

Designation pursuant to section 368B of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of advertising included in on-demand programme services

WHEREAS:

- (1) Section 368B(2) and (3) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of on-demand programme services¹;
- (2) Section 368B(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368B(9) to be, to the extent provided for in the designation, the appropriate regulatory authority for the purposes of any provision of Part 4A of the Act;
- (3) Ofcom originally designated certain of its functions in relation to the regulation of on-demand programme services to the Advertising Standards Authority Limited (Registered number 733214) ('the ASA') with effect for a period of ten years from 1 September 2010. This followed an Ofcom consultation entitled Proposals for the Regulation of Video on Demand Services published on 14 September 2009, and subsequent statement on 18 December 2009² addressing the principle of co-regulation and appropriateness of the ASA's proposal at that time;
- (4) The original designation expires on 31 August 2020 and Ofcom has decided to renew it in substantively the same form from 1 September 2020 until 31 October 2024 in order to align dates with those applying to arrangements for broadcast advertising³;
- (5) Ofcom, in making this Designation, is satisfied that:
 - (i) the ASA is a fit and proper body to be so designated,
 - (ii) the ASA will ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory 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 Communications Act 2003 ('the Act') as appear to be relevant to it in the circumstances;

¹ Inserted by the Audiovisual Media Services Regulations 2009 (SI 2009/2979) and amended by the Audiovisual Media Services Regulations 2010 (SI 2010/419) and Audiovisual Media Services Regulations 2014 (SI 2014/2916).

² <https://www.ofcom.org.uk/consultations-and-statements/category-2/vod>

³ https://www.ofcom.org.uk/data/assets/pdf_file/0028/58942/statement.pdf

- b. to consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act;
 - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
- (iii) the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Function;
 - (iv) the ASA is sufficiently independent of providers of on-demand programme services; and
 - (v) the ASA has consented to being so designated.
- (6) In concluding the above, Ofcom has in particular taken into account the ASA's written undertakings to Ofcom as annexed to this Designation, the ASA's co-regulatory proposal (Annex 8 of the 2009 consultation), responses to the 2009 consultation, information provided by the ASA pursuant to its reporting obligations since 2009 and other information relevant to the ASA's performance of its functions over the period;
- (7) 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 4A OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:

1. Ofcom in exercise of the powers conferred on it under section 368B of the Act hereby designates the ASA, for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368R of the Act) for the purpose of carrying out the function set out in Paragraph 5 of this Designation in relation to advertising included in on-demand programme services to the extent and subject to the Obligations, Conditions and other such circumstances as are described in this Designation ('the Designated Function').
2. This designation incorporates the Schedules and Annex which form 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 Function 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) 'Designated Function' has the meaning given in Paragraph 1 of this Designation;

- (ii) 'Rules' shall be construed in accordance with Paragraphs 6(ii) and 7(iv) of this Designation;
- (iii) 'relevant requirements of the Act' means the requirement set out in section 368D(1) of the Act as it applies in relation to sections 368E (insofar as they relate to advertising included in an on-demand programme service) and section 368F of the Act;
- (iv) 'Service Provider' means a provider of an on-demand programme service;
- (v) for the purposes of this Designation, 'advertising' is included in an on-demand programme service and therefore subject to the exercise of powers under this Designation, if, in accordance with section 368R(3) of the Act, it can be viewed by a user of the service as a result of the user selecting a programme to view; and
- (vi) other terms and expressions used in this Designation shall have the meanings given to them in the Act.

The Designated Function

5. Ofcom designates the ASA to carry out the following function:

In accordance with section 368C(1) of the Act, to take such steps as appear to the ASA best calculated to secure that the relevant requirements of the Act are complied with by Service Providers.

Powers

6. In carrying out the Designated Function the ASA shall exercise the following powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:
- (i) to decide what constitutes 'advertising included in an on-demand programme service' in accordance with section 368R(3) of the Act for the sole purpose of applying the Rules and having regard to guidance prepared and published by the ASA following consultation with Ofcom;
 - (ii) to publish (or have published) Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act;
 - (iii) to secure that accompanying guidance to aid interpretation of those Rules is prepared and published;
 - (iv) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the Rules and to require the Service Provider to co-operate fully and promptly to secure compliance with its decision;
 - (v) to refer any particular case to Ofcom to determine whether there has been a contravention of any of the relevant requirements of the Act;

- (vi) to carry out, commission or support (financially or otherwise) research in connection with its Designated Function (section 368B(11)); and
- (vii) to use any recording, script or transcript provided to it in connection with its performance of any of the Designated Function as permitted under section 69(5) of the Copyright, Designs and Patent Act 1988 (as inserted by Regulation 12(2)(c) of the Regulations).

Obligations and Conditions

7. In carrying out the Designated Function and in exercising the Powers set out in Paragraph 6 above the ASA shall comply with the following Obligations and Conditions:
- (i) to ensure, in performing any function to which this Designation relates, 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 consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
 - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
 - (ii) following referral or appeal to Ofcom, to accept any decision of Ofcom as to whether advertising is included in an on-demand programme service;
 - (iii) to require every Service Provider to secure that advertising included in the service they provide complies with the Rules;
 - (iv) to ensure that the Rules are expressed as the relevant requirements of the Act (as amended from time to time) are expressed without material additions or omissions. Specifically:
 - a. in relation to advertising content of on-demand programme services only, the requirements set out in section 368E of the Act;
 - b. the requirements set out in section 368F of the Act (which specifically relate to advertising in on-demand programme services);

- (v) 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;
- (vi) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:
 - a. that it is provided only in order to aid interpretation of the Rules in light of the relevant requirements of the Act; and
 - b. that compliance with the Rules will not necessarily be taken by Ofcom to be compliance with the relevant requirements of the Act;
- (vii) 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 Function, such processes to be formulated in consultation with Ofcom;
- (viii) to handle complaints received by it and any passed to it by Ofcom in accordance with its obligations in this Designation ensuring that all complaints assessed under the statutory rules are recorded as such;
- (ix) to comply with the reporting obligations set out in the Schedule to this Designation;
- (x) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xi) 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 he or she may authorise, a Service Provider has:
 - a. failed to comply fully and promptly with a decision of the ASA;
 - b. failed to co-operate fully and promptly with a decision of the ASA;
 - c. demonstrated a repeated disregard for the reasonable requests or decisions of the ASA; or
 - d. 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;

- (xii) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a Service Provider may have breached the Rules due to the inclusion in the service of advertising that contains material likely to encourage or to incite the commission of crime, or to lead to disorder and where the potential contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
 - (xiii) 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 Function 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;
 - (xiv) to consult Ofcom and in cases where there is doubt or disagreement as to whether a service constitutes an on-demand programme service for the purposes of section 368A(1) of the Act or, as appropriate, in connection with any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
 - (xv) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Function for any reason and/or can no longer satisfy the relevant requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Function and in each case to use its best endeavours to resolve any such issues promptly; and
 - (xvi) in the event that the ASA no longer wish to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Function and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Function, 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 1 September 2020 and to continue until 31 October 2024 ('the expiry date') or 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 368B(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 368B(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(xvi) 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 those referred to in Paragraph 7(i) of this Designation as well as public law duties such as the duty to act reasonably in all the circumstances.

19. The ASA is only empowered to carry out the Designated Function and exercise the powers specifically designated to them in this Designation. Accordingly, and 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 form part of the Designated Function (including in particular, all functions not relating to advertising content, the power under section 368I of the Act to determine in relation to advertising included in an on-demand programme service that a Service Provider is contravening or has contravened the relevant requirements of the Act and the powers under section 368J, 368K and 368L associated with the enforcement of those requirements).
20. Compliance by Service Providers with the Rules will not necessarily be taken to be compliance with 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 (xv) and (xvi) 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 368B(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 368B(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.

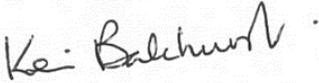
Ofcom's Commitments to the ASA

26. Ofcom shall consider any referrals from the ASA promptly and if having taken into account any representations from the relevant Service Provider, Ofcom determines that section 368D of the Act has been contravened, take such steps as it considers appropriate by way of enforcement action against the Service Provider.
27. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements.
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 368B(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:

Date:



Kevin Bakhurst

1 September 2020

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Kevin Bakhurst

Group Director, Content and Media Policy

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 Function 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 Function 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 advertising on notified on demand programme services broken down to show the number of complaints received in respect of each such service;
 - ii. The number of advertisements on notified on demand programme services about which complaints have been received broken down in respect of each individual ODPS;
 - iii. Prior to investigation, the number of 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 ODPS;
 - 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 ODPS;
 - 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 ODPS;
5. The Chairman 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 Function.

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.

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



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www.asa.org.uk

14 August 2020
By email

Email: kevin.bakhurst@ofcom.org.uk

Dear Kevin,

Co-regulation of video on demand (VOD) advertising content

Thank you for writing to me on 13 August about the ASA continuing our VOD co-regulatory duties under a new designation, which you enclosed.

The ASA agrees that there have been no substantive issues of concern in carrying out our duties over the past 10 years, we are pleased that Ofcom remains satisfied that we continue to meet the Communications Act criteria, we agree that co-regulation remains the appropriate model for regulating VOD advertising content and we also agree that Ofcom has made no substantive changes to our duties and responsibilities in the new designation.

We propose a small number of minor changes to the designation (see tracked changes in the attached word version) to reflect our updated case types and turnaround targets, which we have previously agreed with Ofcom.

We agree that it is a good idea to change the period of the renewal to 31 October 2024, to bring it into line with the period for broadcast co-regulation.

We undertake to continue to meet the Communications Act criteria and consent to being designated by Ofcom as the appropriate regulatory authority for the purpose of carrying out the functions that Ofcom delegates to us, to the extent specified by, and on the terms and conditions set out in, the attached designation (as amended).

Legal, decent, honest and truthful

Chairman Rt Hon Lord Currie of Marylebone **Chief Executive** Guy Parker
ASA Council (Non-Broadcast) Aaqil Ahmed, Zaid Al-Qassab, Reg Bailey, Tracey Follows, Krystle Fonyonga, Wesley Henderson, Richard Lloyd, Suzanne McCarthy, Kirsten Miller, Nita Patel, Rebecca Rumbul, and Neil Stevenson

Finally, we are happy for this letter to be published on Ofcom's website.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'G Parker', with a long horizontal flourish extending to the right.

Guy Parker
Chief Executive

Cc: Shahriar Coupal, Jo Poots, David Currie