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RESPONSE TO THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE CONSULTATION ON PROPOSALS FOR IMPLEMENTATION IN THE UNITED KINGDOM

Introduction

1. Overview of Advertising Standards Authority

- 1.1 The Advertising Standards Authority (ASA) is the UK self-regulatory body for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.
- 1.2 The ASA is widely recognised as being responsible for controlling marketing communications in all media in the UK and we work closely with statutory regulatory partners, such as the Office of Communications (Ofcom) and the Office of Fair Trading (OFT).
- 1.3 Two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are responsible for writing and maintaining the Advertising Codes. CAP is responsible for the non-broadcast Code and BCAP is responsible for the TV and radio Codes.¹
- 1.4 More information about the ASA one-stop-shop and the benefits it brings to consumers and industry is detailed at **Annex A**.

¹ The Advertising Codes can be found at: <http://www.cap.org.uk/cap/codes/>

- 1.5 The ASA welcomes the opportunity to respond to the Government's plans for implementing the Audiovisual Media Services Directive (AVMS; 'the Directive') in the UK.

2 Response summary

2.1 This ASA response will not address each consultation question in turn and will offer no views on some matters. This is because it is important that any decisions about the structure and breadth of advertising co-regulation are made by the industry itself. That said, the advertising regulatory system is ready, willing and able to adapt to develop an appropriate system for the regulation of Video-On-Demand (VOD) advertising under AVMS.

2.2 The ASA naturally supports a simple regulatory structure that is in line with better regulation principles and for that reason this response will make the case for:

- Responsibility for regulation of VOD advertising remaining with the ASA as part of the 'one-stop shop' self-regulatory and co-regulatory model.
- Ofcom being responsible for assigning powers for VOD advertising, rather than those powers being assigned by central government or a third party such as the VOD content regulator(s).
- A simple form of co-regulation to be established for VOD services, something more akin to self-regulation, with the necessary legal underpinning, rather than an onerous co-regulatory structure.

Regulation of VOD advertising

3. VOD advertising regulation under AVMS

3.1 Currently, advertisements accompanying VOD programmes are subject to advertising self-regulation. Advertising must comply with the CAP

Code² and complaints can be made to the ASA. The ASA has not encountered any particular problems with such advertising.

- 3.2 However, the ASA acknowledges that the purely self-regulatory status quo cannot be maintained under the AVMS Directive.
- 3.3 As a self-regulatory and co-regulatory body, the ASA is encouraged that the UK Government has taken the opportunity provided by the Directive to permit co-regulation to play a full role in regulating audio visual media services.
- 3.4 However, the ASA is aware that there are many different degrees of co-regulation, which sit between pure self-regulation and statutory regulation, as indicated below in **Figure 1**.

Figure 1



- 3.5 Given that there is already an effective self-regulatory system in place to control VOD advertisements, it seems unnecessary to devise an onerous (or very formal) system of co-regulation to control VOD advertising under AVMS. Since the Directive is supportive of both self-regulation and co-regulation it seems sensible to provide the most flexible regulatory structure permissible under the Directive. The ASA self-regulatory model has proven that such an approach is workable and effective; the ASA comprises many forms of self-regulation within a co-regulatory framework and the formality of these various arrangements does not have a particular bearing on compliance levels.

² The CAP Code is the non-broadcast advertising code. All the Advertising Codes can be accessed at www.cap.org.uk

- 3.6 The ASA has established effective partnerships with various statutory regulators, which are regarded as self-regulation within a co-regulatory framework. Some of these are outlined in section 10 of this response.
- 3.7 The ASA firmly believes that maintaining a single advertising regulator is the best approach, rather than establishing a new regulatory body(-ies). The whole point of creating the one-stop shop in 2004 was to simplify advertising regulation, because consumers and industry found it confusing dealing with a number of separate bodies. For this reason, the ASA is encouraged that the Government's initial preference, as outlined in part 3B of the consultation document (paragraph 34), is that *"regulation of advertising in video-on-demand services could be assigned to the Advertising Standards Authority"*.
- 3.8 The approach outlined above would be in line with the Better Regulation Commission's five principles of better regulation.

4. Ofcom as the backstop to the system

- 4.1 The ASA strongly supports powers for VOD advertising regulation being assigned directly by Ofcom to the ASA rather than those powers being assigned by central government or a third party such as the VOD content regulator.
- 4.2 The ASA regards this as a much simpler route and in line with better regulation principles because Ofcom already acts as the statutory backstop for broadcast advertising regulation, so there is a constructive pre-existing relationship. This would keep any reporting and accountability as streamlined as possible.

Why the ASA?

5. The ASA one stop-shop has a proven track record of regulating advertising and of adapting to include new areas of advertising. In particular, the system is able to meet the requirements of the regulatory system as detailed on page 22 of the consultation document.

6 International partner

6.1 The ASA is a founding member of the European Advertising Standards Alliance (EASA)³. As part of this alliance, the ASA works in cooperation with partner organisations from across Europe to address international issues of concern and to resolve cross-border complaints.

6.2 The ASA one-stop shop system fulfils EASA's stated mission for advertising self-regulation:

"To maintain consumer confidence in advertising by offering a rapid and effective response to consumer concerns. It facilitates consumer protection by providing a route for the individual consumer to express a view directly to the advertising business and the advertiser. It enables brands to compete on a level playing field to the benefit of the consumer. In all this, the advertising business will also be seen to be actively, continuously, and responsibly engaged with the consumer."

6.3 The ASA is committed to upholding the key common principles of good effective self-regulation, which have been agreed at a European level by EASA:

- Independence and impartiality
- Transparency and accessibility
- Effectiveness
- Efficient complaint-handling and enforcement
- Compliance with the law
- Cross border co-operation
- Sufficiently resourced to meet objectives

6.4 The ASA one-stop shop model meets all these principles. It has:

- vast experience of regulating advertising content;
- a comprehensive regulatory approach;
- strong governance and funding structures;

³ EASA brings together national advertising self-regulatory organisations and organisations representing the advertising industry. It is the single authoritative voice on advertising self-regulation issues and promotes high ethical standards in commercial communications by means of effective self-regulation www.easa-alliance.org

- experience of working in a co-regulatory partnership and;
- a proven track record of being able to adapt the system to work for different media.

This makes the ASA model the logical choice for maintaining advertising standards under the AVMS Directive.

7 An Experienced and Recognised System

- 7.1 The non-broadcast advertising self-regulation has been operating for more than 45 years and the broadcast model has been operating for four years. The system is widely recognised by the Government, the industry, consumers, the Courts and partner regulators, for example the OFT and Ofcom, as the established means of consumer protection against misleading, offensive or harmful advertising.
- 7.2 According to recent MORI research for the Press Complaints Commission (PCC), the ASA is the best recognised UK media regulator, scoring more highly than Ofcom, PhonepayPlus and the PCC. Section 328 of the Communications Act 2003 requires broadcast licensees to publicise the regulatory system and section 60.8 of the CAP Code describes the system's commitment to publicising the ASA's policies and decisions.
- 7.3 The industry's commitment to maintaining high awareness of the system can be evidenced by our advertising campaign that has been running since 2005. The campaign is aimed at informing the public about the ASA's work and is run entirely in advertising space donated by the media. The space donated is not inconsiderable, for example during 2005 and 2006 the ad ran more than 8,500 times in radio and appeared more than 1,500 times in national and regional press.
- 7.4 The ASA strives to deliver excellent service to its customers and undertakes regular customer satisfaction surveys to monitor our levels of service. Given that the ASA's work will inevitably involve disappointing one party to the complaint, it is encouraging that our most recent survey revealed that 61% of our complainants are satisfied with their overall experience of the ASA (85% for upheld complainants and 55% for not

upheld). 74% overall are satisfied with the service they receive and 85% think that the ASA has consumers' interests at heart.

8 A comprehensive system

8.1 The ASA/ CAP/ BCAP approach is a comprehensive regulatory model, with nearly all aspects of advertising regulation under one roof. The system offers:

8.1.1 A large and experienced complaints & investigations department which deals with issues relating to advertising in all media. The ASA is an organisation of over 100 people and deals with around 25,000 complaints each year.

8.1.2 A free Copy Advice service for advertisers, agencies and media who want to check prospective non-broadcast ads or creative ideas against the CAP Code. The team deals with around 6000 enquiries each year.

8.1.3 A compliance and monitoring team that proactively monitors ads in all media on a daily basis to check for compliance with the Codes. The team also undertakes surveys in high profile areas (e.g. sensitive areas such as gambling or alcohol) or amongst sectors with lower compliance records.

8.1.4 Guidance and training for the industry, including regular seminars, presentations and visits by our Code experts to companies and agencies.

8.1.5 Open and transparent performance evaluation, through key performance indicators, which are published every year in the ASA annual statement. These show, for example, the number of complaints received and resolved and the average time taken to deal with different classes of complaints.

8.1.6 Consumer information through the ASA website, including published adjudications, information on how to complain and information about how the system works.

8.1.7 Established sanctions, including prohibiting ads or advertising techniques, and requiring advertisers to seek advice before publishing future ads. In extreme cases the ASA can refer advertisers to the OFT for unfair or misleading ads and broadcasters to Ofcom for persistently airing ads that break the rules.

9 Strong governance structures: an open, transparent system

- 9.1 The ASA is independent of both Government and industry. The system has consistently proven that it is prepared to take action against those advertisers that breach the Codes. In 2007, 2,458 ads were changed or withdrawn following ASA action.
- 9.2 Arms-length funding via a levy on advertising space costs ensures that the system is adequately funded. The levy is the only part of the system that is voluntary (all advertisers must comply with the Codes and ASA decisions, but they do not have to pay the levy). The voluntary nature of the levy and the fact that it is collected by arms-length funding bodies ensures that the ASA's decision-making remains independent of the industry.
- 9.3 CAP and BCAP are responsible for writing the Advertising Codes and co-ordinating sanctions with the ASA. CAP and BCAP have no involvement with the ASA decision-making process.
- 9.4 The Chairman of the ASA is appointed in line with Nolan principles by ASBOF and BASBOF following consultation with the Advertising Association, DBERR, DCMS and Ofcom. The Chairman is required to be someone who has never been engaged in the advertising business. The current Chair of the ASA is the Rt Hon Lord Smith of Finsbury.
- 9.5 The independent ASA Council, which is responsible for deciding whether an ad has breached the Codes, is appointed by the ASA Chairman in accordance with Nolan principles and following public advertisement. Two thirds of Council members are lay.

10 Experience of co-regulation/ self-regulation with a legal backstop

10.1 The ASA already has four years' experience of working in a formal co-regulatory partnership and has even longer-standing, strong ties with other partner statutory regulators. These examples demonstrate that co-regulation can come in many different forms, but can be equally effective in achieving high standards in advertising and consumer protection. For example:

10.1.1 **Ofcom** – Since 2004, the ASA has been operating a formal co-regulatory partnership with Ofcom for broadcast advertising. This partnership is agreed through a formal Memorandum of Understanding (MOU), with the Deregulation and Contracting Out Act 1994 (DCOA) as the legal function that enables this partnership

Although the day-to-day operation of the system is contracted-out, under the MOU, Ofcom retains all its legal powers stemming from the Communications Act 2003. However, Ofcom will not normally intervene in specific ASA or BCAP decisions and actions in respect of matters that have been contracted-out to them.

Also under the MOU, on a quarterly basis ASA(B) and BCAP are required to provide Ofcom with performance data against agreed key performance indicators.

10.1.2 **Office of Fair Trading (OFT)** – The ASA/ CAP/ BCAP system is recognised as an 'established means' for enforcing the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs). The CPRs and BPRs provide protection against unfair and misleading advertisements and unacceptable comparative advertisements.

This recognition means that the ASA can refer an advertiser to the OFT if, for example, the trader is of doubtful repute, or if the advertiser repeatedly fails to comply with the CAP Code. This is rarely necessary because most advertisers comply with the self-regulatory system; since 2000 just 30 advertisers have been referred to the OFT. The ASA views this part of the system as self-

regulation with a legal backstop. Although, the ASA has a close working relationship with the OFT, it is not formally accountable to the regulator. The OFT does satisfy itself that the Codes reflect the requirements in law.

10.1.3 Gambling Commission – Under the Gambling Act 2005 the Gambling Commission can issue code of practice provisions on non-broadcast advertising, but the Commission asked CAP to perform that function and for the ASA to administer the new rules⁴. The Commission has made compliance with the Advertising Codes a provision of its own Code of Practice. Furthermore, the Gambling Act also contains reserve powers for the Secretary of State to issue regulations on advertising. The ASA views this system as being self-regulation with legal underpinning. The ASA has a close working relationship with the Gambling Commission and DCMS, but does not formally report to either body.

11 Proven Track Record of expanding the system

11.1 The ASA already regulates all advertising accompanying VOD programmes and services through the existing self-regulatory CAP Code as part of our wider responsibility for regulating all advertising in the UK. Under the current system all ads must abide by the CAP Code, regardless of the media in which they appear.

11.2 This experience of regulating VOD ads would make a transition to a co-regulatory system for VOD advertising regulation relatively simple.

11.3 The ASA already has the necessary experience, personnel and structures in place to regulate ads accompanying VOD programmes. Although there will be some resource implications involved with establishing a co-regulatory system for VOD advertising, these are likely to be much smaller than those associated with establishing an entirely new or separate regulator.

11.4 It is important for the ASA to make clear that we cannot state categorically what the system might look like as this is a matter for the

⁴ Under the Gambling Act and the Contracting-out Order with Ofcom, BCAP was automatically responsible for developing broadcast advertising rules and ASA(B) for enforcing them.

industry. However, the regulatory system has a good track record of designing and establishing effective self-regulatory and co-regulatory structures that are fit for purpose and aligned with gold-standard principles for advertising regulation.

- 11.5 The current system is based on four fundamental principles. The ASA expects that these would be followed when establishing the new VOD advertising regulatory system. These principles are:

11.5.1 Code ownership and enforcement by the industry

The ASA believes that a new structure for regulating VOD advertising could be adopted without any noticeable change for its customers, both consumers and industry.

11.5.2 Adjudication of complaints by a separate body, independent of industry

Under a new regulatory structure for VOD advertising, the independent ASA Council could continue independent adjudication on VOD ads.

11.5.3 Adequate funding for the system by the industry

The funding mechanism was appropriately adapted to cover broadcast advertising in 2004. It seems likely that a similar arms-length funding system could be devised for VOD advertising under AVMS.

11.5.4 Effective sanctions

Under the one-stop shop model, advertisers, agencies and the media all commit to upholding the highest standards in advertising. However, the ASA has a number of compliance mechanisms available, should advertisers fail to comply with the Codes. The ASA is confident that the industry will be able to devise equally effective sanctioning for advertisements accompanying VOD programmes. It should be noted that the ASA currently has no power to fine and does not want to have that power. The aim of the self-regulatory system is to gain compliance rather than to punish.

11.6 The ASA fully endorses the ability of the current advertising regulatory system to formulate an appropriate and responsible regulatory mechanism for regulating VOD advertising under AVMS.

Conclusion

12.1 The ASA would like to thank Government for the opportunity to respond to its plans for implementing AVMS in the UK.

12.2 The ASA hopes that it has put forward a sufficiently strong case in support of maintaining responsibility for regulation of VOD advertising as part of the 'one-stop shop' self-regulatory and co-regulatory structure, and for VOD advertising regulatory powers being assigned directly by Ofcom.

12.3 The current advertising regulatory system is ready, willing and able to adapt its structure to regulate VOD advertising under the Directive, to the benefit of consumers, the industry and Government.

12.4 The ASA is happy to discuss further its position on any of the above issues and to assist Government and other stakeholders with the AVMS implementation process. If there are any questions arising from this response, please contact me on 020 7492 2121, or at michaelt@asa.org.uk.

Yours sincerely,



Michael Todd
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ANNEX A – About the ASA one-stop shop

1. The ASA has been responsible for policing non-broadcast advertising standards since 1962, when the industry established the ASA as an independent complaints body to administer the new CAP Code for non-broadcast advertising.
2. The self-regulatory system is based on a concordat between advertisers, agencies and the media that each will act in support of the highest standards in advertising. It is not a voluntary system.
3. The success of the self-regulatory system led to the contracting-out of broadcast regulation (TV and radio) by Ofcom in 2004. This move was approved by Parliament and created a ‘one-stop shop’ for all advertising complaints⁵.
4. Two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are responsible for writing and maintaining the Advertising Codes. CAP is responsible for the non-broadcast Code and BCAP is responsible for the TV and radio Codes.⁶
5. The industry worked hard to create a robust regulatory structure for broadcast advertising, which would ensure consistent cross-platform regulation for the benefit of both consumers and advertisers. This included ensuring appropriate funding was put in place for the new regulatory system and creating a fully representative industry code-owning committee (BCAP).
6. Generally speaking, the ASA now regulates all advertisements in ‘paid for space’, anywhere in the UK, including in VOD services. Although primarily a complaints based regulator, the ASA also conducts daily pro-active monitoring of ads in all media and regularly undertakes compliance surveys of advertisements published by sectors about which there is particular societal concern or in sectors where compliance may be poor.

⁵ Agreed through a formal Memorandum of Understanding (MOU), with the Deregulation and Contracting Out Act 1994 (DCOA) as the legal function that enables the partnership

⁶ The Advertising Codes can be found at: <http://www.cap.org.uk/cap/codes/>

7. The system is entirely funded by industry, through a levy of 0.1% on display advertising space and airtime and 0.2% on Royal Mail Mailsort contracts. The levies are collected by two arm-length funding bodies, the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof)⁷. Last year the ASA was awarded £8m to run the system.
8. The ASA 'one-stop shop' advertising regulatory system brings great benefits for consumers and for business:
- **Easier for consumers** – The establishment of a single complaints body has made it easier for consumers to negotiate the complaints system. This is illustrated by the fact that in the ten months prior to November 2004, the ASA received 5,814 complaints about TV advertising from consumers, which it was at that time unable to act upon.
 - **Free to the taxpayer** – The system is funded by the industry, not the tax payer, via the 0.1% levy on the cost of advertising space.
 - **Simpler for Advertisers** – Advertisers are now well-used to working with the ASA model. Not only do advertisers have to deal with just one body during the complaints process; nearly all aspects of advertising regulation are under one roof (CAP and BCAP code development; Copy Advice⁸; complaints and investigations; and compliance and monitoring). Currently, all the advertising Codes are being reviewed by CAP and BCAP to ensure they remain relevant and robust, yet simple to use.
 - **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 in which they appear (while taking into account the context and audience of the marketing communication).

⁷ www.asbof.co.uk

⁸ Copy Advice is a non-broadcast service: pre-clearance for television and radio advertisements is not conducted by the one-stop shop system, but by Clearcast (TV www.clearcast.co.uk) and the RACC (radio www.racc.co.uk)

- **Harmonious decision making** – Cross media adjudications are made by a single organisation.
 - **Corporate Social Responsibility** – Effective self-regulation works because it is powered and driven by a sense of corporate social responsibility amongst advertising stakeholders. The advertising industry has a strong interest in maintaining the system and a level playing field, not least to maintain high levels of consumer trust in advertising,
 - **Cost Effective** – Advertising self-regulation is a cost-effective way to resolve grievances, without the requirement for expensive legal action.
9. Further information about the ASA and the work we do can be found at www.asa.org.uk. The website also contains a searchable database of all our adjudications from the past five years.