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The Advertising Standards Authority's response to the proposed Audiovisual Media Services Directive

1. Introduction

- 1.1 The Advertising Standards Authority (ASA) is the UK self-regulatory body responsible for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.
- 1.2 The ASA is grateful for the opportunity to provide a submission to the Department of Culture Media and Sport on the proposed Audiovisual Media Services (AMS) Directive.
- 1.3 The ASA is concerned that the proposed Directive will impact negatively on the ability of advertising self- and co-regulation to operate in the UK.

2. Summary of the ASA system

- 2.1 The ASA has regulated non-broadcast (e.g. print, outdoor) advertising for more than forty years. The success of advertising self-regulation was recognised in 2004 when Ofcom contracted-out the regulation of broadcast (TV and radio) advertising to the ASA system. The decision was approved by Parliament and permitted under the current legal framework of the Television Without Frontiers (TWF) Directive.
- 2.2 This contracting-out arrangement created a 'one-stop shop' for advertising content standards in the UK. There are effectively two systems operating behind a single shop front: a self-regulatory system for non-broadcast advertising and a co-regulatory system for broadcast advertising. The system brings great benefits for consumers and for business:
 - i. **Easier for consumers** – A single complaints body means that it is easier for consumers to negotiate the complaints system. In the ten months prior to November 2004, the ASA received 5,814 complaints about TV advertising from consumers, which, at that time, it was unable to act upon.

Chairman Lord Borne QC • Director General Christopher Graham
ASA Council Chitra Bharucha • Jean Coussins • Elizabeth Fagan • Christine Farnish • Sunil Gadhia • Alison Goodman • Gareth Jones
• Mike Ironside • Susan Murray • Dan O'Donoghue • Colin Philpott • Donald Trelford • Nigel Walmsley • Neil Watts • Diana Whitworth

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- ii. **Free** – The system is funded by industry, not the tax payer, via a 0.1% levy on the cost of advertising space. The money is collected by two arms-length bodies, the Advertising Standards Board of Finance and the Broadcast Advertising Standards Board of Finance.¹
 - iii. **Simpler for Advertisers** - Advertisers have only to deal with one body during the complaints process.
 - iv. **Technology neutral and ‘high standards for all’ approach** - The ASA deals with advertisements in all media, meaning it is technology neutral. The ASA believes that all ads should be subject to the same high standards, regardless of the media platform through which they are delivered.
 - v. **Harmonious decision making** - Cross media advertising decisions, i.e. single advertising campaigns running on several media platforms, are made by a single organisation.
 - vi. **Corporate Social Responsibility** - Effective self-regulation works because it is powered and driven by a sense of corporate social responsibility amongst advertising stakeholders. Advertisers have an interest in maintaining the system and a level playing field because it:
 - Maintains consumer confidence in commercial communications
 - Reduces costs by ensuring that advertising claims are kept within bounds
 - Is a cost-effective way to resolve grievances, without the requirement for expensive lawyers
- 2.3 A synopsis of the UK’s system of advertising self-regulation and co-regulation is attached at Annex 1. Further information can be found at www.asa.org.uk and www.cap.org.uk.
- 2.4 The ASA is a member of the European Advertising Standards Alliance (EASA)². Advertising self-regulation is a recognised and reliable means of ensuring high levels of consumer protection across the EU25 via EASA members.

¹ The ASA received £8 million in funding for 2006.

² Established in 1992, EASA (www.easa-alliance.org.uk) is an association of EU self-regulatory organisations and European industry associations, representing advertisers, agencies and media. One of its first actions was to establish a credible system for handling cross border complaints about advertising.

3. Self-Regulation and Co-Regulation

Advertising self-regulation is an effective means of consumer protection.

In order to encourage the continued operation, investment in and development of advertising self-regulation by the advertising industry, we urge the UK Government to support the insertion of a reference to advertising self-regulation in Article 3.3 of the proposed AMS directive and the removal of the Inter Institutional Agreement on Better Law Making from the recitals.

- 3.1 The ASA one-stop shop enjoys the support of the Government, regulators, advertisers and consumers and is a model that is internationally admired. We are rightly proud of our work and are keen that it should continue.
- 3.2 The ASA agrees that a level playing field for industry and high levels of consumer protection are key goals for advertising regulation regardless of the media in which the ad appears. However, we believe that advertising self-regulation is best placed to deliver this.

Advertising self- and co-regulation within the proposed Directive

- 3.3 The status of advertising self-regulation within the proposed directive is the ASA's main concern: the proposed text of the AMS Directive could severely inhibit the continued operation and development of effective advertising self- and co-regulation in the UK and across the EU-25.
- 3.4 The European Commission has repeatedly expressed its intention to promote advertising self-regulation as an effective consumer protection tool. Commissioner Reding recently expressed her support for advertising self-regulation during the Culture and Industry Committee on the review of the TWF directive: *"In all policies you need to give industry a chance and there is only need to act if the industry shows that it will not or cannot solve the problems... The advertising self-regulatory authorities have reached good results and have done good preparatory work so they deserve to be trusted"*. In addition, the Explanatory Memorandum³ that accompanied the publication of the proposed Directive stated that the Directive explicitly referred to co- and self-regulation, suggesting that Member States would be able to employ flexible regulatory tools to achieve the Directive's aims.

³ Paragraphs 331, 341 and 342 of the Explanatory Memorandum (<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0646:EN:NOT>)

3.5 Despite this apparent support for self-regulation, a specific reference to self-regulation has been omitted from Article 3 of the proposed AMS Directive, leaving only a reference to co-regulation and an instruction in the recitals to use the Inter Institutional Agreement (IIA) on Better Law Making. The effect of this wording appears to be to prohibit the use of self-regulation and to permit only a very narrow form of co-regulation.

Why is the wording problematic?

- 3.6 The IIA's prescriptive definition of co-regulation does not recognise that there is no 'one size fits all' approach to regulation. The reality is that differing legal traditions in each Member State have allowed very different models of advertising self-regulation to be developed across the EU-25.
- 3.7 For example, although the ASA system is not compliant with the IIA definitions of either self-regulation or co-regulation, it is still widely recognised as a highly successful and best practice regulator⁴. Given that the ASA is operating very effectively and is well-linked in to partner statutory regulators, to require changes of it would be nonsensical and a discredit to European legislators.
- 3.8 The inclusion of a direction to use the IIA is at odds with Article 249 of the Treaty establishing the European Community, which states that a directive "*shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*". This principle was exemplified when Ofcom contracted-out broadcast advertising to the ASA system: the UK is still achieving effective implementation of the TWF Directive, even though the ASA's structures do not comply with the IIA.
- 3.9 Of particular concern is that the IIA definition of co-regulation essentially restricts industry participation to funding the regulatory system, but without providing sufficient motivation for doing so.
- 3.10 The lack of flexibility in the proposed wording means that this Directive could force the ASA to restructure into an organisation in which the industry patently would not want to invest. Let there be no mistake about it: the proposed text puts the ASA at great risk. Losing the benefits of a 'one-stop shop' might ultimately decrease the level of consumer protection in the UK.

⁴ The Hans Bredow Study into co-regulation (commissioned by DGInfosoc) and DG SANCO's recent report on Advertising Self-Regulation praised the UK ASA.

- 3.11 Although not explicitly required by the Directive, it seems likely that Ofcom would introduce licensing for new media providers that fall within the scope of the Directive. The effect of this would be to shift a large amount of non-broadcast advertising from the self-regulatory part of the ASA system into co-regulation. As new media is a major growth area in non-broadcast advertising, this could, in the long term, have a destabilising effect on the self-regulatory system.
- 3.12 The UK Government derives great benefits from the work of the ASA. Non-broadcast media is much more prolific than broadcast advertising and is, therefore, much more difficult to regulate. The UK Government views the ASA as an important part of its plans to implement other EU and UK legislation. For example, the Unfair Commercial Practices Directive and the imminent Nutrition and Health Claims Regulation.
- 3.13 The new ASA one-stop shop has only just restructured: considerable time, effort and money was expended to develop the right model for the UK. The 'new' ASA has already established good awareness amongst consumers and advertisers have become accustomed to the new system. However, this Directive could unravel a system that is working very well.

Why use self- and co-regulation in New Media?

- 3.14 The ASA firmly believes that laws are there to be enforced. They are not enacted to be mere statements of good practice. Where a law cannot be effectively enforced it brings both the law in general and those attempting to enforce it into disrepute.
- 3.15 This point is particularly pertinent in relation to the AMS Directive; the Directive will attempt to regulate a rapidly changing industry that operates in media without any global borders. Pursuing this aim through statutory enforcement seems destined for failure. Any Directive that might encourage businesses to move outside the EU25 to avoid regulation, whilst still allowing those businesses to target EU consumers is unsatisfactory. This, in itself, provides a strong case for allowing flexible self-regulatory mechanisms to tackle the challenge instead.
- 3.16 It is for policy makers to decide how policy aims can best be secured, but passing rigid laws, hiring more officials, and pursuing cases through the courts might not be the best way. Flexible self-regulation would appear to be the most sensible and useful approach in an industry that is changing rapidly and when jurisdiction is difficult to establish.
- 3.17 Self-regulation can respond more quickly and appropriately to changes in fast-moving technology in respect of advertising regulation and a 'one-stop

shop' is able to act on advertising content regardless of a 'linear' / 'non-linear' distinction.

- 3.18 The Codes cover all advertisements in paid-for space (including internet pop-ups and banner ads and text messages) with a few notable exceptions e.g. on pack claims, in-store promotions, election advertising, classified ads and sponsorship.
- 3.19 The CAP Code already covers advertising that falls within the scope of the proposed AMS Directive and the industry is aware of need to extend the structure of the UK system to include formal representation of new media stakeholders in its Committees.
- 3.20 Finally, it is important to note that an absence of a legal backstop does not necessarily lead to a lack of compliance. For example, approximately 75% of cases received by the ASA relate to misleadingness (which is covered by legislation); however 91.8% of non-compliance cases relate to misleadingness. This demonstrates that a lack of a legal framework does not encourage advertisers to flout ASA decisions on the purely self-regulatory parts of the Code.⁵

The ASA supports the amendments that EASA is proposing to the Directive in order to secure the continued operation of advertising self-regulation in the EU-25. I have attached these amendments to the end of this letter at Annex 2.

If you have any queries or questions about any aspect of this submission, please do not hesitate to contact me.

Yours sincerely



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Policy and Public Affairs Advisor

⁵ Between 28 February 2006 and 31 August 2006, there were 195 compliance cases, of which 179 related to misleadingness and 16 related to other parts of the Code.

Annex 1

Introducing a New One-Stop Shop for Advertising Complaints

Background

On 1 November 2004 the biggest change in the regulation of advertising for over forty years took place. The introduction of a one-stop shop for all advertising complaints makes it simpler and more straightforward for consumers to complain about advertisements they find misleading or offensive.

Since 1962 the Advertising Standards Authority (ASA) has controlled the self-regulation of non-broadcast advertising, including print, posters, direct mail, sales promotions and some Internet ads. But the ASA has never been responsible for TV and radio commercials. Instead, the Independent Television Commission, the Radio Authority, and most recently, Ofcom have been the statutory regulators for broadcast advertising.

Following a public consultation in 2004, Parliament approved Ofcom's proposals under the Communications Act 2003 to contract out responsibility for the regulation of broadcast advertising to the ASA. Working with the advertising industry and Ofcom, the ASA developed a one-stop shop for all advertising complaints that launched on 1 November 2004.

In the first ten months of 2004 to 1 November, the ASA had to turn away around 6,000 people who tried to complain about a broadcast advertisement. The one-stop shop ended this confusion, with all ad complaints received and resolved by the ASA. The ASA accepts complaints online, by post or by phone.

Two systems within a one-stop shop

Designed to be simple for consumers to access, behind the scenes the one-stop shop operates two parallel systems for regulating broadcast and non-broadcast advertising. This is because the ASA's contract with Ofcom differs from the existing arrangements for regulating non-broadcast advertising.

The ASA is accountable to Ofcom for its effectiveness in regulating broadcast advertising and is able to refer any broadcaster who does not co-operate to Ofcom for further action. However, Ofcom's remit does not extend to non-broadcast advertising. Here, the Office of Fair Trading continues to provide a legal backstop for advertisers who refuse to comply with ASA adjudications on misleading ads. Although consumers just see a single ASA, two systems operate alongside each other, with separate funding streams, and specialist teams of staff assessing complaints according to the relevant Codes.

Adjudications are made by the ASA Council. Some Council members judge only broadcast complaints while others focus on non-broadcast advertising. Most Council members are lay people, but one-third has experience of the advertising industry. The Council's Chairman is Lord Borrie, QC. Its decisions are published on the ASA's website every Wednesday – www.asa.org.uk.

The advertising Codes

The establishment of the one-stop shop meant that Ofcom handed over responsibility for maintaining standards in broadcast advertising content to the advertising industry. A new body - the Broadcast Committee of Advertising Practice (BCAP) – has taken charge of setting, reviewing and revising the broadcast advertising Codes. The Advertising Advisory Committee (AAC) – a new independent committee of lay people – advises BCAP. Any changes to the Codes proposed by BCAP must be agreed by Ofcom. Ofcom is also able to insist on changes to the Codes, although it would not normally seek to do this.

TV and radio ads still have to be pre-cleared before they can go on air. The pre-clearance bodies – the BACC and the RACC - operate independently of BCAP.

The Code for non-broadcast advertising (The British Code of Advertising, Sales Promotion and Direct Marketing or the CAP Code) continues to be managed and enforced by the advertising industry via the Committee of Advertising Practice - the body that has been responsible for advertising standards in non-broadcast media for over 40 years. Ofcom's remit does not extend to the CAP Code.

Funding

The ASA is funded by the advertising industry via the Advertising Standards Board of Finance (ASBOF). ASBOF collects a levy on display advertising and direct mail expenditure from advertisers and passes it on to the ASA. ASBOF's role means the ASA never knows how much an individual advertiser contributes – helping to preserve the ASA's independence.

Under the new one-stop shop, this income stream is supplemented by a similar levy on broadcast airtime. The broadcast levy is collected by BASBOF – the Broadcast Advertising Standards Board of Finance. Although the two levies both fund the one-stop shop, the two income streams are managed separately.

EASA comments on the Committee on Culture and Education proposal amending Council Directive 89/552/EEC

EASA notes the European Parliament's intention to promote self and co-regulation as a complementary tool for consumer protection. However, EASA is concerned by some wordings of the draft amendments, which could have significant implications for the continued operation and development of effective advertising self-regulation across the EU-25. Please find below a brief overview on why and how some of the suggested amendments should, in our views, be improved. This will be followed by a comparison table that lists the original Commission's proposal, the draft report from the "Culture" Committee rapporteur as well as EASA's suggested amendments.

Recital 25

The proposed reference in the directive to the Inter-Institutional Agreement on Better Regulation (IIA) would restrict, rather than encourage, the development of effective self and co-regulation in the advertising industry, as it does not reflect the current reality of national level advertising self-regulatory (SR) systems. **It would require in each country a special legislative mandate prior to the transposition of the new directive for these systems to continue operating and it could put them at risk.**

It is EASA's position that the IMCO Committee draft amendment for Recital 25 provides a fairly accurate explanation of the relationship between national legislators and co- and self-regulatory regimes in a clear and concise manner, without referring to the IIA. Therefore EASA suggests improving Mrs Hieronymi's amendment on the basis of the wording proposed in the IMCO draft report.

Recital 25A

Recital 25A provides further insight into the functioning of the 'legal backstop', as well as the complementary nature of self-regulation. To further enhance clarity, as well as provide a better interaction with the suggested amendments for a Recital 25, EASA suggests to remove 3 sentences.

Article 3.2

EASA is supportive of the CULT Committee text.

Article 3.3

Following the example of the IMCO Committee text, EASA has re-inserted the reference to self-regulation, bearing in mind the suggested amendment in previous recitals. The emphasis placed on the cooperative nature between state and self-regulatory bodies combined with active stakeholder involvement expresses a more accurate reflection of current realities. It will strengthen self- and co-regulatory regimes, rather than undermining them by referring to the IIA.

Suggested amendments to the directive are attached.

For further information on EASA, its SR Charter and advertising self-regulation across Europe please go to <http://www.easa-alliance.org>

September 5, 2006

	Commission draft	CULT Committee draft	EASA suggested amendments
Recital 25	<p>(24) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Unionⁱ the Commission stressed that "a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. For co-regulation and self-regulation, the Interinstitutional Agreement on Better Law-makingⁱⁱ provides agreed definitions, criteria and procedures. Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection.</p>	<p>(25) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. For co-regulation and self-regulation, the Inter-institutional Agreement on Better Law-making provides agreed definitions, criteria and procedures. Experience showed that co- and selfregulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection, since these objectives, particularly in the context of the new audiovisual services, can best be achieved with the active support of the providers. Co-regulation and self-regulation instruments should therefore be used not only at European level but also, in line with the different legal traditions, for the transposition of the directive in the Member States. Broad acceptance of the regulatory procedure by stakeholders within the meaning of this directive relates to the Member State, not to the Community.</p>	<p>(25) In its Communication to the Council and the European Parliament on Better Regulation for Growth and Jobs in the European Union the Commission stressed that a careful analysis on the appropriate regulatory approach, in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self regulation should be considered. <i>Self-regulation provides a complementary means to implement certain provisions of this Directive but it cannot substitute the obligation of the legislative authorities. Co-regulation provides for the necessary "legal link" between self-regulation and the national legislator, and allows for the transposition of the directive in line with different legal traditions of the Member States.</i> Experience showed that co- and self-regulation instruments implemented in accordance with different legal traditions of Member States can play an important role in delivering a high level of consumer protection.</p>
Recital 25a		<p>(25a) The generic term "co-regulation" covers regulatory instruments which are based on cooperation between state bodies and self-regulation bodies, and vary widely in terms of their names and structures at national level. The actual form such instruments take reflects the specific tradition of media regulation in the individual Member States. What the co-regulation systems have in common is that tasks and objectives which were originally the preserve of the state are realised in cooperation with the actors affected by regulation. Designated or authorised by the state, the participants themselves are to guarantee the achievement of the regulatory objective.</p> <p>In every case the systems are founded on a state legal framework which lays down instructions as to content, organization and procedures. On this basis the interested parties create further criteria, rules and instruments, compliance with which they themselves monitor. Selfregulation as thus</p>	<p>(25a) The generic term "co-regulation" covers regulatory instruments which are based on cooperation between state bodies and self-regulation bodies, and vary widely in terms of their names and structures at national level. The actual form such instruments take reflects the specific tradition of media regulation in the individual Member States. <i>At its minimal form, there is a legal backstop behind these systems; thus providing a framework which lays down a basic set of criteria with regard to the content, organization and procedures.</i> Designated or authorised by the state, the participants themselves are to guarantee the achievement of the regulatory objective. <i>Self-regulation allows specialist knowledge to be used with the aim of achieving better regulation.</i></p>

		defined enables specialist knowledge to be exploited directly for administrative tasks, and bureaucratic procedures to be avoided. It is necessary for all, or at least the most influential, actors to participate in or recognise the system. Co-regulation operates by combining instructions to the interested parties with opportunities for state intervention should those instructions not be carried out.	
Article 3.2	3.2 Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.	(2) Member States shall, by appropriate means, ensure, within the framework of their legislation and in accordance with existing supervision procedures of proven effectiveness in the individual Member States, that media service providers under their jurisdiction effectively comply with the provisions of this Directive	No suggested amendment
Article 3.3	3.3 Member States shall encourage co-regulatory regimes in the fields coordinated by this Directive. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.	(3) Member States shall encourage, in the fields coordinated by this Directive, regimes at national level for co-regulation as a regulatory instrument founded on cooperation between state bodies and self regulation bodies, with the state bodies determining the legal framework for the cooperation. These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement	3. Member States shall encourage, in the fields coordinated by this Directive, <i>self and/ or co-regulatory regimes at national level, as regulatory instruments founded on cooperation between state and self-regulation bodies</i> . These regimes shall be such that they are broadly accepted by the main stakeholders and provide for effective enforcement.