

## A5. Memorandum of understanding



### **MEMORANDUM OF UNDERSTANDING**

BETWEEN

**OFFICE OF COMMUNICATIONS ('OFCOM')**

AND

**THE ADVERTISING STANDARDS AUTHORITY (BROADCAST)  
LIMITED ('ASA(B)')**

AND

**THE BROADCAST COMMITTEE OF ADVERTISING PRACTICE  
LIMITED ('BCAP')**

AND

**THE BROADCAST ADVERTISING STANDARDS BOARD OF  
FINANCE LIMITED ('BASBOF')**

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## **FOREWORD**

Advertising is vital for most commercially-financed television and radio broadcasting in the UK, delivered primarily by broadcasters licensed by Ofcom under the 1990 and 1996 *Broadcasting Acts*. These broadcasters are bound by their licences to comply with various content standards, including advertising standards, and to comply with any directions made by Ofcom that result from a broadcaster failing to comply with such standards. The public expects high standards of broadcast advertising and of its regulation.

In 2004, Ofcom contracted out a number of its statutory functions in relation to the regulation of broadcast advertising content to a self-regulatory system for a period of ten years, expiring on 1 November 2014.

The self-regulatory system comprised 3 separate organisations: ASA(B), BCAP and Basbof, operating in a co-regulatory relationship with Ofcom, under the banner of the Advertising Standards Authority ('ASA').

Having considered the relevant co-regulatory criteria and how the current regime has operated over the last ten years, Ofcom now renews this co-regulatory arrangement for a further ten years.

For the purpose of this Memorandum of Understanding ('MoU'), Ofcom, ASA(B), BCAP and Basbof are hereinafter referred to as 'the Parties'; and ASA(B), BCAP and Basbof as 'the Co-regulatory Parties'.

## **PURPOSE**

The purpose of this MoU is to reflect the Parties' understanding as to the scope, nature and operation of the relationship between Ofcom and the Co-Regulatory Parties in relation to the day-to-day regulation of broadcast advertising. Specifically, this MoU sets out the Parties' agreed roles in relation to the functions Ofcom has contracted out to the Co-Regulatory Parties.

This MoU is framed in the context of ensuring that consumers, viewers and listeners can have continued confidence in the standards of broadcast advertising under the renewed and revised arrangements.

The Parties share a mutual interest in this overriding goal and the Co-Regulatory Parties are committed between them to securing the delivery of broadcast advertising content regulation to the highest standards.

For the avoidance of doubt, the Parties do not intend this document to be legally binding and this document shall not create (nor should it be treated as creating) any legally binding duties or obligations between the Parties. However, it provides context for the documents that form the legal basis for the renewed co-regulatory system and sets out the relevant legal duties and obligations of the Parties. These documents are as follows and are explained more fully in paragraphs 4 to 7 (Legal Context of the MOU):

- the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 ('the DCOA Order') made under the Deregulation and Contracting Out Act 1994 ('DCOA');
- the Authorisation to be made by Ofcom under the DCOA Order ('the Authorisation'); and
- the Deed for the Regulation of Broadcast Advertising ('the Deed of Arrangement'), to be agreed between the Parties.

## **BACKGROUND**

- 1 Under Section 3 (4) of the Communications Act 2003 ('the Act'), Ofcom, in performing its duties, must "have regard to.... the desirability of promoting and facilitating the development and use of effective forms of self-regulation".
- 2 With this in mind, Ofcom has assessed how the co-regulatory system has performed over the last decade against the relevant criteria. Following consultation with all relevant stakeholders and the public more widely, Ofcom considers that the system has proved to be an effective form of self-regulation over this period and that it remains appropriate to contract out certain functions in relation to the development and enforcement of standards codes relating to broadcast advertising to the Co-Regulatory Parties.
- 3 This MoU reflects the Parties' understanding as to:
  - the functions to be undertaken by the self-regulatory framework and those to be retained by Ofcom;
  - how the system will operate and be accountable to both the public and to Ofcom; and
  - how its efficacy will be assessed and reviewed.

The MoU also clarifies the actions to be taken by the Parties in the event of significant problems arising within the self-regulatory system.

## **LEGAL CONTEXT OF THE MOU**

- 4 The legal foundation for the self-regulatory system envisioned by this MoU is the DCOA. Where a Minister or other public authority (such as Ofcom) has been given specific functions or duties by legislation, DCOA allows the Minister or public authority to delegate or 'contract out' those functions to another person or organisation. Under section 1 (7) of the Act, Ofcom has been given the power to contract out its functions under DCOA. Subsequently, those functions relating to advertising that Ofcom may contract out are set out in the DCOA Order.
  
- 5 Ofcom's duties and functions in the area of broadcast advertising regulation derive in the main from sections 319 to 328 of the Act. Ofcom is using the DCOA to contract out the following of its statutory functions, as permitted under the DCOA Order:
  - its functions relating to the setting, reviewing and revising of standards codes for broadcast advertising, to BCAP (section 319(1) of the Act);
  
  - its functions relating to the consideration and resolution of complaints about the observance of broadcast advertising standards codes, to ASA(B) (section 325(2)); and
  
  - other supplementary functions, to ensure that BCAP and ASA(B) are invested with the appropriate legal authority they require.
  
- 6 Ofcom is also using DCOA to contract out to ASA(B) its functions relating to the consideration and resolution of complaints concerning the compliance of broadcast advertising reflected in other relevant legislation.
  
- 7 Ofcom contracts out its functions by giving an authorisation ('the Authorisation') to BCAP and ASA(B) under the DCOA Order, which sets out, in legal terms, the statutory functions to be delegated and the limitations and conditions on the exercise of those functions by BCAP and ASA(B). The DCOA Order and Authorisation governs the scope of the delegated powers of BCAP and ASA(B), and the legally binding commitments of the Parties will be set out in the Deed of Arrangement. This MoU describes the roles of the Parties in more detail, and at a more practical level, than is required to be reflected in the Authorisation (see, in particular, 'Delegated Functions' below).

## **INDEPENDENCE OF BCAP AND ASA(B)**

- 8 The Parties note it is essential that ASA(B) and BCAP enjoy autonomy over their day-to-day work, as contracted out. As long as the undertakings, agreed processes and targets contained in the MoU are met, there is a presumption that Ofcom and the Co-regulatory Parties will operate their relationship through agreed liaison and review arrangements, and Ofcom undertakes not to interfere in the functioning of the system, except in exceptional circumstances. However, paragraphs 9b, 31, 32, 33 and 39, below, outline when Ofcom has a right to be consulted, to approve action or to initiate action, in relation to the delegated functions.

## **DELEGATED FUNCTIONS**

- 9 As indicated above, the Parties agree that the following broadcast advertising regulation functions should, subject to the appropriate constraints identified in this document and the Authorisation, and for the time period specified in the Authorisation, be carried out by ASA(B) and BCAP:

**a) Consideration and resolution of complaints**

The Parties agree that the processing, consideration and resolution of complaints concerning the content of radio and television advertisements will be the responsibility of ASA(B)<sup>1</sup>. Ofcom will pass all complaints it receives about broadcast advertising that fall to be regulated by ASA(B), under the functions Ofcom has contracted out to it, directly to ASA(B), and will not entertain such complaints, even when specifically requested by the complainant to do so. ASA(B) will maintain a set of published procedures governing the processing, consideration and resolution of complaints.

**b) Code setting, monitoring and enforcement**

The Parties agree that the UK Code of Broadcast Advertising ('the BCAP Code') is owned by BCAP on behalf of the industry. Further, code setting and monitoring is the responsibility of BCAP. However, under the terms of the DCOA, Ofcom retains all its legal powers stemming from the Act, and is therefore ultimately able to make Code changes. Nevertheless, Ofcom undertakes to use this power only in exceptional circumstances and, in practice, will seek to have any such changes introduced following consultation at Group Director or Chief Executive level between Ofcom and BCAP.

The Parties also note that:

- via consultation with Ofcom, the Secretary of State may (in accordance with section 321 of the Act) issue directions in relation to prohibited categories of advertising and that BCAP must comply with such directions, if so notified by Ofcom;
- any Code changes proposed by BCAP must be agreed by Ofcom; and
- broadcasters are required by the terms of their Ofcom licences to ensure compliance both with the BCAP Code and with directions made by ASA(B).

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<sup>1</sup> Ofcom has not contracted out responsibility for all areas of broadcast advertising to the Co-regulatory Parties. Such areas that Ofcom has retained are detailed in this MoU.

**c) Teleshopping and other non spot advertising content**

The Parties agree that ASA(B)/BCAP will be responsible for broadcast advertising content that is subject to the BCAP Code and falls to be regulated by ASA(B) under the functions contracted out to it (subject to any exceptions agreed by the Parties from time to time). This content is not limited to traditional spot advertising, but also encompasses:

- long-form advertising (including teleshopping), either as extended advertising items in programme-based output, or as the entire output of dedicated teleshopping channels; and
- any output involving a transactional element that Ofcom determines is subject to Advertising Code provisions, having regard to the requirements of the Audiovisual Media Services ('AVMS') Directive.

The Parties agree that the above excludes Participation TV (i.e. long form television advertising for direct-response remote entertainment services that typically include the possibility of interacting with broadcast content), concerning which Ofcom retains responsibility for the processing, consideration and resolution of complaints.

To assist ASA(B) in its monitoring and enforcement functions, Ofcom undertakes to inform it of all new licence awards concerning television services that intend to broadcast any advertising content, identifying the nature of such services (i.e. whether they are editorial, teleshopping or self-promotional channels). Ofcom will also, where practicable, notify ASA(B) of any change in the nature or launch date of any such television service.

The Parties note the provisions in the AVMS Directive relating to teleshopping channels, teleshopping windows and teleshopping spots, as interpreted by Ofcom's Code on the scheduling of television advertising ('COSTA'), the enforcement of which remains Ofcom's responsibility.

The Parties also note that responsibility for compliance with the Articles of the AVMS Directive that relate to the insertion of advertising breaks, the amount of advertising permitted and sponsorship are specifically excluded from the remit of ASA(B)/BCAP in the Authorisation. However, the Parties agree that, in carrying out their delegated functions, ASA(B)/BCAP will, where appropriate, take account of any other relevant international obligations of the UK with respect to advertising included in television and radio services.

**d) Political advertising**

Ofcom is required, under the Act, to ensure that political advertising is not included in the television and radio services regulated by Ofcom. The Parties agree it is appropriate that Ofcom itself remains responsible for carrying out this function, notwithstanding that it involves the control of advertising content. The rules relating to political advertising will be determined by Ofcom but will remain in the BCAP Code, for consistency and transparency. In practice, should ASA(B) or BCAP have grounds to believe, either through complaints or through its own monitoring, that an advertisement may contain political content, it will refer the matter as soon as practicable to Ofcom. Ofcom will consider and, as appropriate, investigate it, to determine whether the advertisement is political advertising, and therefore prohibited, or is not political advertising, and therefore a matter that should remain within ASA(B)'s remit. Any adjudication made by Ofcom relating to broadcast political advertising will be published in Ofcom's Broadcast Bulletin, when Ofcom undertakes to inform ASA(B) of Ofcom's decision prior to publication. Should Clearcast or the RACC need advice concerning political advertising (or potential political advertising), they should consult BCAP, which will seek a view from Ofcom on the matter raised.

**e) Scheduling of spot advertising**

The Parties agree that ASA(B) will consider complaints relating to the scheduling of individual spot advertisements (other than issues falling solely under COSTA), including the enforcement or imposition of scheduling restrictions, enforcement of watershed policy and issues of inappropriate or insensitive scheduling. The Parties note that:

- scheduling considerations concerning certain categories of advertising will require special care – e.g. alcohol; and
- any policy changes proposed by BCAP in relation to the scheduling of spot advertising will require Ofcom's approval.

**f) Commercial communications in programming**

The Parties agree that, due to their strong links with programming and editorial issues, Ofcom will retain responsibility for issues concerning commercial references in television programming – including programme/channel sponsorship and product placement – and all commercial communications in radio programming, as detailed respectively in Sections Nine and Ten of the Ofcom Broadcasting Code.

**g) On Demand Programme Services**

The Parties note that advertising included in On Demand Programme Services is not subject to this MoU, but forms part of a separate regulatory regime.



#### **h) Public Policy requirements**

The Parties agree that ASA(B)/BCAP will take the lead in ensuring public policy requirements are reflected in the BCAP Code, as necessary. Ofcom may from time to time wish to make representations about such requirements to ASA(B)/BCAP or others – e.g. when issues run across both advertising and programming or where Government makes public policy considerations known directly to Ofcom. Ofcom is at liberty to make, and – if it regards it appropriate to do so – to publish any such representations. Where such representations are made to ASA(B)/BCAP, these parties undertake to take account of them.

#### **i) Audience Research**

ASA(B)/BCAP undertakes to maintain a comprehensive programme of quantitative and qualitative research, to ensure:

- it monitors and evaluates the degree to which the co-regulatory regime is meeting the Key Performance Indicators ('KPIs') agreed with Ofcom (see paragraphs 43-44, below);
- it keeps abreast of public opinion, incorporating specialist views and being mindful of public policy objectives where relevant;
- it investigates audiences who are not traditionally minded to complain and issues of potential detriment to society that may not be the subject of complaint; and
- its decisions on Code reviews, rule change proposals and policy positions are evidence-based, robust and well-informed.

The Parties note that none of the above precludes Ofcom from undertaking its own research in any of these areas (in consultation with BCAP) or precludes joint research being undertaken by either Ofcom and ASA(B)/BCAP and/or any other relevant body. All research will be objective and independent. In no circumstances will the integrity of research be compromised. External research partners will not therefore have vested interests in the results – e.g. car manufacturers should not contribute to research on the perception of car advertisements.

The Parties also note that Ofcom is obliged under section 15 of the Act to publish all its research in such manner as it considers appropriate. It is therefore presumed that ASA(B)/BCAP will also publish the audience research it undertakes. Where ASA(B)/BCAP does not do so, such research will be shared with Ofcom.

**j) Publicity**

The Parties agree that ASA(B) is responsible for ensuring its public profile in relation to broadcast advertising, which it will maintain through appropriate publicity.

**k) Compliance with legislation**

The Parties note that the functions contracted out to the Co-regulatory Parties are those authorised by Ofcom, as reflected in relevant legislation from time to time.

**STRUCTURE AND FUNCTION OF THE PARTIES TO THE MOU**

10 The Parties' understanding is that the basic elements of the regulatory system for broadcast advertising are as follows:

**Funding the system**

- 11 The Parties agree that the system will be funded via a voluntary levy on broadcast advertising collected by Basbof. Members of Basbof will be representative of broadcasting and advertising interests.
- 12 The Parties agree that the funding will at all times be sufficient to secure the effective discharge of all the functions contracted out, as authorised by Ofcom. This will be reviewed annually as part of the formal reporting process to Ofcom. ASA(B)/BCAP will inform Ofcom in writing immediately if Basbof is unable to provide adequate funding to meet these obligations. In this event, Ofcom will not make up, or contribute to making up, any shortfall, but will invite Basbof to propose alternative means of doing so. In the unlikely event of broadcast advertising regulation failing to be carried out to required standards, the recovery programme will commence, as appropriate to the circumstances (see paragraphs 53-56, below).

**Operation of ASA(B)**

13 The Parties agree that:

- ASA(B) is responsible for carrying out those functions specified in paragraph 9, above, in relation to the enforcement of the BCAP Code and the consideration and resolution of complaints;
- as a company limited by guarantee, the Memorandum and Articles of Association ('M&A') of ASA(B) Ltd will not be amended without prior consultation with Ofcom;
- ASA(B)'s Chairman will also be the Chairman of the ASA (Non-broadcast ("NB")) ("ASA(NB)"). When the Chairman steps down, the new Chairman will be appointed

by Basbof and Asbof (which funds the NB system), by a proper process, after due consultation in line with the M&A's of Basbof and Asbof, to preserve his or her independence from Ofcom, industry and Government;

- the appointed ASA(B) Chairman will be appropriately qualified and of good standing, and free of interests in the advertising and media industries; and
  - Ofcom will be consulted regarding the appointment of the ASA(B) Chairman but will have no right of appointment or veto.
- 14 The Parties agree that the person with primary responsibility to Ofcom for the delivery of an effective self-regulatory system will be the Chief Executive of ASA(B)<sup>2</sup>. He/she may depute a senior executive to be the day-to-day point of contact and liaison for Ofcom (see paragraphs 38-40, below).
- 15 The Parties agree that adjudications on complaints about broadcast advertising content will be made by a group of persons (the 'ASA(B) Council') appointed by, and representing, ASA(B). Further:
- all members of the ASA(B) Council will be directors of ASA(B);
  - new members of the ASA(B) Council will be appointed by the ASA(B) Chairman, independently advised as appropriate, and in accordance with proper process;
  - there will be a ratio of at least 2:1 independent/industry membership on the ASA(B) Council, with the non-industry members being recruited by public advertisement, and the industry members selected by the independent ASA(B) Chairman;
  - membership of the ASA(B) Council will include lay representation and a member with broadcast advertising expertise who will participate only in the work of the ASA(B) Council and its broadcast adjudications; and
  - members of the ASA(B) Council will serve for a maximum of six years, in line with procedures that are published.
- 16 Appropriately supported by staff, and to ensure that broadcast advertising complaints are dealt with in accordance with the law (in particular, in accordance with the Act and the Authorisation), the manner in which the ASA(B) Council make their adjudications shall ensure that separate and proper consideration will be given to broadcast and non-broadcast complaints.
- 17 Appeals for a review of an adjudication by the ASA(B) Council can be made to an Independent Reviewer in accordance with specific terms of reference. A review by the Independent Reviewer may be requested by a complainant or by a body complained

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<sup>2</sup> Ofcom has not contracted out responsibility for all areas of broadcast advertising to the Co-regulatory Parties. Such areas that Ofcom has retained are detailed in this MoU.

about within 21 days of the date of ASA(B)'s letter of notification of an adjudication. Specific grounds are required for a review to take place (i.e. where the relevant party alleges a substantial flaw in process or adjudication, or produces additional relevant evidence that could not have been submitted previously) and, during the review process, the original adjudication generally stands (see paragraph 21, below). The Independent Reviewer's recommendation to the ASA(B) Council will state whether the adjudication should be confirmed, amended or reversed. The Independent Reviewer may ask the ASA(B) Council to reconsider its decision, but the ASA(B) Council retains the power to take the final decision on the appeal.

## **Powers of ASA(B)**

### **Enforcement of decisions**

- 18 The Parties note that it is a condition of all relevant licences under the Broadcasting Acts that licensees comply with directions issued by any body to which Ofcom has contracted out its functions under DCOA.
  
- 19 The Parties agree that ASA(B) will communicate its decisions clearly and promptly to all parties in response to a complaint/challenge. The initial contact will be with the broadcaster, as a *Broadcasting Act* licensee carrying ultimate responsibility for what appears on its channel(s), or with the relevant pre-clearance centre (e.g. Clearcast or RACC), acting on the broadcaster's behalf. The advertiser/agency will also be kept informed at all times.
  
- 20 Decisions in relation to upheld complaints/challenges may result from informal, standard or complex investigations (see paragraph 43). Such decisions will:
  - instruct the advertiser and broadcaster to change the advertisement prior to subsequent broadcast;
  - instruct the broadcaster to restrict transmission, as directed; or
  - instruct the broadcaster to cease broadcasting the advertisement.

Publication of decisions will follow within 14 days via weekly publication on the ASA's website.

- 21 It is the responsibility of ASA(B) to notify the relevant clearance house and/or broadcaster(s) of decisions. Decisions take effect as soon as they are notified. The implementation of a decision would not normally be suspended following a request for a review, but the Chief Executive of ASA(B) has discretion to do so, or to delay publication, pending the outcome of such a request for review.
  
- 22 Broadcasters are required forthwith to cease transmission of, or to re-schedule any, advertisement, on the direction of ASA(B):
  - following a decision to that effect; or

- if circumstances demand (e.g. where there is *prima facie* public detriment) pending the outcome of an investigation.

23 The Parties note that ASA(B) does not have the power to fine licensees or impose other forms of sanction; only Ofcom has the power to impose such sanctions at its discretion and ASA(B) will have a referral process in place to enable it to refer appropriately serious cases to Ofcom for consideration of such sanctions.

Further action, including referral to Ofcom

24 The Parties agree that proportionate action beyond the suspension of specific advertising may be taken by ASA(B) in order to achieve a broadcaster's prompt compliance with the BCAP Code and ASA(B) adjudications. ASA(B) and BCAP may take such additional measures as may be considered appropriate to ensure future compliance with the BCAP Code (e.g. seeking assurances concerning future compliance or calling broadcasters in for a meeting).

25 The Parties note that Ad Alerts may be issued to broadcasters to alert those who may not regularly use the clearance centres' services (e.g. community radio and smaller TV channels) of problems with an advertiser.

26 If, in the opinion of the Chief Executive of ASA(B), a broadcaster:

- fails to comply fully and promptly with a decision of ASA(B);
- fails to co-operate fully and promptly with a reasonable request of BCAP;
- demonstrates a disregard for decisions of ASA(B) or the reasonable requests of BCAP; or
- commits, in ASA(B)'s opinion, one or more code breaches of sufficient seriousness to warrant a statutory sanction;

the Chief Executive shall, after ASA(B) has reached any relevant decision(s), refer the matter, together with copies of all evidence and submissions required by Ofcom, to Ofcom, for its consideration of further action. Ofcom undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it considers appropriate in the circumstances in support of ASA(B), taking into account any representations from the broadcaster(s) concerned. Such sanctions may include a formal reprimand, a fine, a warning about possible revocation of the broadcaster's licence or, ultimately, the actual revocation of the licence. Ofcom undertakes to keep ASA(B) informed of its intended actions during this process, subject to any confidentiality requirements of the proceedings.

## Operation of BCAP

- 27 The Parties note that BCAP exists alongside and separate from the parallel, Committee of Advertising Practice (“CAP”). BCAP is responsible for setting and monitoring compliance with the BCAP Code, CAP having (retained) responsibility only for the (non-broadcast) CAP Code. The two Committees have a single Chairman and partly overlapping membership, to provide an adequate level of liaison between the two code-owning bodies, albeit they operate with different Codes.
- 28 The Parties also note that broadcasters are required by the terms of their Ofcom licences to ensure compliance both with the BCAP Codes and with the directions of ASA(B).
- 29 The Parties agree that BCAP is responsible for ensuring it:
- sets, reviews and revises (as required) the BCAP Code;
  - helps the broadcast advertising communications industry to operate in the interests of the public;
  - coordinates the action required to ensure compliance with the BCAP Code (e.g. by monitoring broadcast advertisements and broadcast teleshopping services);
  - gives broadcast licensees and the advertising industry advice, information, training and support on matters relating to broadcast advertising self-regulation (with the exception of copy clearance of specific advertisements, which remains the responsibility of Clearcast, RACC or individual licensees);
  - supports the maintenance and preservation of broadcast advertising standards;
  - maintains an Advertising Advisory Committee, which comprises an independent Chairman, industry representatives and expert/lay members (see paragraphs 34-37, below);
  - reviews, initiates and proposes changes to the BCAP Code, subject to the paragraphs below and, in particular, the procedural requirements set out in section 324 of the Act;
  - consults widely on proposed significant changes to the BCAP Code with licensees, other industry stakeholders, its AAC, consumer representatives, Ofcom and other interested persons, and publishes the results of those public consultations together with its subsequent decision;
  - obtains Ofcom’s approval concerning all BCAP Code rule changes prior to implementation (including minor or technical changes or changes stemming from

changes in legislation), when such approval will be taken by Ofcom at a level of authority appropriate to the change(s) proposed; and

- informs licensees of all BCAP Code rule changes it implements.

### **Accountability of decisions**

30 The Parties agree that decisions of the ASA(B) Council are sovereign under the self-regulatory system. However ASA(B) will have in place an independent review procedure to consider appeals for a review of its adjudications (see paragraph 17, above). Further, both ASA(B) and BCAP are responsible and accountable for specific decisions and actions, and may therefore be open to Judicial Review.

31 The Parties note that Ofcom will not normally intervene in specific decisions and actions of ASA(B) or BCAP in respect of matters that have been contracted out to them. However, Ofcom will remain:

- ultimately accountable under DCOA for anything done, or omitted to be done, by ASA(B) or BCAP in respect of the contracted-out functions; and
- accountable to the Secretary of State and to Parliament, and open to judicial review, in respect of the exercise of its statutory duties.

### **Ofcom's involvement in code making and review**

32 The Parties note that, under the terms of DCOA, Ofcom retains all its legal powers stemming from the Communications Act 2003, and is therefore able to implement Advertising Code changes itself. However, Ofcom does not anticipate using its power to do this in anything other than exceptional circumstances (e.g. in response to a particular public policy issue, Ofcom may need to insist that a rule should be amended or introduced), when, in practice, it would seek to have any such change introduced following consultation with BCAP at Group Director / Chief Executive level.

33 The Parties note that Ofcom reserves the right to conduct research into advertising policy issues in co-operation with BCAP, and may from time to time request BCAP reviews a section of the BCAP Code. If so, BCAP would consider such a request within its normal rule-making process.

## **Advertising Advisory Committee**

### **Terms of reference**

34 The Parties agree that the role of an Advertising Advisory Committee ('AAC') is to provide independent, third party advice to BCAP on advertising issues, particularly in relation to the BCAP Code.

### **Procedures and obligations**

35 The Parties agree that:

- the AAC will provide timely advice to BCAP on BCAP Code issues and on other advertising issues, as appropriate;
- BCAP will therefore:
  - make all relevant research it undertakes available to the AAC;
  - keep the AAC fully informed of its plans for code revision, both with respect to timing and substance; and
  - request the AAC input to these plans in a way that allows it the opportunity to provide timely advice;
- Basbof will make necessary funding available to AAC; and
- ~~ASA(B) and Ofcom will make any relevant research they undertake available to the AAC through BCAP; and~~
- ASA(B) will include in its annual report a section written by the independent Chairman of the AAC on its year's activities.

### **Composition**

36 The Parties agree that:

- membership of the AAC will comprise:
  - an independent Chairman;
  - the Chairman of BCAP; and



- ~~a minimum of 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;~~

all of whom will have non-executive roles;

- the Chairman of the AAC will be:
  - appointed by the independent Chairman of ASA(B), independently advised, as appropriate, and by a proper process after due consultation to ensure his or her independence from Ofcom, industry or Government; and
  - appropriately qualified and of good standing, free of interests in the advertising and media industries;
- ~~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.~~
- the expert/lay members of the AAC will be appointed by a process involving public advertisement and selection by the Chairman of the AAC, the Chairman of BCAP and the Chairman of ASA(B);
- BCAP will provide Ofcom with details of new appointments to the AAC in a timely manner after they are made;
- 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.
- ~~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 for interview; and~~
  - ~~the preferred candidate, prior to his/her appointment.~~
- ~~Ofcom will have observer status at meetings of the AAC.~~

## Transparency

37 The Parties agree that:

- expert/lay members of the AAC will be required to participate as individuals, not as representatives of any particular organisations or interest groups;
- all members of the AAC will be required to respect the Chatham House Rule;
- all contributions will be evidence-based, wherever possible, and will aim to ~~reflect ensure Ofcom's commitment to maintaining~~ a “bias against intervention”;
- the AAC will not generally publish its advice, but BCAP shall listen carefully to the AAC’s advice and insights, and let the AAC know how it has responded and the outcomes of its decisions; and
- the Chairman of BCAP will report to BCAP on the deliberations of the AAC.

## **Liaison Arrangements at executive and board levels**

38 The Parties agree that:

- a member of senior staff at Ofcom (‘the Ofcom Executive’) will be appointed as the key contact between Ofcom and the appropriate managers of the system;
- regular contact will be maintained between ASA(B)/BCAP and Ofcom, to the effect that:
  - ASA(B)/BCAP staff members involved in a broadcasting issue have a route to contact Ofcom should advice, information or assistance be required; and
  - Ofcom colleagues in Content Standards, Licensing and Enforcement give appropriate priority to contact from ASA(B)/BCAP, to further the timely resolution of outstanding issues;
- formal and regular contact be maintained between the Ofcom Executive and the Chief Executive of ASA(B) at intervals agreed by both parties; and
- the Ofcom Executive will discuss BCAP Code issues with the BCAP Chairman as appropriate.

39 The Parties agree that, to assist Ofcom's monitoring of the system (and thus ensure that the appropriate advertising standards are maintained):

- the Ofcom Executive will be responsible for such monitoring;
- ASA(B) will provide Ofcom with performance data against KPIs (see paragraphs 43-44, below);
- if at any time the Ofcom Executive has grounds to believe there is a performance problem with the system, he/she can call for data or information from ASA(B)/BCAP outside the regular reporting intervals;
- the Ofcom Executive may instigate audience/industry research, as required, on Ofcom's behalf and paid for by Ofcom, either relating to system performance or, in consultation with BCAP, to advertising policy issues;
- the Ofcom Executive will not act so as to interfere with the independence of ASA(B)/BCAP;
- ASA(B)/BCAP may comment at any time on the working of the KPIs and suggest changes, either to the measures themselves or to timing of the reporting, with any changes being negotiated between the relevant parties; and
- the Ofcom Executive shall report as it considers necessary to the Content Board and to the Ofcom Board on the degree to which the self-regulatory system is delivering Ofcom's statutory responsibilities.

40 The Parties commit to good communication, including a 'no surprises' policy, based on notifying each other (where possible) of significant announcements and policy developments. The Parties understand, however, that each may speak separately in public and to the media as necessary.

### **MONITORING AND PERFORMANCE REPORTING TO OFCOM**

41 The Parties note that the effectiveness of the co-regulatory arrangement is judged by the degree to which the standards objectives laid down in section 319(2) of the Act are met in relation to broadcast advertising, while also having regard to Ofcom's general duties in section 3 of the Act.

42 The Parties agree that, to assist Ofcom's monitoring of the effectiveness of the system, ASA(B)/BCAP shall report biannually to Ofcom on a number of agreed KPIs, as outlined in paragraphs 43-44, below.

## Quantitative

### Complaint response times

- 43 The Parties agree to the following completion benchmarks against which ASA(B) will report average complaints turnaround to Ofcom:
- 10 working days for a complaint that falls outside ASA(B)'s remit – i.e. the material complained about is excluded from the definition of broadcast advertising provided in the Introduction of the BCAP Code;
  - 15 working days for a complaint that requires no investigation – i.e. the material complained about does not appear to breach the BCAP Code and does not therefore require referral to the ASA(B) Council;
  - 20 working days for a complaint that requires no investigation after an ASA(B) Council Decision – i.e. where the ASA(B) Council has decided, without further investigation, that the material is not in breach of the BCAP Code;
  - 35 days for a complaint that requires an informal investigation – i.e. where a potential breach of the BCAP Code has been resolved by seeking co-operation from the relevant broadcaster(s) and advertiser without referral to the ASA(B) Council;
  - 60 days for a complaint that requires a standard investigation – i.e. where the complaint has warranted further investigation (and an ASA(B) Council Adjudication); and
  - 115 days for a complaint that requires a complex investigation – where the complaint has required further investigation of a detailed and/or technical nature (and an ASA(B) Council Adjudication).
- 44 ASA(B) undertakes to meet these benchmarks in respect of 80% of complaints. If factors emerge (within or without the system) that may unavoidably influence turnaround times, ASA(B) and Ofcom will agree and publish revised targets.

### Trend data on complaints

- 45 The Parties note that trend data on complaints received and processed are not associated with any particular target, but give insight into the caseload and ASA(B)'s productivity.
- 46 ASA(B) also undertakes to ensure that Ofcom is kept abreast of the level of requests for review to the Independent Reviewer (see paragraph 17, above).

## **Qualitative**

47 The Parties agree that ASA(B) and BCAP will also report biannually to Ofcom in relation to the following, to ensue Ofcom's comprehensive assessment of the effectiveness of broadcast advertising regulation at the time of reporting:

- Policy initiatives and activity (including in those socially important areas where few complaints may be received) – ASA(B) and BCAP will undertake initiatives in sensitive sectors and keep Ofcom informed;
- Assessment of compliance in particularly contentious areas – ASA(B) and BCAP will monitor compliance in any sensitive policy sectors, and in particular public policy sectors, which may be high on the public agendas of the moment, and keep Ofcom informed;
- Research undertaken (including public attitude surveys to determine the public's satisfaction with the degree and effectiveness of regulation – ASA(B) and BCAP will share the results with Ofcom of any Customer Satisfaction Surveys and Attitudes and Awareness research;
- Code changes and rule reviews – BCAP will keep Ofcom informed of any upcoming proposals for either a review or a change to the BCAP Code and any external campaign aimed at changing it;
- Assessment of internal performance – ASA(B) and BCAP will share the performance information with Ofcom; and
- Reports to Ofcom on significant external criticisms of the regulatory regime – ASA(B) and BCAP will ensure that Ofcom is made aware of significant public affairs concerns as soon as they arise.

48 Ofcom undertakes to keep ASA(B), BCAP and Basbof informed through regular liaison meetings about any concerns it may have, or which have been brought to its attention, so they can be addressed at an early stage.

## **Performance reporting to Ofcom**

49 The Parties note that:

- the ASA(B and NB) Annual Report is published in May of each year, reporting on the previous calendar year; and
- ASA(B) Ltd and BCAP Ltd's year end is 31 December.

50 The Parties agree that:

- the ASA Annual Report will contain a section dealing with the work processes and performance of ASA(B) and BCAP. Basbof will publish a separate report; and
- ASA(B) and BCAP will publish a half-year statement in October of each year, setting out their performance for the past period and their objectives and targets for the forthcoming calendar year. Performance information will update the results reported in the Annual Report for the previous year, drawing on the results for the first six months of the year.

51 The Parties agree that:

- the annual reports and half-year statement will inform Ofcom's Annual Plan and also fits with Basbof's business planning cycle, public reporting against KPI's therefore taking place formally at year-end and at half-year;
- rolling Customer Satisfaction surveys will feed into the six-monthly public reporting (ASA Annual Report and half-year statement), covering both complainants and advertisers/broadcasters;
- the interpretation of complainant satisfaction scores must take into account the extent to which complaints about broadcast advertising are not upheld;
- an annual Attitude and Awareness survey will feed into the annual statement;
- when considered appropriate by Ofcom, and by invitation, the Chairman of ASA(B) (and, where appropriate, the Chairman of BCAP) will attend the Ofcom Board and/or Content Board, to discuss the ASA Annual Report (in relation to ASA(B)) and/or other matters concerning advertising on Ofcom-licensed broadcast services; and
- Ofcom will report, in relation to the regulation of broadcast advertising, on both ASA(B) and BCAP's performance and its own performance in its annual report, in July of each year.

## **STAFFING**

52 The Parties commit to ensure there is appropriate staffing within ASA(B), BCAP and Ofcom to deliver effective co-regulation, and that appropriate training and support is provided to those staff, as required.

## **RECOVERY PROGRAMME**

53 The Parties agree that, if the system were consistently to fail to meet the agreed standards, they would open discussion at a Senior Management or Chief Executive level, to agree an appropriate strategy concerning corrective measures.

- 54 Notwithstanding Ofcom's statutory powers, the Parties intend the system described in this document should operate for a period of ten years, subject to the Parties entering into a new Deed of Arrangement by no later than 31 January 2015, such Deed to set out the operational arrangements to be agreed between them including any provisions relating to termination and compensation as may be appropriate. The new Deed of Arrangement will replace the 2004 Deed of Regulation. The Parties agree to enter into discussions in good faith.
- 55 The Parties intend that the 2004 Deed of Regulation shall continue to apply pending agreement of the new Deed of Arrangement but that the 2004 Deed of Regulation shall in any event cease to apply on 31 January 2015.

#### **AMENDMENTS TO THE MOU**

- 56 Any Party to this MoU may propose alterations to it at any time, and all other Parties promise in good faith to discuss any such proposals as soon as practicable with a view to reaching agreement and amending the MoU accordingly.