

1 May 2014

Rt Hon Lord Smith of Finsbury
Chairman
Advertising Standards Authority
Mid City Place
71 High Holborn
London
WC1V 6QT

Claudio Pollack
Group Director,
Content, Consumer and External Affairs

Dear Lord Smith

Proposed renewal of the co-regulatory arrangements for the regulation of broadcast advertising

As you know, on 17 May 2004 Ofcom issued a statement¹ contracting out to the Advertising Standards Authority (“ASA”) certain of its statutory functions in relation to the regulation of broadcast advertising.

The statement described a new co-regulatory system, which we concluded at that time, and subject to the successful completion of a probationary period of two years, would operate for a further eight years before being subject to renewal by Ofcom. A number of subsequent documents set out the practical and legal basis for the operation of the system. These were:

- A Memorandum of Understanding (“MoU”)² between Ofcom, and three newly created bodies – Advertising Standards Authority (Broadcast) Ltd (“ASA(B)”), Broadcast Committee of Advertising Practice Ltd (“BCAP”) and Broadcast Advertising Standards Board of Finance Ltd (“BASBOF”) – setting out the parties’ understanding of how the system of co-regulation would be implemented and operate in practice;
- An Order made under the Deregulation and Contracting Out Act 1994 (“the Contracting Out Order”)³, providing Ofcom with the power to contract out these functions;
- an Authorisation given by Ofcom by virtue of that Order (“the Authorisation”)⁴; and
- a legally binding Deed for Regulation of Broadcast Advertising entered into by all the relevant parties (“the Deed”)⁵ in order to implement the co-regulatory system.

¹‘Ofcom’s decision on the future regulation of broadcast advertising’, at:

http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/regofbroadadv.pdf

²http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/bcast_ad_MoU.pdf

³The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 1975/2004)

⁴http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/auth.pdf

⁵<http://www.cap.org.uk/~media/Files/CAP/Transperancy/CAP%2014%20Deed%20for%20Regulation%20of%20Broadcast%20Advertising.ashx>

The Authorisation, which took effect on 1 November 2004, expires on 1 November 2014. Unless terminated earlier, the Deed also continues until 1 November 2014 and automatically terminates on expiry of the Authorisation.

We are therefore writing to you now, with a view to the possible renewal of the co-regulatory arrangements under the Contracting Out Order from November this year. The considerations we consider relevant to that decision are set out below.

Co-regulatory Criteria

In 2004 Ofcom developed a set of criteria that we would apply when assessing whether to transfer any of our functions to a co-regulatory body. These were revised in 2008 in our statement, *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation*⁶. These criteria are part of the mechanism by which Ofcom can adjudge co-regulatory arrangements, including whether we retain certain functions; they are:

- Public awareness;
- Transparency;
- Significant participation by industry;
- Adequate resource commitments;
- Enforcement measures;
- Clarity of processes and structures;
- Audit of members and schemes;
- System of redress in place;
- Involvement of independent members;
- Regular review of objectives and aims; and
- Non-collusive behaviour.

Ofcom's current thinking, which we put before the Leveson Inquiry in 2012⁷, also referred to some relevant principles. We consider that an effective regulatory body must have:

- independent governance and decision making;
- clear public accountability;
- clear regulatory objectives set out in a code;
- clear and transparent processes, which are followed;
- workable membership incentives (where relevant) and/or obligations for or on those it regulates;
- secure and sufficiently independent funding and budget control;
- accessibility to those seeking redress;
- genuine powers of investigation; and
- effective powers of enforcement and sanction.

We consider that the current co-regulatory arrangements, as set out in the MoU and as implemented in practice, satisfactorily reflect these requirements. Further, we recognise that the effective relationship established between Ofcom and its co-regulatory partners stands testament to the successful operation of the system that the parties agreed in 2004, and which, as reflected in the MoU, has required no significant amendment since inception.

We have judged the effectiveness of the co-regulatory arrangements over the past decade in accordance with the arrangements in the MOU, by assessing the extent to which the ASA(B)

⁶<http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

⁷<http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>

and BCAP have secured the relevant standards objectives – such as preventing broadcast advertising that may be misleading, harmful or offensive⁸ – taking into account our general duties as set out in the Communication Act 2003⁹. We have done this by reference to agreed key performance indicators and both quantitative and qualitative evidence contained in the regular reports that BCAP and the ASA(B) provide to Ofcom to monitor their performance, as well as our regular meetings, including liaison meetings, designed to maintain a consistent approach to advertising regulation¹⁰.

From a structural perspective, we note that industry has made a significant commitment to the co-regulatory system, funding it by means of a levy and participating in both the setting and enforcement of the advertising rules. Nevertheless, it is important to note that these functions are carried out by legally separate organisations in order to ensure independence, with, importantly, a majority of the ASA(B) Council (ASA(B)'s adjudicating body) required to be independent of the advertising industry.

In addition, we consider ASA(B)'s processes for investigating and adjudicating on complaints are both transparent and easily accessible. Full details of its procedures and information about how to make complaints are readily accessible on the organisation's website. The outcome of ASA(B) investigations are published on a weekly basis and made publicly known via the organisation's dedicated communications functions. ASA(B) also retains an Independent Reviewer to whom advertisers and complainants may appeal (generally there are between ten and twenty appeals a year) if they are dissatisfied about the conduct of ASA(B) investigations, and a compliance function to ensure that the outcomes of investigations are enforced. As a final resort, it is also possible for ASA(B) to refer cases to Ofcom for consideration of statutory sanctions.

In relation to complaints handling, Ofcom notes that in nine of the last ten years the number of complaints received by ASA(B) has exceeded pre-contracting out levels. In 2013 alone ASA(B) received 15,448 complaints about 5,613 separate issues, compared with 9,860 complaints about 2,391 issues in 2004. Despite this workload, the co-regulator has met over 88% of its performance targets for complaints assessment since 2005 (its first full year). Further, in 2013 over 90% of cases (against a target of 80%) were resolved within agreed timeframes. In addition, although the number of advertisements considered by ASA(B) has grown, the number of advertisements found in breach of the BCAP Code remains small, with only 147 upheld adjudications in 2013 compared with 175 in 2003, the last full year before ASA(B) took on responsibility for broadcast advertising regulation. These figures indicate that, despite a fragmenting broadcasting environment in which audiences have shifted to a broader range of services that have offered greater advertising opportunities to an ever-widening number of potential advertisers, the system is succeeding in convincing broadcasters and advertisers of the need to comply with standards requirements.

In addition, customer satisfaction surveys carried out since 2007 indicate high levels of approval from both complainants and advertisers about the organisation's approach to resolving complaints. Nearly three quarters of complainants have consistently stated that they have been satisfied with their experience of ASA(B)'s complaints handling processes, including at least 70% of those whose complaints were ultimately not upheld.

As well as case handling by ASA(B), Ofcom considers that BCAP has taken an active role in revising code rules over the past decade, including a comprehensive review in 2010, and has responded rapidly to contentious advertising issues, as shown recently by its work on e-

⁸ Section 319(2) of the Communications Act 2003

⁹ Section 3(1)-(5) of the Communications Act 2003

¹⁰ Paragraphs 5 and 15 of the Authorisation and Paragraph 3 of the Deed

cigarette advertising. We note also that BCAP has, throughout the past ten years, provided training as well as detailed guidance to industry to help secure compliance, on general issues such as onscreen text in advertising and the appropriate scheduling of advertisements, as well as the acceptability of specific types of claims, including those relating to nutrition and environmental impact.

Accordingly, we consider that ASA(B) and BCAP have proved to be effective in performing the range of delegated functions.

In light of the above, therefore, and recognising that the co-regulatory parties agreed to the operation of the current co-regulatory system for an initial period of ten years allowing for subsequent renewals, Ofcom is minded to renew the co-regulatory arrangements, subject to the same exceptions, limitations and conditions as are set out in the current Authorisation, for a further ten years, subject to the following:

Proposed Amendments to the MoU¹¹

Ofcom has considered a range of issues that we consider essential in ensuring the maintenance of a system that would continue to provide a robust, consistent, proportionate and targeted regulatory system for broadcast advertising. A summary of these issues, in relation to the current co-regulatory arrangements as set out in the MoU, is enclosed.

You will see that we do not propose any substantive changes to the current arrangements. In the main, the proposals for change that we have included in the summary document are intended merely to update the documentation to reflect current and established practice, recognising how the operation of the co-regulatory system has evolved over the last ten years.

In addition, we propose removing from the MoU material that relates principally to the inception and initial implementation of the co-regulatory system (which is now redundant) and updating any references to legislation that are to be retained.

The Authorisation

If a decision is made to renew (in whole or in part) the co-regulatory arrangements between us, a new Authorisation would need to be issued by Ofcom, authorising the contracting out of the relevant statutory functions to ASA(B) and BCAP by virtue of the Contracting Out Order. The Authorisation would again need to specify both what those functions were and the exceptions, limitations and conditions to which the Authorisation was subject¹². It is intended that, on any such renewal, the parties would again enter into a legally binding Deed, which would give effect to the renewal and set out the operational arrangements that had been agreed.

¹¹The proposed amendments reflect the outcome of discussions held in good faith by the said parties – as required under Paragraph 4.3 of the Deed – in relation to the basis and terms on which the Authorisation might be renewed.

¹²Any new Authorisation would also need to reflect amendments made to the legislation since the previous Authorisation was issued.

Next Steps

In light of the above, I invite the ASA to submit formal comments on our proposal to renew the co-regulatory arrangements for the regulation of broadcast advertising. Comments should be sent to me by 17:00 on Friday 30 May 2014.

Although we do not propose to make significant changes to the system now in place, we will be publishing a copy of this letter, together with the relevant documentation, on Ofcom's website, and drawing it to the attention of interested parties through an emailed update, so that they, and the public more widely, are given the opportunity to comment on the proposal and their comments can be taken into account before a decision is made.

We anticipate publishing our decision during the summer, subject to neither receiving substantive comments in response to our proposal as set out in this letter nor, if the decision is to renew, any substantive points arising during the formulation of the Authorisation and related documentation.

Yours sincerely

A handwritten signature in black ink that reads "Claudio Pollack". The signature is written in a cursive style with a large initial 'C'.

Claudio Pollack

Enc.