

## Designation pursuant to section 368T of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of audiovisual commercial communications included in video-sharing platform services

### WHEREAS:

- (1) Section 368(T)(2) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of video-sharing platform ('VSP') services, including the regulation of audiovisual commercial communications included in such services;<sup>1</sup>
- (2) Section 368Z13 defines 'audiovisual commercial communication' ('AVCC') as a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which is designed to promote (directly or indirectly) the goods, services or image of a person pursuing an economic activity and accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes. Forms of AVCC include advertising, sponsorship, teleshopping and product placement;
- (3) Section 368Z(1) of the Act distinguishes between AVCCs that are marketed, sold or arranged by the provider and AVCCs that are not. VSP providers are legally responsible for ensuring that AVCCs they market, sell or arrange meet certain requirements to protect users from potential harm. In this Designation we refer to this type of AVCC as 'VSP-controlled advertising';
- (4) Section 368T(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368T(9) to be, to the extent provided for in the Designation, the appropriate regulatory authority for the purposes of any provision of Part 4B of the Act;
- (5) Ofcom issued a public consultation on 26 May 2021<sup>2</sup> seeking views on its proposals for the regulation of AVCCs included in VSPs. These included a proposal to designate the Advertising Standards Authority Limited (Registered number 733214) ('the ASA') in relation to VSP-controlled advertising and also included Ofcom's preliminary assessment of the ASA against the criteria set out in section 368T(9);
- (6) Ofcom published a [statement](#) on 7 December 2021<sup>3</sup> which included its final assessment and reasons for deciding to designate the ASA in accordance with the proposals set out in the consultation. Accordingly, and to the extent provided for in this Designation, Ofcom is designating the ASA to be the appropriate regulatory authority under Part 4B of the Act for the purpose of VSP-controlled advertising;

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<sup>1</sup> Inserted by the Audiovisual Media Services Regulations 2020.

<sup>2</sup> Ofcom, [Consultation – Proposals for the regulation of advertising on video-sharing platforms](#), May 2021.

<sup>3</sup> Ofcom, [Statement - The Regulation of advertising on video-sharing platforms](#), December 2021.

(7) Ofcom, in making this Designation, is satisfied that:

- i. the ASA is a fit and proper body to be so designated;
- ii. the ASA has consented to being so designated;
- iii. the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Duty;
- iv. the ASA is sufficiently independent of providers of VSP services; and
- v. the ASA will ensure, in performing the Designated Duty, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in exercising its powers, including in particular: to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;

(8) In concluding the above, Ofcom has taken particular account of its existing co-regulatory arrangements with the ASA for the regulation of broadcast and on-demand advertising, the existing self-regulatory system for online advertising administered by the ASA, and responses to the consultation referred to in Recital 5;

(9) Ofcom is satisfied that in making this Designation it has acted in accordance with its duties under the Act.

**NOW THEREFORE BY VIRTUE OF PART 4B OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:**

1. The Office of Communications ('Ofcom'), in exercise of the powers conferred on it under section 368T of the Communications Act 2003 ('the Act'), hereby designates the Advertising Standards Authority Limited (Registered number 733214) ('the ASA'), for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368Z13 of the Act) for the purpose set out in Paragraph 5 of this Designation in relation to VSP-controlled advertising, to such extent, and subject to the Obligations, Conditions and other such circumstances, as described in this Designation.
2. This Designation incorporates the Schedule which forms part of this Designation for all purposes and includes such variations as from time to time may be made by Ofcom in accordance with paragraphs 9 and 10 of this Designation.

3. This Designation shall be legally binding and, as Ofcom's designee, the ASA shall be liable to Ofcom for any failure to carry out the Designated Duty in accordance with the terms of this Designation.

### **Interpretation of terms**

4. The following terms referred to in this Designation shall have the following meanings:
  - (i) 'Audiovisual commercial communication' or 'AVCC' means a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which (a) is designed to promote (directly or indirectly) the goods, services or image of a person pursuing an economic activity, and (b) accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes; and forms of AVCC include advertising, sponsorship, teleshopping and product placement;
  - (ii) 'Designated Duty' has the meaning given in Paragraph 5 of this Designation;
  - (iii) 'Rules' shall be construed in accordance with Paragraphs 7(ii) and 7(iii) of this Designation;
  - (iv) 'relevant requirements of the Act' means the requirement set out in section 368Y(1) of the Act as it applies in relation to section 368Z of the Act;
  - (v) 'Notified Service Provider' means a provider of a VSP service which has been notified to Ofcom in accordance with section 368V of the Act;
  - (vi) 'VSP-controlled advertising' refers to an 'AVCC' that, in accordance with section 368Z(1) of the Act, is marketed, sold or arranged by the VSP provider.

Other terms and expressions used in this Designation shall have the meanings given to them in the Act.

### **The Designated Duty**

5. Ofcom designates the ASA to carry out the following duty:
  - (i) in accordance with section 368X(1) of the Act, to take such steps as appear to the ASA best calculated to secure that every Notified Service Provider complies with the relevant requirements of the Act.

## **Powers**

6. In carrying out the Designated Duty the ASA may exercise the following Powers, in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:
  - (i) to determine, following a complaint or otherwise, whether a Notified Service Provider is contravening or has contravened any of the Rules;
  - (ii) to draw up, and review and revise as appropriate, interpretive guidance concerning the Rules; and
  - (iii) to carry out, commission or support (financially or otherwise) research in connection with its Designated Duty.

## **Obligations and Conditions**

7. In carrying out the Designated Duty and in exercising the Powers set out in Paragraph 6 above the ASA shall take such steps as appear to the ASA best calculated to comply with the following Obligations and Conditions:

### *General*

- (i) to ensure that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:
  - a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
  - b. to have regard, in relation to the carrying out of the Designated Duty, to the circumstances in which it may be necessary to carry out an impact assessment in accordance with Ofcom's duty under section 7 of the Act; and
  - c. to have regard, as appropriate, to complying and securing that its staff comply with section 393 of the Act (confidentiality);
  - d. to act in accordance with public law duties, including the duty of fairness.

### *Rules and guidance*

- (ii) to publish (or have published) Rules for the purpose of securing that every Notified Service Provider complies with the relevant requirements of the Act;
- (iii) to ensure that the Rules are expressed as the relevant requirements of the Act (as amended from time to time) without material additions or omissions;
- (iv) to consult with Ofcom in securing the preparation of interpretative guidance to the Rules (and any subsequent material changes to that guidance), before it is published (or any changes to it are published);
- (v) to ensure that any guidance that the ASA draws up pursuant to this Designation is designed to aid interpretation of the Rules in light of the relevant requirements of the Act;

### *Compliance*

- (vi) to secure that every Notified Service Provider complies with the Rules relating to VSP-controlled advertising;

### *Scope*

- (vii) to determine, following a complaint or otherwise, whether a video is accompanied by or includes an AVCC;
- (viii) to determine, following a complaint or otherwise, whether an AVCC is included in a VSP service which has been notified to Ofcom in accordance with section 368V of the Act;
- (ix) to determine, following a complaint or otherwise, whether an AVCC constitutes VSP-controlled advertising, in accordance with relevant guidance drawn up by Ofcom;

### *Complaints handling, assessments/investigations and reporting obligations*

- (x) to have in place and publish appropriate and robust complaints handling processes for the assessment, investigation and adjudication of complaints in order to carry out the Designated Duty, such processes to be formulated in consultation with Ofcom;
- (xi) to handle complaints received by it in accordance with its obligations in this Designation ensuring that all complaints assessed under the statutory rules are recorded as such;
- (xii) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;

- (xiii) to comply with the reporting obligations set out in the Schedule to this Designation;

#### *Referrals*

- (xiv) following referral or appeal to Ofcom, to accept any decision of Ofcom as to whether AVCCs are included in a VSP service, and/or whether those AVCCs constitute VSP-controlled advertising;
- (xv) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the Rules, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as they may authorise, a Notified Service Provider has:
  - a. failed to comply fully and promptly with a decision of the ASA;
  - b. failed to cooperate fully and promptly with reasonable requests of the ASA, including but not limited to requests for the provision of information relating to their degree of control over advertising included in their platforms; or
  - c. has committed one or more breaches of the Rules of sufficient seriousness so as to warrant in the ASA's opinion investigation by Ofcom;

and to refer those matters to Ofcom (together with copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom;

- (xvi) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a Notified Service Provider may have breached the Rules due to the inclusion in the service of an AVCC that contains material likely to encourage or to incite the commission of crime, or to lead to disorder, where the potential contravention may be such as to justify the need for Ofcom to take urgent action under section 368Z6 of the Act (suspension or restriction of service for inciting crime or disorder);

#### *Cooperation with Ofcom*

- (xvii) to cooperate fully with Ofcom at all times, including:
  - a. to consult Ofcom, as appropriate, in cases where there is any doubt in connection with the Designated Duty and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and

- b. to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
  - (xviii) to inform Ofcom in cases where it is unclear whether a service that has not been notified to Ofcom in accordance with section 368V of the Act constitutes a VSP service for the purposes of section 368S(1) of the Act, and it appears on the face of it that there may have been a contravention of the Rules;
  - (xix) to consult Ofcom in cases where it is unclear whether a video is accompanied by or includes an AVCC;
  - (xx) to consult Ofcom in cases where it is unclear whether an AVCC constitutes VSP-controlled advertising;
  - (xxi) to consult Ofcom, as appropriate, where there is a lack of clarity in connection with the operation of any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
  - (xxii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Duty for any reason and/or can no longer satisfy the relevant requirements of section 368T(9) to be the appropriate regulatory authority in relation to the Designated Duty and in each case to use its best endeavours to resolve any such issues promptly; and
  - (xxiii) in the event that the ASA no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Duty and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Duty, setting out its reasons.
8. For the avoidance of doubt, this Designation shall not be revoked except in accordance with Paragraphs 15 and 16 below.

#### **Variation of this Designation**

- 9. Ofcom may vary this Designation at any time, subject to Ofcom notifying the ASA in writing not less than thirty days prior to the date that the proposed variation is to come into force in order to give the ASA a reasonable opportunity to comment or, exceptionally, in such lesser period as Ofcom considers appropriate.
- 10. The ASA may also request a variation of this Designation at any time for Ofcom's consideration. Any variation will take effect only on Ofcom signing and issuing a notice of variation to that effect.

### **Duration of this Designation**

11. This Designation is to have effect from 7 December 2021 and to continue until:
  - a. 31 October 2024 ('the expiry date'), or
  - b. the relevant provisions of the Act regarding the regulation of VSPs are superseded by the Online Safety Bill (as enacted), or
  - c. until such time as it is revoked in accordance with Paragraphs 15 and 16 below.
12. No less than twelve months before the expiry date, Ofcom and the ASA shall discuss in good faith a renewal of this Designation for such period as they may agree; the decision whether or not to renew shall rest with Ofcom.

### **Review of this Designation**

13. Ofcom may review this Designation at any time where, in Ofcom's reasonable opinion, regulatory development, including any changes in relevant legislation, make it appropriate to do so.

### **Publication of this Designation**

14. Ofcom shall publish this Designation in such manner as it considers appropriate for bringing it to the attention of persons who, in its opinion, are likely to be affected by it. The ASA shall publish this Designation in the same manner as Ofcom and subsequent to Ofcom having first published it.

### **Revocation of this Designation**

15. Ofcom may revoke this Designation in accordance with section 368T(7) of the Act.
16. Ofcom must revoke this Designation if it is no longer satisfied that the ASA is able to satisfy the requirements for being the appropriate regulatory authority set out in section 368T(9) of the Act or if the ASA no longer consents to being designated, having first notified Ofcom in accordance with the obligations in Paragraph 7(xxiii) above.
17. In exercising its powers to revoke under Paragraphs 15 and 16 above, Ofcom will give reasonable notice to the ASA of its intention to revoke and will give the ASA an opportunity to make representations and, where in the circumstances Ofcom considers it appropriate, an opportunity to take any remedial steps within such period as Ofcom requires; that period of notice being of such period as Ofcom shall determine to be appropriate in all the circumstances.



## **For the Avoidance of Doubt**

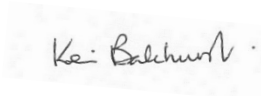
18. The duties and obligations that apply to each of Ofcom and the ASA as an appropriate regulatory authority include the obligations and conditions that apply to the ASA under Paragraph 7 of this Designation.
19. For the avoidance of doubt, the ASA is not the appropriate regulatory authority in relation to any function set out in the Act that does not relate to the Designated Duty (including in particular, all functions not relating to AVCCs that constitute VSP-controlled advertising, the power under section 368Z2 of the Act to determine in relation to AVCCs included in an VSP service that a Notified Service Provider is contravening or has contravened the relevant requirements of the Act and the powers under section 368Z(4) to 368Z(8) associated with the enforcement of those requirements).
20. Where the ASA has determined that there has been a contravention of the Rules, and referred the case to Ofcom, Ofcom will determine whether there has been a contravention of any of the relevant requirements of the Act, and the ASA's investigation and recommendation will not be binding on Ofcom;
21. Any Notice given by the ASA under Paragraph 7 (xxii) and (xxiii) above, would not have the effect of revoking this Designation unless or until Ofcom decided to revoke in accordance with Paragraphs 15 and 16 above.
22. The ASA may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
23. Where the ASA is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of the ASA (section 368T(3) of the Act) and will notify the ASA as appropriate.
24. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368T(2) of the Act).
25. Where there is any inconsistency or conflict between the provisions of this Designation and the provisions of the Act, the provisions of the Act shall prevail.

## **Ofcom's Commitments to the ASA**

26. Ofcom shall consider any referrals from the ASA promptly and if having taken into account any representations from the relevant Notified Service Provider, Ofcom determines that section 368Y of the Act has been contravened, take such steps as it considers appropriate by way of enforcement action against the Notified Service Provider.

27. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements or any legal restriction on disclosure.
28. Subject to any restriction in law, Ofcom shall provide the ASA with such assistance and information as the ASA may reasonably require from time to time under section 368T(4) and 10(c) of the Act, including, where appropriate, assisting in relation to the carrying out of impact assessments.
29. Ofcom shall have regard to any comments made by the ASA under Paragraph 9 and shall consider in good faith any requests made by the ASA from time to time under Paragraph 10 for a variation of the Designation.

Signed:

A handwritten signature in black ink that reads "Kevin Bakhurst". The signature is written in a cursive style and is positioned above a faint, light-colored rectangular stamp or watermark.

Date: 30/11/2021

**Kevin Bakhurst**

**Group Director, Broadcasting and Online Content**

**Person duly authorised in accordance with Paragraph 18 of the Schedule to the Office of Communications Act 2002**

## SCHEDULE

### Reporting Obligations and Key Performance Indicators

#### Reporting Obligations

1. The ASA shall report to Ofcom on the carrying out of its Designated Duty as set out below.
2. The ASA shall by no later than the end of April each year, provide Ofcom with a written report detailing its exercise of the Designated Duty in the preceding calendar year.
3. The report shall include quantitative and qualitative information regarding complaints received and handled and the monitoring of the standards set out in the Rules.
4. In particular, the report in paragraph 3 of this Schedule, shall include the following information:
  - (i) Number of complaints received about VSP-controlled advertising on notified VSPs broken down to show the number of complaints received in respect of each such service;
  - (ii) The number of VSP-controlled advertisements on notified VSPs about which complaints have been received broken down in respect of each individual VSP;
  - (iii) Prior to investigation, the number of VSP-controlled advertisements assessed against the statutory rules and which rules they are assessed against (an assessment of such an advertisement against one or more statutory rules is henceforth referred to as a “case”). These should be broken down in respect of each individual VSP;
  - (iv) Number of cases taken to investigation stage under the statutory rules, the rules they were investigated under and the status of those investigations i.e. 'informal investigation' and 'formal investigation' (using the same categories as for completed broadcast advertising cases). These should be broken down in respect of each individual VSP;
  - (v) The number of cases that after investigation were (a) upheld and (b) upheld in part and the rules they breached, and whether or not the investigation was referred to Ofcom for consideration of a Sanction. These should be broken down in respect of each individual VSP;
5. The Chair and/or Chief Executive of the ASA will report in person on the matters set out in this designation to Ofcom's Content Board at meetings of the Content Board as reasonably requested by Ofcom.

6. The ASA shall forthwith provide such information and assistance to Ofcom as Ofcom shall from time to time reasonably require for purposes connected with Ofcom's (or another designated body's) functions under Part 4A of the Act and generally to assist Ofcom to review how effectively the ASA has exercised, or is exercising its Designated Duty.

**Key Performance Indicators**

7. The ASA shall seek to resolve 80% of cases within the number of working days indicated in the table below, depending on the nature of the case.

<b>Turnaround times for complaint cases (in working days)</b>	
No Additional Investigation	15
No Additional Investigation after Council Decision	20
Informal Investigation	35
Formal Investigation (Harm & Offence)	60
Formal Investigation (Misleadingness)	115