

ASA submission of evidence to Department for Digital, Culture, Media & Sport's consultation on the Online Harms White Paper

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'
- 1.2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 57 years and the broadcast Advertising Code (written and maintained by BCAP) for 15, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to take action against misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 535,478 pieces of advice and training in 2018.
- 1.5. The ASA system is providing this written submission in response to the Department for Digital, Culture, Media & Sport's consultation on the Online Harms White Paper. Our submission focuses on: the proposal to create a new online regulator; our regulation of online advertising; regulating online political advertising; adverts for illegal products online; and AVMSD.

2. The creation of a new online harms regulator

- 2.1. The ASA recognises the consultation's proposal to create a new regulator for online safety. The ASA operates a form of "collective regulation" – neither statutory nor purely self-regulatory. We co-regulate broadcast and video-on-demand ads with Ofcom and, in relation to non-broadcast advertising; we work with a range of legal backstops, from Trading Standards and the Gambling Commission, to the Information Commissioner's Office.
- 2.2. We are able to secure compliance in over 98% of cases where a breach of the Advertising Codes is identified, without having to refer an advertiser to a legal backstop. Referrals are rare because UK media and platforms agree to act as gatekeepers for the ASA. If we spot a bad ad on YouTube, on Instagram, on a TV channel, in cinemas, on outdoor media or in print media,

those organisations and platforms work with us to remove the offending ad quickly.

- 2.3. Between 2014-2018, we resolved around 71,000 complaint cases and 64,000 own-initiative cases involving allegedly misleading advertising. Of those, around 30,000 resulted in us taking follow-up compliance action of some sort, including threatening referral to the appropriate legal backstop. That compliance action was overwhelmingly successful, resulting in us referring only 68 companies, all to Trading Standards, in those five years. On average, only 14 cases were referred each year, with obvious big savings for Trading Standards and the tax payer.
- 2.4. As part of that collective regulatory approach, we would of course seek to work with the appointed regulator in an open and constructive manner. We welcome further clarity on how the role of the new regulator will fit with established regulators and enforcement bodies. The ASA has bespoke agreements with other regulators, enforcement agencies and Government departments, which ensure there is an appropriate level of understanding and respect for each other's duties and responsibilities, and that we do everything we can to maximise protecting people while avoiding unjustified expense or double jeopardy for regulated parties.
- 2.5. We invite the new regulator to have regard to the ASA if it were to identify harm arising from the content or placement of online ads that fall under the Advertising Codes. In all but exceptional circumstances, the ASA should undertake the role, as it currently does, of addressing any such identified harm in the first instance. We would want to prioritise drawing up a memorandum of understanding, or the like, with the appointed regulator to cover any potential overlap in regulatory responsibilities in order to reassure stakeholders about the division and co-ordination of any such responsibilities.

3. The ASA's regulation of online advertising

- 3.1. The ASA has regulated paid-for online ads since the emergence of the internet. In 2011, the ASA's online remit was extended to include companies' and other organisations' own advertising claims on their own websites, social media spaces and advergames. We call this online 'advertiser-owned' advertising.
- 3.2. In 2018, the ASA resolved 14,257 cases from 16,059 complaints about online advertising. 78% of the 14,257 online cases were in online advertiser-owned spaces, and 22% were in other online media.
- 3.3. The 16,059 complaints amounted to 47.6% of the total number of complaints we resolved last year. Of those online advertising complaints, the vast majority (over 13,000) concerned potentially misleading advertising. Under 1,000 of the online complaints were categorised under potential 'harm or irresponsibility'.

- 3.4. In 2018, we secured the amendment or removal of 10,850 ads or campaigns. 90% of these appeared online, either in whole or in part.
- 3.5. Age-restricted ad online – including on social media – need to follow the same strict content rules as those in traditional media. They must be prepared in a way that is socially responsible and do not appeal inappropriately to children or other vulnerable people. Crucially, age-restricted ads mustn't be directed at under 18s and/or children. This includes adverts for gambling, alcohol and food and drinks high in fat, salt or sugar (HFSS). We proactively monitor advertising and undertake compliance sweeps to make sure ads are responsible.
- 3.6. We continually review our rules to ensure they are in the right place and introduce new standards where necessary to keep up with technology and to protect children. In 2017, following a call for evidence and a full public consultation, the ASA introduced tough new rules banning ads for HFSS food and drinks in children's non-broadcast media.
- 3.7. Those new rules help ensure ads for HFSS products are no longer allowed to appear online, including around video-on-demand content, in apps and in advergames that are directed at or likely to appeal particularly to children.
- 3.8. In addition to those rules, CAP has introduced [standards](#) requiring advertisers to use all the tools available to them on social media platforms to prevent targeting their ads at under-16s (in the case of HFSS ads) and under-18s (in the case of alcohol and gambling ads, for example). That is because, while age targeting provides a robust tool to reach a specific audience, it is inevitable that some incorrect information may be submitted or inaccurately inferred, e.g. by younger users misreporting their age or different people sharing the same device. Primary responsibility falls on the advertiser to demonstrate that they've done everything they can to target age-restricted ads away from children, including by not just relying on reported age. Advertisers, of course, hold to account the agencies that support them and the platforms and networks they advertise on in order to meet that responsibility. The Advertising Codes also place secondary responsibility on those intermediaries, platforms and networks direct.
- 3.9. Selecting or deselecting interest-based factors, such as what users are interested in, share on social media or the accounts with which they interact, can – in combination with age-targeting tools – help remove certain demographics, including children, from a target audience. For example, a child who misreports their age is still very likely to remain interested in content designed for their real age and less likely to be interacting with much content designed for adults. Such interest-based factors can be used as a tool to reduce inappropriate exposure.
- 3.10. We welcome the consultation document's acknowledgment of our five-year strategy, [More Impact Online](#). The strategy prioritises:

- Working more closely with the large online platforms and more prioritisation and partnership working, in particular in our regulation of online 'advertiser-owned' advertising
- The protection of vulnerable people and the appropriate limitation of children and young people's exposure to age-restricted ads
- Exploring new technological solutions and listening in new ways, including through research, data-driven intelligence gathering and machine learning.

3.11. As a part of our strategy commitments the ASA has been making use of new monitoring technology in the form of child 'avatars' - online profiles which simulate children's online profiles - to identify ads that children see online. In particular, we are looking at the potential exposure of children to ads for alcohol, gambling and HFSS food and drink.

3.12. Our avatar monitoring of HFSS advertising found:

- 2.3% of the 41,030 ads served to child Avatars across general interest and youth interest websites and YouTube channels were for HFSS products
- Over two-thirds of HFSS ads on websites and YouTube were for products likely to be of little interest to children, e.g. ads for supermarkets and Grana Padano cheese
- Breaches of the rules by eight brands on YouTube channels, against which we took successful action
- Over the same period, we monitored openly available website and social media content from a selection of the 50 top UK food and drink brands. Advertising on only one website was found to be problematic.

3.13. Our avatar monitoring of gambling advertising found:

- Gambling ads were served to the child Avatars on 11 of the children's websites monitored. Gambling ads were seen by the child Avatars on those 11 children's websites a combined total of 151 times – 1.40% of all ads served to child avatars in children's media during the research
- One gambling operator was responsible for 122 of the ad impressions (81% of the 151)
- The gambling operators accepted their ads broke the rules. In most instances, we were told the problems arose due to errors by third-party companies.

3.14. Our avatar monitoring of alcohol advertising found:

- Just 73 of the 95,665 ads served to the seven avatars were for alcohol products (0.08%)
- The monitoring did not identify any instances where alcohol ads were served to child avatars on websites clearly intended for children.

3.15. Our findings show the majority of advertisers are sticking to our rules, but the monitoring has enabled us to take action to enforce the rules against

a number of ads that we have found to be irresponsibly targeted. We will be repeating this monitoring exercise and exploring whether this approach can be extended to logged-in social media environments like Facebook, Instagram and logged-in YouTube.

- 3.16. The consultation document refers to the government's upcoming review of online advertising regulation. The ASA is engaging with government in the development of that review.

4. Regulation of online political advertising

- 4.1. Political ads are banned from being broadcast on TV under the Communications Act 2003 (instead, parties are given airtime via party political broadcasts, which aren't classed as advertising). Non-broadcast political ads are not currently regulated by any body in the UK. The non-broadcast Advertising Code excludes political advertising, which it defines as "claims in marketing communications, whenever published or distributed, whose principal function is to influence voters in a local, regional, national or international election or referendum are exempt from the Code".
- 4.2. The decision, taken in the late 1990s, fully to exclude such ads was driven by three factors. Firstly, the short, fixed timeframes over which elections run (i.e. the likelihood that complaints subject to ASA investigation would be ruled upon after an election has taken place). Secondly, the 1998 Human Rights Act, which raised concerns about the legality of the ASA restraining the freedom of political speech around democratic elections and referendum. Finally, and most importantly, there was no consensus amongst the main political parties that political advertising should be brought within the scope of our Codes.
- 4.3. CAP and the ASA Council reviewed their positions on this matter in 2017 and concluded that, as those barriers remain in place, they remain reluctant to change the current position.
- 4.4. We would consider revisiting the issue if, as a starting point, the main political parties/referendum campaign groups were to agree to follow the Advertising Codes and if suitable funding was available. Funding would be important because of the likely cost that would fall on any body regulating political advertising proactively, or quickly enough reactively, to take effective action against political ads before the election or referendum had taken place.
- 4.5. One other barrier to a body taking on such a role – the risk that it would be used as a political football by a political party on the receiving end of its regulation – might be mitigated by bodies with appropriate expertise sharing such a role for the limited formal campaign period of elections/referendums. If another body was to take up responsibility for regulating such advertising, we would want to share our insights from our long-standing role in regulating other forms of advertising across all media, including our regulation of (non-political) cause-related advertising where freedom of speech is a vital consideration, so we could help out as best we could.

4.6. Since 2017, we've been a member of a group convened by the Electoral Commission, which includes the organisations named in the committee's recommendation. Some of the other members include the Committee on Standards in Public Life, UK Statistics Authority and the Equality and Human Rights Commission. Those discussions have helped ensure a shared understanding of each organisation's respective activity, and helped ensure our activity complements that of other organisations. We've also coordinated common lines to use for public and media enquiries to ensure that the public gets clear, consistent information about roles and responsibilities. The group will continue to meet regularly to discuss emerging issues and, if necessary, to take further steps.

5. Regulation of online ads for illegal products

5.1. The ASA system dovetails with law enforcement bodies and operates within an over-arching legal framework. The non-broadcast Advertising Code complements, reflects and, where appropriate, goes beyond the law. In some places, it specifically refers to legislation (for example, in financial advertising or food and nutrition claims) and in others it mirrors the law (for example, it prohibits prescription-only medicines being advertised to the public). Generally, however, the Code reminds advertisers that they have primary responsibility for ensuring that their marketing communications are legal and should not incite anyone to break the law.

5.2. Advertisers should ensure that the product or service advertised is legal. For example, in 2011 the ASA upheld a complaint about an online ad targeting UK consumers that offered weapons that could not legally be imported into the UK. The ASA ruled the ad was irresponsible because it encouraged UK consumers to break the law by importing prohibited weapons.

5.3. If it has both a legal and an illegal use, a product may be advertised. In those circumstances, the ASA will consider the tone and message of the ad. For example, the ASA has rejected complaints about a leaflet that featured instruments for smoking marijuana because the items had legal uses (the smoking of tobacco). It considered that, however consumers chose to use them once bought, the products had a legitimate use and the sale of them did not, in itself, incite consumers to break the law. The ASA did, however, insist that pictures of marijuana leaves should be removed from the ad.

5.4. Ads do not necessarily have to link a specific product with illegal behaviour to breach the Code. In 2012, the ASA investigated a Greenpeace ad that promoted the painting of power station chimneys as a form of protest and requested donations to support the cause. The ASA considered that the ad encouraged and condoned defacing property, which would in some circumstances be illegal. It concluded that the ad was irresponsible and upheld the complaints.

5.5. The ASA will always take action where we can to stop bogus ads from appearing. In terms of online scams, we work with platforms such as Google and Facebook to have problem ads taken down. And we work with other

partners, including law enforcement bodies such as National Trading Standards as well as other regulators, to take action against those who are engaged in fraud. We also liaise with our counterparts across Europe and globally through a cross-border cooperative. We can and will refer cases to the body in the country where the problem ad originated.

5.6. As an example of our work with our statutory backstop, in 2018 we referred the secondary ticketing provider, viagogo to National Trading Standards for its failure to make changes to misleading pricing information on its website.

5.7. Earlier in the year we had banned several pricing practices by viagogo for:

- Not making clear the total ticket price at the beginning of the customer journey
- Not including the booking fee (inclusive of VAT) upfront
- Not making clear the applicable delivery fee.

5.8. Viagogo failed to meet the deadline to make the necessary changes to its website despite having provided assurances that it would do so. However, after the referral to Trading Standards but before legal action had been taken, viagogo agreed to make changes to the pricing information appearing on their website and came into compliance with the Code.

6. Audiovisual Media Services Directive (AVMSD)

6.1. We note that the government recently launched a consultation on the UK government's proposed approach to implementing the Audiovisual Media Services Directive 2018.

6.2. The Directive includes provisions, which are relevant to the ASA's work as well as the government's work on online harms, such as certain ad restrictions on video sharing platforms and the prevention of the targeting of alcohol advertising to under-18s.

6.3. The ASA will be responding to the government's consultation on the Audiovisual Media Services Directive 2018 in due course.

Contact

Kate Roche
Public Affairs Adviser
Advertising Standards Authority
kater@asa.org.uk or publicaffairs@asa.org.uk
020 7492 2176