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BY EMAIL

Non-confidential

Hutchison 3G UK Limited (Three) response to Ofcom's consultation on proposals to renew the co-regulatory arrangements for broadcast advertising

Dear Daniel,

This is Three's response to Ofcom's consultation on its proposal to renew the co-regulatory arrangements with the Advertising Standards Authority (ASA) in relation to broadcast advertising content, whereby Ofcom contracts out certain functions under to the ASA. Ofcom is proposing to renew these arrangements with only minor changes for a ten year period. This has been set out in a letter to Lord Smith, Chairman of the ASA ("The Letter").

Ofcom has invited comments on the proposals and this is to be welcomed. Three would also like to take this opportunity to raise points which we believe it is pertinent for Ofcom to consider at this time as the co-regulatory arrangements between Ofcom and the ASA in relation to broadcast advertising content set precedent for the exercise of the ASA's self-regulatory powers in relation to other forms of advertising. As such, they impact directly on Three as a regulated communications provider.

We therefore welcome this opportunity to comment on issues raised in the Ofcom consultation document.

We have identified several areas where Ofcom could take action ensure that the ASA complies with the Co-regulatory Criteria as sent out in The Letter. Our response deals with these issues thematically. It will consider:

- Ofcom's role in escalations
- Complaints processes
- Appeal processes

- Legal process and political bias
- Quality and user satisfaction

The Letter also refers to relevant principles, such as ‘Independent governance and decision making’, ‘clear regulatory objectives’ and ‘clear and transparent processes’. The points we make below are relevant to the fulfilment and achievement of these criteria and principles as well as to specific obligations incumbent on Ofcom pursuant to the Memorandum of Understanding between Ofcom and the ASA and Ofcom’s wider regulatory obligations.

1. Ofcom’s role in escalations, both generally, and in relation to Telecoms matters.

Whilst it is understood that the ASA should be independent from Ofcom, there should be a procedure whereby advertisers can ask for Ofcom to consider a complaint/adjudication and provide the ASA its opinion on it, if the adjudication touches on issues which fall within Ofcom’s remit (for example, telecoms regulation) or due to defined circumstances where it is appropriate for Ofcom to assert its backstop powers as ultimately responsible for the proper performance of broadcast regulation.

In relation to the former we have encountered a number of cases where there appears to be an apparent tension between the ASA’s approach and Ofcom’s regulatory objectives (complaints relating to coverage checkers and in relation to traffic management in the context of ‘unlimited’ type claims are recent examples) with no clear process for requesting or observing Ofcom’s involvement. Advertisers should have the right to refer matters to Ofcom and/or to another sector specific regulator where the ASA’s approach conflicts with that regulator or to Ofcom if the ASA exceeds its regulatory scope.

There should be greater clarity as to when and how Ofcom inputs into ASA Code and policy issues. There should also be a clear process by which complaints about the ASA unrelated to the merits of any particular adjudication (e.g. the ASA’s complaints handling methods and processes) can be raised with, and investigated by, Ofcom.

2. Complaints Process neither transparent nor demonstrably ‘balanced’

At present, advertisers’ submissions are not provided to the decision making body, the ASA Council. Instead, only the ASA Executives’ summaries are provided, which do not always fully reflect the points made by the advertiser. This means that advertisers cannot be sure that they are getting a full and fair hearing in accordance with the principles of natural justice. Subject to some restriction to avoid abuse of the system, the advertisers’ full submission should be provided to the ASA Council for its consideration.

In this regard, arguments are currently presented to the Council in the form of draft adjudications with a provisional finding such as ‘complaint upheld’. In our experience, the majority of these are followed (and it would be useful to quantify what proportion of such draft adjudications are followed), which may give rise to a perception that the ASA Council’s decisions are being strongly influenced by the way in which they are presented to them.

Advertisers should also have an opportunity to comment on the ASA Council's draft adjudications (as opposed to just the ASA Executive's Draft Recommendations as at present), as per Ofcom's own procedures for TV and radio content. There should also be the possibility of an oral hearing in complex or sensitive cases, again as per Ofcom's own procedures. This also relates to Ofcom's principles of "clear and transparent processes".

3. No Appeals

The ASA should introduce a proper appeals procedure by a fully independent panel. The panel should have the power to overturn ASA Council decisions if they are clearly wrong, as per the Court of Appeal.

At present there is only a review by a single individual whose remit is only in relation to substantial flaws in the Council's adjudication or process or additional new evidence. Although the Council must consider the independent reviewer's (IR) recommendation, the Council's adjudication remains final. At present the IR must consult with the Chairman of Asbof and the Chairman of the ASA as part of his review. These are clearly not independent persons.

If Ofcom is minded to maintain or modify some form of IR process, there should, at least, be much greater clarity as to the procedure followed by the IR, and what information, documents etc. he or she is provided with. In some cases, it would be appropriate for him or her to consider Ofcom's or other relevant regulators' submissions or policies. We would also request that Ofcom considers an option for an oral hearing as part of the appeal, or at least a formal process of submitting arguments in a transparent way. The selection process for the IR is also currently unclear and it should be a fixed term appointment of, say, 4 years.

4. Legal Process and Legal Basis

Unless the ASA ensures that it is correctly applying the laws which underpin the Codes, and following appropriate and fair procedures, then it is likely to find itself increasingly vulnerable to challenges in the courts. For the reasons set out above, the current process does leave it vulnerable as they do not necessarily provide due and fair process.

The ASA should also apply the BCAP and CAP codes in a manner that is consistent with the underlying legislation, such as for example, the Consumer Protection from Unfair Trading Regulations (CPUTs) which determines whether an act is misleading by reference to the 'average consumer'. Ofcom is also required to ensure it does so, as in paragraph 35 of the MOU, it is stated that "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".

This may become increasingly of concern to advertisers as the Consumer Protection from Unfair Trading Regulations Amendments will shortly introduce a new direct civil right of redress for consumers against businesses for misleading and aggressive practices (Part 4A, CPUT Amendment Regulations), and ASA adjudications may be used as evidence for such purposes. This development appears to us to require the ASA to apply suitably

robust processes for the proper determination of such issues pursuant to the law, otherwise advertisers may seek to challenge such decisions in the courts and confidence in the self-regulatory regime may be undermined.

5. Quality and User Satisfaction

We have observed considerable variation in handling of cases at the ASA, particularly with regard transparency. Given the way in which information is provided to the ASA Council (as outlined above), this feeds directly into the quality of final adjudications.

Whilst the ASA sets targets for the overall time it takes the ASA to deal with complaints there is not, insofar as we are aware, any mechanisms, either formal or informal for overseeing quality. Ofcom's criteria for co-regulation includes "audit of members and schemes" and "clear public accountability", and it has a responsibility to ensure acceptable quality levels are maintained by the ASA.

This could be done through regular independent audits of ASA investigations/adjudications as well as obtaining undertakings from the ASA as to the training they provide their staff (including in relation to the relevant laws they are applying, the way in which they should go about dealing with adjudications and sector/specialist training for those dealing in particular areas). The co-regulation criteria of "adequate resource commitments" also means that the ASA should recruit people of a sufficiently senior level in order to deliver the necessary level of skill and experience.

The Letter refers to 'customer satisfaction surveys' which indicate that "nearly three quarters of complainants have consistently stated that they have been satisfied with their experience of ASA(B)'s complaints handling processes". It would appear as though only complainants are included within this survey, not advertisers. This may, therefore, give a very misleading picture. Ofcom should ensure that the ASA also obtains and publishes satisfaction survey data from at least the major advertisers as well and that should form part of the monitoring and performance reporting to Ofcom (for example see paragraph 55 of the MOU). This also relates to "audit of members and schemes".

We make the above points in good faith with the intention of contributing to a better, fairer and more transparent self-regulatory framework. We would be very happy to meet with you to further discuss and explore any of the matters raised in this letter if it would be helpful.

Yours sincerely

Simon Miller
Head of Governmental and Regulatory Engagement