive or otherwise unfair non-broadcast advertising, impacting England and Wales which falls within the scope of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and any amendments; and misleading and impermissible comparative advertising that falls within the scope of the Business Protection from Misleading Marketing Regulations 2008 (BPR5) and any amendments; which may also encompass advertising that is fraudulent within the meaning of the Fraud Act 2006.

BSTS is commissioned by National Trading Standards (NTS) to provide the ASA's legal backstop on an independent basis. All funding for the work is channelled to BSTS by NTS. The ASA have no involvement in the funding arrangements.

Grounds for an ASA referral to BSTS

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

Referral and follow-up process

2. If BSTS is best placed to deal with the issue both parties will discuss the nature of the case, the supporting evidence held and the broader market implications.
3. In the course of the ASA referring a company to BSTS the following shall occur:
 - a) The ASA must have completed its own route to compliance before a case is referred.
 - b) Both parties will discuss and agree what materials will be submitted to support the referral and the referral template will be compiled by the ASA.
 - c) Once the referral has taken place, all subsequent decisions about how the referral is progressed will be taken by BSTS (with its own legal advice as necessary and appropriate). The ASA will be informed of the progress of any action that BSTS decide to take, and the eventual outcome. To this end, BSTS will provide a monthly summary report to the ASA in writing subject to restrictions on disclosure.
 - d) BSTS will first review the referral and determine whether the matter can be dealt with by bringing the trader back into compliance by means of direct contact with the advertiser. Alternatively, BSTS might decide to initiate a website suspension application. These steps will usually be possible without extra funding from NTS.

- e) Should these steps not be possible or appropriate, BSTS will make an application to NTS for funding for further action, and confirm to the ASA when this is in place.
- f) In all cases BSTS will seek to discuss the case with an identified local authority trading standards service (LATSS) and if possible determine with them the most appropriate course of action.
- g) Where the advertiser is in a primary authority partnership¹ (PAP) with a LATSS, Bucks & Surrey will adhere to the Regulators' Code² and the ASA will adhere to the spirit of the Code.
- h) The ASA will not take any further action against the referred party that might reasonably be regarded as prejudicing BSTS's or another body's investigation. The ASA will refer on any subsequent substantive communications with relevant parties to BSTS and will refer on any new similar complaints. On receipt of new complaints against the same advertiser, the complainant will be notified that their complaint will be passed to BSTS but that they may not hear directly from an officer of BSTS.
- i) When BSTS is considering asking an advertiser to sign undertakings (or other similarly binding assurances) it shall discuss the content and application of those undertakings with the ASA before they are signed but the final wording used will be determined by BSTS.
- j) BSTS will communicate the final outcome to the ASA in advance of any public announcement.

For cases that cannot be referred to BSTS

4. In the unlikely event that a case cannot be progressed, BSTS, in conjunction with NTS's National Tasking Group (NTG), will consider whether an alternative route not previously identified (e.g. referral to the Competition and Markets Authority (CMA) for cases with broader market implications) might be available. Having explored options, and on identifying when one is available, BSTS will ensure that a letter is sent to the ASA outlining the course of action it has decided to take (with appropriate contact details and any further instructions).
5. When BSTS passes the case on to an alternative backstop better placed to deal with the case (e.g. CMA or another local authority), that other regulator should be advised by BSTS to either liaise directly with the ASA and provide regular progress updates on the investigation, or to liaise through BSTS.
6. If, in the opinion of BSTS, a case cannot be progressed, then this decision will be notified to the ASA and a course of action will be agreed upon. If the case cannot be progressed and there is no alternative means of referral available, BSTS will inform the ASA in writing of the reasons for this. The case will then be reviewed if new evidence comes to light or new complaints are received by the ASA. If on review the case is suitable for adoption then this will be dealt with as per 2 and 3 above.

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

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

Communications

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

Other processes

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

Freedom of Information Requests

9. The Freedom of Information Act (FOIA) gives persons the right to ask any public sector organisation for all the recorded information they have on any subject, this includes information held by local authority organisations.
10. It is anticipated that much of the information passed to BSTS by the ASA will fall within one of the following exemptions under the FOIA and will therefore not be disclosed:
 - Section 30: investigations and proceedings conducted by public authorities
 - Section 31: law enforcement
 - Section 41: information provided in confidence
 - Section 42: legal professional privilege
11. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis. In the event information doesn't fall within one of the relevant exemptions, this information will have to be released.
12. BSTS will consult with the ASA to obtain their views before deciding whether any information should be released. However, any decision to release information under the FOIA will ultimately be the responsibility of BSTS as the data processor for the purposes of the FOIA, or HM Courts and Tribunals Service.

Environmental Information Requests

13. The Environmental Information Regulations 2004 (EIR) provide public access to environmental information held by public authorities.
14. The Regulations do this in two ways:
 - public authorities must make environmental information available proactively;
 - Members of the public are entitled to request environmental information from public authorities.

15. When BSTS receives a request for information, it must consider whether the requested information is environmental and whether it should be dealt with under the Regulations. In most cases this will be fairly clear.
16. As with the FOIA, EIR provides exceptions that allow the Authority to refuse to share requested information. It is anticipated that much of the information passed to BSTS by the ASA will fall within one of the following exemptions under the EIR and will therefore not be disclosed:
 - The course of justice and inquiries exception (regulation 12(5)(b))
 - Confidentiality of proceedings (regulation 12(5)(d))
 - Interests of the person who provided the information to the public authority (regulation 12(5)(f))
17. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis, and all are subject to a public interest test. In the event information does not fall within one of the relevant exemptions, or if it does fall within an exemption but the public interest in maintaining the exemption does not outweigh the public interest in disclosure, then this information will have to be released.
18. BSTS will consult with the ASA to obtain their views before deciding whether any information should be released. However, any decision to release information under the EIR will ultimately be the responsibility of BSTS as the data processor for the purposes of the EIR, or HM Courts and Tribunals Service.