
Extension of the remit of the Advertising Advisory Committee

STATEMENT

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1. Overview

What we have decided – in brief

Ofcom has agreed changes to the Memorandum of Understanding (MoU)¹ between Ofcom and the Broadcast Committee of Advertising Practice, the Advertising Standards Authority (Broadcast) Limited and the Broadcast Advertising Standards Board of Finance that will facilitate the extension of the remit of the Advertising Advisory Committee (AAC). The AAC is an independent panel that supports the broadcast advertising co-regulatory system by bringing a consumer voice to broadcast advertising policy issues.

Following a consultation, we have agreed changes to the MoU which will allow the remit of the AAC to be extended so that it is able to provide a consumer perspective on issues impacting both broadcast and non-broadcast advertising.

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0037/169858/memorandum-of-understanding-october-2019.pdf

2. Advertising regulation

- 2.1 Advertising in the UK is regulated through a combination of ‘co-regulation’ and ‘self-regulation’ systems:
- Co-regulation – Ofcom has a statutory duty to regulate broadcast (TV and radio) advertising. We have contracted out this function to the Advertising Standards Authority (“ASA”) and the Broadcast Committee of Advertising Practice (“BCAP”). Ofcom is also responsible for regulating advertising on Video on Demand (VOD) services and we have designated the ASA to carry out this function.
 - Self-regulation – The ASA and the Committee of Advertising Practice (CAP) are responsible for regulating non-broadcast (e.g. newspapers, posters, website, social media) advertising. This is achieved through a system of self-regulation, which means that the advertising industry has voluntarily established and paid for its own regulation.

The co-regulatory model

- 2.2 In 2004, following public consultation (“the 2004 Consultation”), Ofcom contracted out certain of its statutory functions to the ASA in relation to the regulation of broadcast advertising.²
- 2.3 Under an Authorisation dated 31 October 2014, the contracted out functions are split between two bodies:³
- i) The Broadcast Committee of Advertising Practice (“BCAP”), which is responsible for setting, reviewing and revising the standards code that apply to television and radio advertising content (“the BCAP Code”); and
 - ii) The Advertising Standards Authority (Broadcast) Limited (“ASA(B)”), which is responsible for the process, handling and resolution of complaints about broadcasters’ compliance with the BCAP code.
- 2.4 The Authorisation specifies the regulatory functions that are contracted out, together with the exceptions, limitations and conditions to which the Authorisation is subject. It also designates responsibility to the Broadcast Advertising Standards Board of Finance (“BASBOF”) for ensuring the functions exercised by BCAP and ASA(B) are appropriately funded.
- 2.5 In addition to the Authorisation and a Deed of Regulation agreed by the Parties (i.e. Ofcom and the Co-regulatory Parties⁴ operating under the umbrella of the ASA), a Memorandum

² https://www.ofcom.org.uk/data/assets/pdf_file/0018/51309/regofbroadadv.pdf, pages 7 and 17. The relevant functions were contracted out pursuant to the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, SI 1975/2004, made under the Deregulation and Contracting Out Act 1994.³ https://www.ofcom.org.uk/data/assets/pdf_file/0028/36496/auth.pdf.

³ https://www.ofcom.org.uk/data/assets/pdf_file/0028/36496/auth.pdf.

⁴ The Co-Regulatory Parties are, collectively, ASA(B), BCAP and BASBOF.

of Understanding (“MoU”) details the Parties’ understanding of the day-to-day operation of the co-regulatory system.

- 2.6 Under the terms agreed between the Parties, Ofcom continues as the back-stop regulator, responsible for conducting sanctions proceedings against broadcasters who fail to comply with ASA(B)’s rulings. Ofcom also has oversight of the co-regulatory arrangements, with responsibility for supervising our co-regulators’ performance and approving any proposed changes to the regulatory requirements.
- 2.7 The co-regulatory scheme was renewed in 2014.⁵
- 2.8 In 2010, under a separate scheme, Ofcom designated the ASA as the co-regulator for advertising appearing on regulated VOD services (“ODPS”). This co-regulatory arrangement was also renewed in 2014.⁶

The self-regulatory model

- 2.9 Ofcom has no regulatory functions in relation to non-broadcast/non-ODPS advertising, which is regulated exclusively by the ASA under a self-regulatory model.
- 2.10 Under this model, the Committee of Advertising Practice (“CAP”) is responsible for writing and maintaining the rules (“the CAP Code”), which are enforced by the ASA.
- 2.11 Members of CAP represent the advertising industry, covering advertisers, media owners and agencies.

⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0028/58942/statement.pdf, paragraphs 1.6-1.7.

⁶ https://www.ofcom.org.uk/data/assets/pdf_file/0029/97346/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.pdf.

3. The role of the Advertising Advisory Committee

- 3.1 The AAC was established to address concerns, raised in response to the 2004 Consultation, about the transparency and accountability of the co-regulatory system for broadcast advertising. These concerns were that:
- BCAP, being made up of advertising and broadcasting industry representatives, would not reflect the voice of the consumer in its code-making;
 - the process of setting of rules by BCAP would be less transparent than the existing process at the time; and
 - the new system would lack an appropriate degree of independence for a body carrying out public functions.
- 3.2 The AAC was created in response to these concerns to ‘provide independent, third party advice to BCAP on advertising issues, particularly in relation to the BCAP Code’⁷. The statement that followed the 2004 consultation set out how the AAC would operate, including Ofcom’s role within it, and how it would support greater transparency and accountability.⁸ This arrangement was formalised in the MoU between the co-regulatory parties.
- 3.3 Since its inception, the AAC has demonstrated that it is effective in ensuring a consumer perspective is taken into account when BCAP considers broadcast advertising regulation policy.

⁷ https://www.ofcom.org.uk/_data/assets/pdf_file/0037/169858/memorandum-of-understanding-october-2019.pdf

⁸ https://www.ofcom.org.uk/_data/assets/pdf_file/0018/51309/regofbroadadv.pdf, pages 7 and 17.

4. The extension of the AAC's remit

- 4.1 Ofcom received a request from BCAP and CAP (the Committees) to facilitate the extension of the remit of the AAC to enable it to provide advice on issues affecting both broadcast and non-broadcast advertising. This proposal reflected 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.
- 4.2 Ofcom was supportive of the proposal. However, as Ofcom has no role in the regulation of non-broadcast advertising (apart from advertising on VOD services and on online services which meet the definition of a Television Licensable Content Service), we recognised that an extension of the AAC's remit would impact on Ofcom's role within it.
- 4.3 We therefore consulted on changes to the MoU that would facilitate the expansion of the AAC's remit while ensuring both that its core purpose would be maintained (i.e. to represent the interests of citizens and consumers) and that Ofcom would not become involved in matters outside of its regulatory remit.⁹ We considered the proposed amendments were appropriate to enable the AAC to represent consumer interests across all forms of advertising.
- 4.4 As part of the consultation, we requested that:
- The ASA(B) would provide written assurances to Ofcom that it will continue to make any relevant research it undertakes available to the AAC through the Committees; and
 - BCAP would provide written assurances that it will continue to provide all relevant Ofcom and ASA(B) research to the AAC as part of its consideration of BCAP Code changes and application.
- 4.5 The consultation was open between 27 June 2019 to 8 August 2019.

⁹ <https://www.ofcom.org.uk/consultations-and-statements/category-2/proposed-extension-to-the-remit-of-advertising-advisory-committee>

5. Ofcom's Decision

- 5.1 Ofcom received no responses to the consultation.
- 5.2 We have therefore decided to amend the MoU in line with the proposals consulted on, as set out in Annex 1.
- 5.3 We have also received the written assurances from the ASA(B) and BCAP in a letter of 20 September 2019.
- 5.4 We have now published:
 - a) The revised MoU¹⁰; and
 - b) Copies of the written assurances from the ASA(B) and BCAP.¹¹

¹⁰ https://www.ofcom.org.uk/_data/assets/pdf_file/0037/169858/memorandum-of-understanding-october-2019.pdf

¹¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0032/169862/lord-currie-letter-to-ofcom.pdf

A1. 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 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 reflects the increasing convergence between broadcast and non-broadcast advertising issues. Extending the remit of the AAC will 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 will impact Ofcom's role within it, as established in the MoU.

Ofcom has consulted on changes to 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 changes that Ofcom consulted on, which have now taken effect in the revised MoU.¹² The rationale for the changes and any relevant safeguards required as a result of them are set out following each proposal.

Procedures and obligations (paragraph 35)

1. The following has been removed 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 reflected that the remit of the AAC had 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.

Ofcom recognises that the extension of the AAC's remit means that it is likely to need to consider a wide range of research, not just that which applies to broadcast advertising. The text has therefore

¹² https://www.ofcom.org.uk/_data/assets/pdf_file/0037/169858/memorandum-of-understanding-october-2019.pdf

been removed from the MoU to reflect the extension of the AAC's remit to include non-broadcast advertising.

Ofcom will continue to make available research it undertakes that is relevant to broadcast advertising. To ensure the AAC continues to have access to this research, the Committees have provided a written assurance to Ofcom that the AAC will be provided with relevant research from both ASA(B) and Ofcom when considering issues affecting broadcast advertising.¹³ We expect the new AAC to take this 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).

Composition (paragraph 36)

2. The following requirement has been amended:

Extract from previous MoU	New 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 previous 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 recognised that 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 AAC will now consider issues outside of Ofcom's remit, it is not appropriate for Ofcom to determine how many members will be required to fulfil that purpose. We have therefore removed 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 considered 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

¹³ https://www.ofcom.org.uk/_data/assets/pdf_file/0032/169862/lord-currie-letter-to-ofcom.pdf

Committees confirmed that this purpose will remain at the heart of the AAC, which will represent the interests of citizens and consumers in relation to advertising across all media, not just broadcasting.

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

3. The following requirement has been amended:

Extract from the previous MoU	New 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 previous requirement provided Ofcom with oversight of the process of the appointment of the Chair of the AAC, but did not allow it to influence the decision. Ofcom also had no right of appointment or veto in relation to AAC members. On this basis, and taking into account that members of the AAC will now consider issues beyond Ofcom’s remit, we amended the requirement, as set out above. This ensures that Ofcom remains informed of appointments to the AAC in a timely manner after they are made.

4. The following requirement has been amended:

Extract from the previous MoU	New amended text
<p>Ofcom will have observer status at the meetings of the AAC.</p>	<p>Ofcom will be provided with the minutes of each AAC meeting, redacted to remove</p>

	<p>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>
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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.

Ofcom no longer has observer status at meetings of the AAC, to reflect that the AAC will discuss issues beyond Ofcom’s remit, which it is not appropriate for Ofcom to be part of.

However, we considered 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, the following requirements were 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. The following requirement has been amended:

Extract from the previous MoU	New 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”.

Statement: Extending the remit of the Advertising Advisory Committee

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 previous MoU was included to ensure that the AAC also took a targeted approach to regulatory activities in accordance with Ofcom's responsibilities.

Ofcom noted 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 therefore agreed that the inclusion of non-broadcast advertising in the AAC's remit makes it inappropriate for the AAC's responsibilities to be explicitly linked to Ofcom's duty. We removed the reference to Ofcom in this extract, and replaced 'aim to reflect' with 'aim to ensure' to mirror the regulatory principles of Ofcom, the Committees and the ASA.