

A1. Proposed changes to the Memorandum of Understanding (MoU)

The Advertising Advisory Committee (AAC) is an independent panel that supports the broadcast advertising co-regulatory system by bringing a consumer voice to broadcast advertising policy issues, including the drafting and interpretation of the UK Code of Broadcast Advertising.

Ofcom has received a request from BCAP and CAP (the Committees) to facilitate the extension of the remit of the AAC to provide advice on issues affecting both broadcast and non-broadcast advertising. This proposal reflects the increasing convergence between broadcast and non-broadcast advertising issues. Extending the remit of the AAC would enable it to provide a consumer perspective across all media.

Ofcom agrees that extending the AAC's remit is in the interest of consumers. As Ofcom has no role in the regulation of non-broadcast advertising (apart from advertising on on demand programme services and on online services which meet the definition of a Television Licensable Content Service), we recognise that an extension of the AAC's remit would impact Ofcom's role within it, as established in the MoU.

Ofcom and the Committees have discussed the potential impact of this change and consider that there is scope to amend the MoU to ensure both the core purpose of the AAC is maintained (i.e. to represent the interests of citizens and consumers) and that Ofcom does not become involved in matters outside of its regulatory remit.

Below is a summary of the proposed changes that Ofcom and the Committees consider are appropriate to enable the AAC to represent consumer interests across all forms of advertising, while maintaining a system that provides robust, consistent, proportionate and targeted regulation of broadcast advertising.

The proposed changes reflect the outcome of discussions between Ofcom and the Committees. The rationale for the proposed changes and any relevant safeguards that will be required as a result of them are set out following each proposal.

Ofcom welcomes views and comments on the proposed changes, by **5pm on Thursday 8 August 2019**. Further information on how to respond to this consultation can be found in Annex 2. Ofcom's consultation principles are in Annex 3, and the consultation coversheet is in Annex 4.

A revised version of the MoU follows in Annex 5, including tracked changes showing the proposed changes to the text.

Procedures and obligations (paragraph 35)

1. Proposal to remove the following from the MoU:

ASA(B) and Ofcom will make any relevant research they undertake available to the AAC through BCAP.

This requirement was included in the MoU to ensure that the AAC has access to relevant resources relating to broadcast advertising to enable it to make considered, evidence-based recommendations to BCAP. It reflects that the remit of the AAC has been limited to broadcast advertising, and that both Ofcom and the ASA(B) (the broadcast-only arm of the ASA) produce research in this area.

The Committees have proposed that the text is removed from the MoU to reflect the extension of the AAC's remit to include non-broadcast advertising. They have also proposed providing a written assurance to Ofcom that the AAC will continue to be provided with relevant ASA(B) and Ofcom research when considering issues affecting broadcast advertising.

Ofcom recognises that if the AAC's remit is extended, it is likely to need to consider a wide range of research, not just that which applies to broadcast advertising.

Ofcom will continue to make available research it undertakes that is relevant to broadcast advertising and we expect the new AAC to take this, and other relevant research conducted by ASA(B), into account when considering issues that impact on the BCAP Code rules.

Ofcom has ultimate approval of changes to the BCAP Code, and we will continue to hold BCAP to account for soliciting advice from, and responding to, the new AAC, including in relation to research undertaken by Ofcom and the ASA(B).

On this basis, we are minded to accept the proposal to remove the requirement from the MoU subject to:

- The ASA(B) providing written assurances to Ofcom that it will continue to make any relevant research it undertakes available to the AAC through the Committees; and
- BCAP providing written assurances that it will provide all relevant Ofcom and ASA(B) research to the AAC as part of its consideration of BCAP Code changes and application.

Composition (paragraph 36)

2. Proposal to amend the following requirement:

Extract from current MoU	Proposed amended text
Membership of the AAC will comprise...between four and six independent expert or lay individuals who can represent the interests of citizens and consumers in relation to Ofcom's general duties under section 3(1) of the Communications Act.	Membership of the AAC will comprise...a minimum of four independent expert or lay individuals who can represent the interests of citizens and consumers.

As set out in the 2004 Statement announcing the decision to contract out the regulation of broadcast advertising, Ofcom considered that the formation of the AAC was a significant step towards ensuring an accountable regulatory process, and that the public and external nature of the AAC would provide a suitable degree of transparency to BCAP’s rule-making. The wording in the current MoU was intended to ensure that the AAC was appropriately resourced to provide independent, considered advice to BCAP that represents the interests of citizens and consumers.

We recognise the extension of the AAC’s remit may require a change in the number of members needed to consider the range of issues brought to the committee. As the proposed AAC will consider issues outside of Ofcom’s remit, it would not be appropriate for Ofcom to determine how many members will be required to fulfil that purpose. We therefore propose removing the reference in the MoU to the upper limit for membership. However, we believe that it is important to stipulate a minimum number of members needed to ensure the AAC is resourced adequately to consider broadcast advertising issues.

We also consider that it is important for the duties of the AAC to be explicitly linked to representing the interests of citizens and consumers as this is one of its key purposes. The Committees have confirmed that this purpose will remain at the heart of the new AAC, which will represent the interests of citizens and consumers in relation to advertising across all media, not just broadcasting.

On this basis, we consider it neither appropriate nor necessary for the MoU to link the purpose explicitly to Ofcom’s statutory duties.

3. Proposal to amend the following requirement:

Extract from the current MoU	Proposed amended text
<p>The Chairman of ASA(B) will consult with Ofcom on the appointment of the Chairman of the AAC, but Ofcom will have no right of appointment or veto; and</p> <p>Ofcom has no right of appointment or veto, but will input into the selection process of AAC members in relation to: candidates who have been selected for interview, prior to their invitation; and the preferred candidate prior to his/her appointment.</p>	<p>BCAP will provide Ofcom with details of new appointments to the AAC in a timely manner after they are made.</p>

The MoU requires the Chair of the AAC to be appointed by the Chair of the ASA(B). The Chair of ASA(B) must appoint the Chair of the AAC ‘independently advised, as appropriate,’ and ‘by a proper process (involving public advertisement) after due consultation to ensure their independence from Ofcom, industry or Government...and free of interests in the advertising media industries’.

The expert and lay members of the AAC must be ‘appointed by a process involving public advertisement and selection by the AAC, the Chairman of BCAP and the Chairman of ASA(B).’

These requirements will remain in the MoU.

The current requirement provides Ofcom with oversight of the process of the appointment of the Chair of the AAC, but does not allow it to influence the decision. Ofcom also has no right of appointment or veto in relation to AAC members. On this basis, and taking into account that

members of the new AAC will consider issues beyond Ofcom’s remit, we are minded to accept the Committees’ proposal to amend the requirement, as set out above. This will ensure that Ofcom remains informed of appointments to the AAC in a timely manner after they are made.

4. Proposal to amend the following requirement:

Extract from the current MoU	Proposed amended text
Ofcom will have observer status at the meetings of the AAC.	<p>Ofcom will be provided with the minutes of each AAC meeting, redacted to remove material that is relevant solely to non-broadcast advertising, within two weeks of the date of each meeting;</p> <p>The Chair of the AAC will meet with Ofcom on at least an annual basis to discuss the operation of the committee; and</p> <p>The AAC will be added as a standing item to the agenda for the regular Ofcom/BCAP Executive meetings.</p>

Ofcom’s observer status at AAC meetings was introduced to allow it oversight of the AAC’s discussion of matters relating to broadcast advertising. It has helped inform Ofcom about the extent to which BCAP seeks and takes account of the advice of the AAC.

The Committees are proposing that Ofcom no longer has observer status at meetings of the AAC, to reflect that the AAC would be discussing issues beyond Ofcom’s remit, which it would not be appropriate for Ofcom to be part of.

Ofcom agrees with the Committees that our current observer status would not be appropriate should the remit of the AAC be extended to include non-broadcast advertising. We are therefore minded to agree with the Committees’ request.

However, we consider that Ofcom’s oversight of the extent to which BCAP seeks and takes account of the advice of the AAC remains an important aspect of Ofcom’s relationship with BCAP. Therefore, as set out above, we propose that the following requirements are added to the MoU:

- Ofcom will be provided with the minutes of each AAC meeting, redacted to remove material that is relevant solely to non-broadcast advertising, within two weeks of the date of each meeting;
- The Chair of the AAC will meet with Ofcom on at least an annual basis to discuss the operation of the committee; and
- The AAC will be added as a standing item to the agenda for the regular Ofcom/BCAP Executive meetings.

Transparency (paragraph 37)

4. Proposal to amend the following text in the MoU:

Extract from current MoU	Proposed amended text
All contributions will be evidence-based, wherever possible, and will aim to reflect Ofcom's commitment to maintaining a bias against intervention.	All contributions will be evidence-based, wherever possible, and will aim to ensure a "bias against intervention".

The Communications Act requires that, in performing its duties, Ofcom must have regard in all cases to the principles under which regulatory activities should be targeted only at cases in which action is needed. The above extract from the MoU was included to ensure that the AAC also took a targeted approach to regulatory activities in accordance with Ofcom's responsibilities.

The Committees are proposing that the reference to Ofcom's commitment to maintaining a bias against intervention is removed to reflect that the AAC duties will no longer be solely linked to Ofcom's responsibilities.

Ofcom notes that this regulatory principle is shared by both the Committees and the ASA (see the ASA and CAP's [commitment to good regulation](http://www.asa.org.uk/uploads/assets/uploaded/79371092-342b-4776-b2a971df44c6f502.pdf) (<http://www.asa.org.uk/uploads/assets/uploaded/79371092-342b-4776-b2a971df44c6f502.pdf>)).

We also agree that the proposed inclusion of non-broadcast advertising in the AAC's remit would make it inappropriate for the AAC's responsibilities to be explicitly linked to Ofcom's duty. For these reasons, we are minded to remove the reference to Ofcom in this extract, and replace 'aim to reflect' with 'aim to ensure' to mirror the regulatory principles of Ofcom, the Committees and the ASA.