



# Renewal of the co-regulatory arrangements for broadcast advertising

Statement

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# About this document

Ofcom's duties include a requirement to set broadcasting standards in advertising and prevent the inclusion of advertising in licensed services that may be misleading, harmful or offensive.

Although Ofcom remains ultimately responsible for the implementation and enforcement of standards in broadcast advertising, we have, since 2004, contracted out certain functions relating to the regulation of broadcast advertising content to two co-regulatory bodies:

- The Broadcast Committee of Advertising Practice, which is responsible for the setting and reviewing broadcast advertising standards as set out in the UK Code of Broadcast Advertising – known as the BCAP Code; and
- The Advertising Standards Authority (Broadcast), which is responsible for the handling and resolution of complaints under the BCAP Code.

Earlier in the summer, Ofcom invited comments from interested parties on its proposal to renew this relationship for a further ten years, as the existing co-regulatory arrangements were to expire at the end of October.

This document summarises our assessment of the responses we received to our proposal and explains our decision to renew the co-regulatory arrangements for broadcast advertising until 2024.

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## Section 1

# Executive Summary

## Introduction

- 1.1 Ofcom has a duty under the Communications Act 2003 ('the Act') to set and, from time to time, review and revise, standards in broadcast advertising. Among other things, the objectives of this duty are to ensure that "persons under the age of 18 are protected", and to prevent the inclusion of advertising in television and radio services that may be misleading, harmful or offensive. We also have a duty to establish procedures for the handling and resolution of complaints from citizens and consumers.
- 1.2 In 2004, Ofcom contracted out certain of its functions to the Advertising Standards Authority ("ASA")<sup>1</sup> for a period of ten years under a scheme of co-regulation. Under an Authorisation<sup>2</sup> ("the 2004 Authorisation") issued by Ofcom, these functions were split between two bodies – the Broadcast Committee of Advertising Practice Limited ("BCAP"), which became responsible for setting, reviewing and revising the standards code that applied to television and radio advertising, and the Advertising Standards Authority (Broadcast) Limited ("ASA(B)"), which became responsible for the process, handling and resolution of complaints about broadcasters' compliance with that code. Also under the 2004 Authorisation, the Broadcast Advertising Standards Board of Finance Limited was designated responsibility for ensuring the functions exercised by BCAP and ASA(B) were appropriately funded.
- 1.3 In addition to the 2004 Authorisation issued by Ofcom and a Deed of Regulation agreed by the Parties (i.e. Ofcom and the Co-regulatory Parties<sup>3</sup> operating under the umbrella of the ASA), a Memorandum of Understanding ("the 2004 MoU") was established, which detailed the Parties' understanding of the day-to-day operation of the co-regulatory system.
- 1.4 Under the current terms agreed between the Parties, Ofcom has continued to act as the back-stop regulator. As such, we: conduct sanctions proceedings against broadcasters who fail to comply with ASA(B)'s rulings; supervise our co-regulators' performance against a variety of key performance targets; and approve any proposed changes to regulatory requirements, retaining the right to intervene (in exceptional circumstances), to set such requirements.
- 1.5 The 2004 Authorisation expired on 1 November 2014. Accordingly, Ofcom has assessed whether these functions should continue to be contracted out to the Co-regulatory Parties and, if so, on what terms.

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<sup>1</sup>In this Statement, the term "ASA" is used as an umbrella term under which the Co-regulatory Parties, among others, operate (see also footnote 3)

<sup>2</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/statement/auth.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/auth.pdf)

<sup>3</sup>The Co-Regulatory Parties are, collectively, The Advertising Standards Authority (Broadcast) Ltd, The Broadcast Committee of Advertising Practice Ltd and The Broadcast Advertising Standards Board of Finance Ltd

## The co-regulatory model – relevant criteria

- 1.6 Ofcom's criteria for assessing whether to transfer any of our functions to a co-regulatory body were initially considered in 2004<sup>4</sup> and last formally revised in 2008.<sup>5</sup> These criteria comprised, among other things, accessibility, transparency, adequate resourcing and effectiveness of enforcement measures. We refined our thinking as part of our submission to the Leveson enquiry in 2012,<sup>6</sup> noting, among other things, the importance of independent governance and decision making, clear public accountability, clear regulatory objectives set out in a code, genuine powers of investigation, and effective powers of enforcement and sanction.
- 1.7 For the reasons set out in this statement, Ofcom considers the co-regulatory arrangements that have been in place to date (as agreed with the Co-regulatory Parties, set out in the 2004 MoU and implemented in practice) have satisfactorily met those criteria.

## Ofcom's proposal to renew the co-regulatory arrangements for broadcast advertising

- 1.8 Given our assessment of both the appropriateness of the co-regulatory model for broadcast advertising and of the current co-regulatory system's successful operation over the last decade, Ofcom wrote to Lord Smith, Chairman of the ASA, on 1 May 2014, proposing to renew the co-regulatory arrangements for broadcast advertising for a further ten years. We proposed amendments to the 2004 MoU, to:
- 1.8.1 reflect current and established practice, recognising how the operation of the co-regulatory system had evolved over the last ten years;
  - 1.8.2 remove material that related principally to the inception and initial implementation of the co-regulatory system, which had become redundant; and
  - 1.8.3 update any references to legislation that were to be retained.
- 1.9 As well as seeking the ASA's comments on the proposal, we published our letter to Lord Smith on our website, inviting comments more widely, from all interested stakeholders, including members of the public.

## Stakeholders' views

- 1.10 In response to Ofcom's proposal to renew the co-regulatory arrangements for broadcast advertising, we received submissions from the following stakeholders: the ASA; the Advertising Association; the British Heart Foundation; Channel 5; Clearcast; Freedom4Health; ITV plc; Hutchison 3G UK Limited; and a further broadcaster.<sup>7</sup>

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<sup>4</sup>'Criteria for promoting effective co and self-regulation', at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/co-reg/statement/co\\_self\\_reg.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/co-reg/statement/co_self_reg.pdf)

<sup>5</sup>'Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation', at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>

<sup>6</sup>'Submission to the Leveson Inquiry on the future of press regulation', at:

<http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>

<sup>7</sup>Non-confidential submissions are available at:

<http://stakeholders.ofcom.org.uk/consultations/asa-reauthorisation/?showResponses=true>

- 1.11 The ASA, the Advertising Association, Channel 5, Clearcast and ITV plc broadly supported the current co-regulatory arrangements for broadcast advertising, Ofcom's proposal to renew them and the suggested amendments to the 2004 MoU that we outlined in our letter to Lord Smith. However, the British Heart Foundation, Freedom4Health and Hutchison 3G UK Limited expressed reservations about our proposals. These generally appeared to have stemmed from separate issues relating to decisions made by the ASA about *non-broadcast* (rather than *broadcast*) advertisements in which they had an interest. However, we have considered all the issues raised and have subsequently concluded, for the reasons set out in this Statement, that none of them prevent us from renewing the co-regulatory arrangements for which we are responsible under the Act.

## Ofcom's Decision

- 1.12 Having taken all the consultation responses into account, and for the reasons set out in this Statement, Ofcom has decided to renew the co-regulatory arrangements with the ASA for broadcast advertising, subject to certain revisions being made to the relevant documentation.
- 1.13 We have now published:
- 1.13.1 an Authorisation for new co-regulatory arrangements to commence on 1 November 2014, which, subject to the Parties entering into a Deed of Arrangement setting out the operational arrangements to be agreed between them, shall continue for a period of ten years ("the 2014 Authorisation");<sup>8</sup> and
  - 1.13.2 a revised MoU ("the 2014 MoU"), which reflects established practices agreed by Ofcom and the ASA since the initial implementation of the co-regulatory system in 2004 and removes redundant material related principally to the inception and initial implementation of the co-regulatory system.<sup>9</sup>
- 1.14 The new arrangements are intended to run until 1 November 2024.

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<sup>8</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Authorisation\\_2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Authorisation_2014.pdf)

<sup>9</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum\\_of\\_Understanding\\_2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum_of_Understanding_2014.pdf)

## Section 2

# Development and review of the existing co-regulatory arrangements

## Development of the co-regulatory arrangements for broadcast advertising

- 2.1 Ofcom has a duty under section 319 of the Communications Act 2003 ('the Act') to set and, from time to time, review and revise, standards in broadcast advertising so that certain objectives are achieved, including the protection of the under 18s and preventing the inclusion of advertising in television and radio services that may be misleading, harmful or offensive. Such standards must be included in one or more codes. We also have a duty under section 325(2) of the Act to establish procedures for the handling and resolution of complaints about the observance of those standards.
- 2.2 Under section 3 of the Act, Ofcom's principal duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate, by promoting competition. In carrying out our functions, we must also secure certain things, such as: the availability throughout the UK of a wide range of television and radio services, which, taken as a whole, are both of high quality and calculated to appeal to a variety of tastes and interests; and provide in the case of all television and radio services, standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services. We must also have regard, when carrying out our duties, to principles of transparency, accountability, proportionality and consistency, and any other principles representing best regulatory practice, targeting regulation only at cases in which action is needed.
- 2.3 Further, section 3 of the Act places a duty on Ofcom, in reviewing its functions, to have regard to the extent to which its duties are likely to be furthered or secured by effective self-regulation. Although broadcast advertising had been directly regulated by Ofcom's predecessors, the Independent Television Commission and Radio Authority (and, subsequently, therefore, Ofcom itself), we concluded in early 2004 that a self-regulatory approach to broadcast advertising regulation could be better equipped to handle the growing issues of convergence raised by the growth of digital communications than the (then) current system. As a self-regulatory system had already existed in relation to non-broadcast advertising for over forty years, we also believed that a single point of contact for consumers for advertising issues across all media would serve the public better than the fragmented approach to advertising regulation then in place.
- 2.4 Pursuant to powers given under the Deregulation and Contracting Out Act 1994 ("the Contracting Out Order") and following a public consultation,<sup>10</sup> Ofcom issued a statement<sup>11</sup> on 17 May 2004, contracting out certain of our statutory functions in relation to the regulation of broadcast advertising to three newly created bodies ("the

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<sup>10</sup>'The Future Regulation of Broadcast Advertising', at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/summary/pdf\\_version](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/summary/pdf_version)

<sup>11</sup>'Ofcom's decision on the future regulation of broadcast advertising', at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/statement/regofbroadadv.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/regofbroadadv.pdf)

Co-regulatory Parties”), which would operate under the auspices of the Advertising Standards Authority (“ASA”); namely:

- 2.4.1 The Broadcast Committee of Advertising Practice Limited (“BCAP”);
  - 2.4.2 The Advertising Standards Authority (Broadcast) Limited (“ASA(B)”); and
  - 2.4.3 The Broadcast Advertising Standards Board of Finance Limited (“Basbof”).
- 2.5 The statement described a new co-regulatory system, which, subject to the successful completion of a probationary period of two years, Ofcom decided should operate for ten years before being considered for renewal. A number of subsequent documents set out the practical and legal basis for the operation of the system. These were:
- 2.5.1 the 2004 MoU between the Parties (i.e. Ofcom and the Co-regulatory Parties), setting out their agreed understanding of how the system of co-regulation would be implemented and operate in practice;
  - 2.5.2 the 2004 Authorisation given by Ofcom by virtue of the Contracting Out Order<sup>12</sup>; and
  - 2.5.3 a legally binding Deed for Regulation of Broadcast Advertising, entered into by the Parties, in order to implement the co-regulatory system.
- 2.6 Although Ofcom remained ultimately responsible for the implementation and enforcement of standards in broadcast advertising, day-to-day responsibility for advertising regulation was therefore currently contracted out to the following:
- 2.6.1 BCAP – responsible for setting, reviewing and revising broadcast advertising standards it has drawn up, and administers, through the UK Code of Broadcast Advertising (“BCAP Code”);
  - 2.6.2 ASA(B) – legally separate from BCAP, but operationally aligned to it, and responsible for the administration, consideration and resolution of complaints about broadcast advertising; and
  - 2.6.3 Basbof – responsible for raising the funds necessary for the Co-regulatory Parties to execute the functions of broadcast advertising regulation that have been contracted out to them.
- 2.7 Under the terms of the co-regulatory arrangements between the Parties, Ofcom retained its statutory powers as the backstop regulator. As such, we:
- 2.7.1 conducted sanctions proceedings against broadcasters that failed to comply with ASA(B)’s rulings;
  - 2.7.2 supervised our co-regulators’ operation (e.g. against a variety of key performance targets);
  - 2.7.3 approved any proposed changes to the BCAP Code; and

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<sup>12</sup>The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 1975/2004)



- 2.7.4 retained the right to intervene (in “exceptional circumstances”), to set BCAP Code rules;<sup>13</sup> and
- 2.7.5 retained responsibility for setting and enforcing standards in those categories of broadcast advertising where Ofcom had not contracted out its functions to the ASA (e.g. functions relating to the statutory prohibition of political advertising).

## **Ofcom’s criteria for assessing the suitability of co-regulatory arrangements**

- 2.8 In 2004, Ofcom set out the criteria it would apply for the promotion of effective co- and self-regulation, and in deciding whether to establish co-regulatory models.<sup>14</sup> In order to be considered, proposed co-regulatory models were required to demonstrate the following characteristics:
  - 2.8.1 Beneficial to consumers;
  - 2.8.2 Clear division of responsibility between co-regulatory body and Ofcom;
  - 2.8.3 Accessible to members of the public;
  - 2.8.4 Independence from interference by interested parties;
  - 2.8.5 Adequate funding and staff;
  - 2.8.6 Achieve and maintain near universal participation;
  - 2.8.7 Adequate funding and staff;
  - 2.8.8 Effective and credible sanctions;
  - 2.8.9 Auditing and review by Ofcom (including key performance indicators);
  - 2.8.10 Transparency and accountability;
  - 2.8.11 Consistent, proportionate and targeted regulation;
  - 2.8.12 Appropriate appeals mechanism; and
  - 2.8.13 An ability to diverge from the above criteria where appropriate.
- 2.9 Ofcom’s criteria for assessing whether to transfer any of our functions to a co-regulatory body were last formally revised in 2008,<sup>15</sup> at which time, we concluded that effective co-regulatory models should be able to demonstrate:
  - 2.9.1 Public awareness;
  - 2.9.2 Transparency;

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<sup>13</sup>Paragraph 10b, at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/reg\\_broad\\_ad/statement/mou.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf)

<sup>14</sup>Criteria for promoting effective co and self-regulation’, at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/co-reg/statement/co\\_self\\_reg.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/co-reg/statement/co_self_reg.pdf)

<sup>15</sup>Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation’, at: <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>

- 2.9.3 Significant participation by industry;
  - 2.9.4 Adequate resource commitments;
  - 2.9.5 Enforcement measures;
  - 2.9.6 Clarity of processes and structures;
  - 2.9.7 Audit of members and schemes;
  - 2.9.8 System of redress in place;
  - 2.9.9 Involvement of independent members;
  - 2.9.10 Regular review of objectives and aims; and
  - 2.9.11 Non-collusive behaviour.
- 2.10 We refined our thinking as part of our submission to the Leveson enquiry,<sup>16</sup> noting that an effective regulatory body must have:
- 2.10.1 independent governance and decision making;
  - 2.10.2 clear public accountability;
  - 2.10.3 clear regulatory objectives set out in a code;
  - 2.10.4 clear and transparent processes, which are followed;
  - 2.10.5 workable membership incentives (where relevant) and/or obligations for or on those it regulates;
  - 2.10.6 secure and sufficiently independent funding and budget control;
  - 2.10.7 accessibility to those seeking redress;
  - 2.10.8 genuine powers of investigation; and
  - 2.10.9 effective powers of enforcement and sanction.

## **Does the co-regulatory model for broadcast regulation remain appropriate?**

### **Structural characteristics**

- 2.11 Ofcom notes that the criteria under which we originally assessed the co-regulatory arrangements (see paragraph 2.8, above), and which were reflected in the 2004 MoU, remain central to our more recent assessments of the essential characteristics of an effective co-regulatory regime (see paragraphs 2.9 and 2.10 respectively, above).

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<sup>16</sup>'Submission to the Leveson Inquiry on the future of press regulation', at: <http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>

- 2.12 We note that the advertising industry has, throughout the past decade, made a significant commitment to the co-regulatory system, funding it by means of a levy and participating in both the setting and enforcement of advertising rules to maintain a scheme that fulfils statutory obligations, while minimising costs and administrative burdens. At the same time, we note that the adjudication function has been managed by a legally distinct body – ASA (B) – with an independent chairman and a complaints adjudication body, which is required to have a majority of members who are independent of the advertising industry.
- 2.13 Further, Ofcom considers that ASA(B)'s established processes for the consideration, investigation and adjudication of complaints have been both transparent and easily accessible, with:
- 2.13.1 full details of its procedures and information about how to make complaints readily accessible on its website;
  - 2.13.2 the outcome of its investigations published on a weekly basis and made publicly known via its dedicated communications functions;
  - 2.13.3 its retention of an Independent Reviewer to whom advertisers and complainants may appeal, if they are dissatisfied with its conduct of investigations;
  - 2.13.4 its compliance function ensuring that the outcomes of its investigations are enforced; and
  - 2.13.5 the possibility as a final resort, for it to refer cases to Ofcom for consideration of statutory sanctions.
- 2.14 In light of the above, Ofcom considers the existing co-regulatory model remains appropriate in principle.

### Implementation of the co-regulatory model

- 2.15 In addition to satisfying ourselves of the continuing fitness of the co-regulatory structures, Ofcom has also examined how effectively the co-regulatory arrangements have operated in practice over the past decade. In accordance with the co-regulatory arrangements in the 2004 MoU, we did this with reference to the following factors:
- 2.15.1 **Agreed key performance indicators** – Ofcom noted in particular that, despite a significant increase in workload, ASA(B) had met over 88% of its performance targets for complaints assessment since 2005 (its first full year), with over 90% of cases (against a target of 80%) in 2013 having been resolved within agreed timeframes;
  - 2.15.2 **Trend data** – Ofcom noted that no significant adverse trends (raising issues of a decline in performance) appeared to have developed since the co-regulation of broadcast advertising had commenced. In relation to complaints handling, we noted that, in nine of the last ten years, the number of complaints received by ASA(B) had exceeded pre-contracting out levels. Most recently, in 2013, it had received 15,448 complaints about 5,613 separate issues, compared with 9,860 complaints about 2,391 issues in 2004. Ofcom also noted that, although the number of advertisements considered by ASA(B) had increased, the number of advertisements found in breach of the BCAP Code remained small, with only 147 upheld

adjudications in 2013 compared with 175 in 2003, the last full year before ASA(B) took on responsibility for broadcast advertising regulation. Ofcom considered these figures indicated that, despite an ongoing fragmentation of the broadcasting environment, in which audiences shifted to a broader range of services – offering greater advertising opportunities to an ever-widening number of potential advertisers – the system had succeeded in convincing broadcasters and advertisers of the need to comply with standards requirements;

- 2.15.3 **Policy initiatives and activity** – Ofcom noted that, throughout the past ten years, BCAP had been involved in, and both ASA(B) and BCAP had liaised effectively with Ofcom about, high-profile public policy initiatives, such as those concerning the advertising of alcohol and of products that are high in fat, salt or sugar (“HFSS foods”), while remaining aware of the constant need for vigilance concerning advertising to children. Further, BCAP had provided both training and detailed guidance to stakeholders, to help secure compliance on more general issues, such as onscreen text in advertising and the appropriate scheduling of advertisements, as well as the acceptability of specific types of claims, including those relating to nutrition and environmental impact;
- 2.15.4 **Assessment of compliance in contentious areas** – Ofcom noted that the ASA had reported the results of its compliance surveys online,<sup>17</sup> having kept us informed of those that included broadcast advertising, such as surveys of gambling advertising, food and soft drink advertising, and advertising for health and beauty products.
- 2.15.5 **Research undertaken** – Ofcom noted that the ASA had reported the results of its research online,<sup>18</sup> having kept us informed of reports that included broadcast advertising, such as its reports on public perceptions of harm and offence in UK advertising<sup>19</sup> and the use of violence in advertising,<sup>20</sup>
- 2.15.6 **Customer satisfaction surveys** – Ofcom noted that customer satisfaction surveys carried out since 2007 had indicated high levels of approval from both complainants and advertisers about ASA(B)’s approach to resolving complaints. Consistently, nearly 75% of complainants stated they had been satisfied with their experience of ASA(B)’s complaints handling processes, including at least 70% of those whose complaints had not ultimately been upheld, while, generally, approaching 80% of advertisers said they were very or quite satisfied with its overall case handling, around 75% with its final decisions, and approaching 75% with its reasoning;
- 2.15.7 **Code changes and rule reviews** – Ofcom noted the active role taken by BCAP over the past decade in revising its rules, which included a comprehensive Code review in 2010, and its ability to respond rapidly to contentious advertising issues, as demonstrated by its consultation earlier this year on e-cigarette advertising;

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<sup>17</sup> <http://www.asa.org.uk/News-resources/Reports-and-research.aspx>

<sup>18</sup> <http://www.asa.org.uk/News-resources/Reports-and-research.aspx>

<sup>19</sup> [http://www.asa.org.uk/News-resources/~/\\_media/Files/ASA/Misc/ASAHarmOffenceReport.ashx](http://www.asa.org.uk/News-resources/~/_media/Files/ASA/Misc/ASAHarmOffenceReport.ashx)

<sup>20</sup> [http://www.asa.org.uk/News-resources/Reports-and-research/~/\\_media/Files/ASA/Reports/ASAViolenceinAdsEventReport21Nov07.ashx](http://www.asa.org.uk/News-resources/Reports-and-research/~/_media/Files/ASA/Reports/ASAViolenceinAdsEventReport21Nov07.ashx)

- 2.15.8 **Assessment of internal performance** – Ofcom noted that ASA(B) and BCAP had shared performance information with Ofcom on a quarterly basis, as the Parties had agreed;
- 2.15.9 **Performance reporting** – Ofcom noted that the work and operation of the Co-regulatory Parties has been recounted in the ASA annual reports and the annual statements of ASA(B) and BCAP, incorporating the results of an annual attitude and awareness survey, as the Parties had agreed.
- 2.16 Accordingly, we concluded that BCAP and ASA(B) had proved to be effective over the past decade in performing the range of functions delegated to them.

## Proposal to renew the co-regulatory arrangements

- 2.17 In light of our assessment, as described above, on 1 May 2014 Ofcom wrote to Lord Smith, Chairman of the ASA proposing to renew the existing co-regulatory arrangements for a further ten years.<sup>21</sup> In our letter we proposed amendments to the current arrangements in order to update the 2004 MoU, to reflect current and established practice.<sup>22</sup> We also proposed to remove material that related principally to the inception and initial implementation of the co-regulatory system.
- 2.18 The letter – which was published on our website – also invited comments from interested stakeholders, including broadcasters, advertisers, consumer bodies and members of the public. Our assessment of those responses is set out in the next section.

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<sup>21</sup><http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/summary/Letter-to-Lord-Smith.pdf>

<sup>22</sup><http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/summary/MoU-issues-and-proposals-summary.pdf>

## Section 3

# Stakeholders' submissions and Ofcom's response

## The ASA

- 3.1 In response to Ofcom's letter dated 1 May 2014, to Lord Smith, Chairman of the ASA, the organisation said it welcomed "Ofcom's assessment that the current co-regulatory arrangements with the ASA(B) and BCAP, as set out in the [2004] MoU and as implemented in practice, [had] satisfactorily met the requirements of good regulation and that the ASA(B) and BCAP [had] proved to be effective in performing delegated functions." It noted our "proposals for limited changes intended to reflect how the operation of the co-regulatory system [had] evolved over the last ten years" and that Ofcom "did not propose substantive change to the existing co-regulatory arrangements". The ASA said it had "no detailed comments on Ofcom's proposals, and [looked] forward to [our] decision and next steps...".

## Other stakeholders

- 3.2 In response to Ofcom's published invitation to stakeholders, to comment on the proposals detailed in our letter to Lord Smith, Ofcom received submissions from:
- 3.2.1 The Advertising Association;
  - 3.2.2 British Heart Foundation;
  - 3.2.3 Channel 5;
  - 3.2.4 Clearcast;
  - 3.2.5 Freedom4Health;
  - 3.2.6 ITV plc, supported by STV and UTV;
  - 3.2.7 Hutchison 3G UK Limited, in confidence (in part); and
  - 3.2.8 A broadcaster, in confidence.<sup>23</sup>
- 3.3 In summary, the Advertising Association, Channel 5, Clearcast and ITV plc broadly supported the current co-regulatory arrangements for broadcast advertising, Ofcom's proposal to renew them and the amendments to the 2004 MoU outlined in our letter to Lord Smith. In contrast, the British Heart Foundation, Freedom4Health and Hutchison 3G UK Limited raised concerns about Ofcom's proposal to renew co-regulatory arrangements.
- 3.4 The following paragraphs summarise issues raised by various stakeholders in non-confidential submissions Ofcom has received. These submissions have addressed not only Ofcom's proposed co-regulatory approach in principle, but also issues relevant to specific sections of the 2004 MoU. To ensure clarity, when responding to

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<sup>23</sup>The non-confidential submissions to Ofcom are available at:

<http://stakeholders.ofcom.org.uk/consultations/asa-reauthorisation/?showResponses=true>

these submissions, we have drawn together the issues raised under the relevant headings taken from, or reflected in, the different sections of the 2004 MoU.

## **MoU section: Purpose and Background (including general comment)**

### **Clearcast**

- 3.5 Clearcast noted that, having now existed for 5 years, it considers reference in the 2004 MoU to its predecessor, BACC, is no longer required.

### Ofcom's response

- 3.6 Ofcom has ensured that all references to third parties are updated in the 2014 MoU, to reflect current and established practice.

## **MoU section: Functions to be Delegated**

### **BHF**

#### Handling and resolution of complaints about advertising content on radio and television

- 3.7 BHF said it considered “the current complaints process is not meeting the criteria originally set out in the [2004] MoU of: public awareness, transparency and clarity of process and structures”. It suggested that the evidence presented in a recent report by the Children’s Food Campaign “demonstrates that the current system places the onus on small organisations and parents to navigate the incredibly complex system, with little help or assistance.”
- 3.8 BHF added that “not all judgements of the ASA are held in public”, which it considers problematic, “not only [in relation to] transparency of procedures, which is at the heart of the [2004] MoU, but also ... for industry, as other marketers could learn from pitfalls of their competitors in order to produce adverts that are compliant with the regulations.” It considered this to be “compounded by the fact that complaints can be ‘informally resolved’ with no additional evidence provided on how the decision was reached”, adding that “as long as all investigation processes lack clear documented proof on decisions made, Ofcom cannot claim that the co-regulatory agreement is in anyway transparent, or offers clarity of process and structure.”
- 3.9 BHF also considered the Children’s Food Campaign report highlighted “that the [ASA’s investigations] process itself is lengthy, complex and not widely known as an available option by the general public,” adding that “even if a successful complaint is lodged by a concerned parent, the penalties for the marketer are minimal.”

#### Advertising code setting, monitoring and enforcement

- 3.10 BHF requested “clarity as to why the co-regulatory arrangements for the regulation of advertising included in On Demand Programme Services is separate to the Memorandum of Understanding...”.
- 3.11 BHF disagreed with BCAP retaining “the role of producing the codes” and Ofcom “its oversight function of all ... Code changes”, as it considers the BCAP Code currently failed to protect children from advertisements for HFSS foods. It claimed that,



“despite Ofcom regulation preventing HFSS adverts during children’s programming, evidence comparing the six months prior and post regulation implementation shows that the amount of HFSS adverts that children viewed was unaffected<sup>24</sup>. BHF was also concerned that children’s viewing habits have shifted to later in the evening, leaving them exposed to “marketing that would otherwise be prohibited during ‘children’s programming’”, which it considered “clearly shows that the BCAP Code has not been reviewed and revised to ensure it is fit for purpose to clearly protect children from harmful adverts and ... should be addressed under the current regulatory review.”

## Ofcom’s response

### Handling and resolution of complaints about advertising content on radio and television

- 3.12 Ofcom notes BHF’s concern about transparency. However, it is important to note that a regulator’s investigations are essentially a process of fact finding and assessment. Transparency is achieved by the publication of adjudications setting out all relevant reasoning where they are required. Ofcom also notes the clear and concise procedures concerning complaints about advertising in the UK that are available on the ASA’s website.<sup>25</sup> Further, we are unable to find anything in the Children’s Food Campaign report to which BHF referred that demonstrates “the current system places the onus on small organisations and parents to navigate the incredibly complex system, with little help or assistance”. Rather, the report appears to focus on the process and outcomes of submitted advertising complaints. Ofcom also notes that, in relation to a submitted “super-complaint”, it concluded that, among other things, “there is a gulf between the reasonable protection for children from broadcast marketing (mainly on TV) of HFSS food and drink and the lack of protection from non-broadcast marketing” over which Ofcom has no remit.
- 3.13 In relation to BHF’s concern about informally resolved advertising complaints, Ofcom acknowledges there is a similarity in the separate investigation processes that exist for both non-broadcast and broadcast advertising. However, we disagree with BHF’s perceived outcome and implied conclusion in relation to informally resolved advertising complaints, broadcast or otherwise. In relation to broadcast advertising complaints, ASA(B) states that it will consider carrying out an informal investigation only where such a process appears “reasonable and proportionate”. Further, it states that, in the event of a case being informally resolved, it will, “if necessary, request an assurance ... that the ad will be suitably amended or withdrawn”. Ofcom also notes that informally resolved complaints will be taken into account as part of a broadcaster’s compliance record.<sup>26</sup> Further, summary details of cases which are informally resolved are published on the ASA’s website and we understand from the ASA that any person can request from it further information in relation to the rationale behind such an outcome. In addition, we note that, out of the 5,572 broadcast advertising cases ASA(B) considered in 2013, only 197 were informal investigations.
- 3.14 In relation to BHF’s concern about the ASA’s investigations process more generally, Ofcom can find no reference in the Children’s Food Campaign report to the process being “complex and not widely known as an available option by the general public”.

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<sup>24</sup> Adams, J et al (2012) ‘Effect of Restrictions on Television Food Advertising to Children on Exposure to Advertisements for ‘Less Healthy’ Foods: Repeat Cross Sectional Study.’

<sup>25</sup> <http://www.asa.org.uk/Consumers/How-to-complain.aspx>

<sup>26</sup> See paragraphs 26 and 27, at: [http://www.asa.org.uk/Industry-advertisers/~media/Files/ASA/Misc/Broadcast\\_Complaint\\_Handling\\_Procedures.ashx](http://www.asa.org.uk/Industry-advertisers/~media/Files/ASA/Misc/Broadcast_Complaint_Handling_Procedures.ashx)



Further, the report's only reference to the co-regulatory complaints process being lengthy appears to be in passing and unsubstantiated references to "prolonged adjudications" and a "time-consuming complaints process". We also note BHF's view concerning "penalties for the marketer", which are irrelevant in a co-regulatory system under which the broadcaster, rather than the advertiser, is ultimately responsible for the material shown. Under the terms of the 2014 MoU, if the co-regulator considers that 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 repeated disregard for decisions of ASA(B) or the reasonable requests of BCAP; or
- commits one or more code breaches of sufficient seriousness to warrant in ASA(B)'s opinion a statutory sanction;
- it may refer the matter to Ofcom for consideration of the imposition of one or more statutory sanctions, which could include a financial penalty or revocation of the relevant licence to broadcast.

#### Advertising code setting, monitoring and enforcement

- 3.15 In response to BHF's request for clarification concerning On Demand Services, it should be noted that, although the ASA co-regulates advertising on such services – which is subject to the (non-broadcast) CAP Code, not the BCAP Code – ASA(B)'s co-regulation of broadcast advertising is subject to separate legislation and, therefore, separate arrangements with Ofcom.
- 3.16 In response to BHF's comments about BCAP's approach to revising the rules in the BCAP Code about HFSS foods, Ofcom notes BHF's view and the research to which it refers. Ofcom's own research, however, encompassed analysis based on capturing advertising activity across the entire television network (i.e. all regional and national advertising activity across all BARB-reported channels). In our 2007 statement,<sup>27</sup> Ofcom estimated that the effect of television advertising restrictions would be to reduce HFSS impacts for children aged 4-15 by 41% (compared to 2005) and by 51% for children aged 4-9. Based on Ofcom's 2010 Final Review,<sup>28</sup> exposure to HFSS advertising among 4-15s actually fell by 37% and among 4-9s by 52%, with a 22% fall in exposure among 10-15s.
- 3.17 The protection of children remains a matter of paramount importance to Ofcom and is an issue we continue to monitor closely with the Co-Regulatory Parties. For example, at the end of 2013, following detailed research by Ofcom and consultation with industry, BCAP issued new guidance to make sure scheduling restrictions remain effective at limiting child exposure to a range of restricted product categories, including HFSS foods. However, we do not consider it appropriate to conflate our consideration of co-regulatory renewal with the review of any specific Code requirements.

<sup>27</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/foodads\\_new/statement/statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/statement/statement.pdf)

<sup>28</sup> <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf>

## Clearcast

- 3.18 Clearcast agreed that Ofcom should retain responsibility for the regulation of political advertising but notes that, occasionally, it has to take a view on whether an advertisement is being inserted by or on behalf of a body whose objects are wholly or mainly of a political nature (which is prohibited from advertising). As it did not always consider such an assessment straightforward, Clearcast considered it would be helpful if it were able to consult Ofcom.

## Ofcom's response

- 3.19 Ofcom notes Clearcast's view. However, we consider it remains appropriate for the 2014 MoU to continue to state that, if a broadcast advertising clearance body requires advice concerning political advertising, it should be sought from BCAP, "which will seek a decision from Ofcom on the query raised." This maintains Ofcom's traditional post-broadcast role as adjudicator of political broadcast advertising complaints, in parallel with ASA(B)'s co-regulatory role.

## Freedom4Health ("F4H")

- 3.20 F4H registered its "concern about the way in which the ASA deals with claims in the field of natural and alternative health", which it considered "discriminatory and biased". However, it stated that it knows of no instances of the specific concerns it details as having ever been applicable "in the broadcasting field". Nevertheless, F4H also stated that it "know[s] of at least one case where Ofcom had accepted advertising material yet the ASA did not."

## Ofcom's response

- 3.21 Ofcom notes the concerns detailed by F4H but sees these are in relation to *non-broadcast*, rather than *broadcast* advertising. F4H has provided no evidence of such concerns having arisen in relation to any material broadcast by Ofcom licensees. We have subsequently sought further detail from F4H concerning its reference to Ofcom's acceptance of advertising material. F4H has however explained to Ofcom that it is unable to provide this. Without such clarification, Ofcom is not in a position to comment further on the matter.

## Hutchison 3G UK Ltd ("Three")

### "Complaints process..."

- 3.22 Three's concerns related predominantly to the parallel processes operated by the ASA in relation to non-broadcast advertising. Specifically, it objects to the fact that advertiser submissions are not provided to the ASA Council (which decides on the outcome of investigations concerning advertising). Three considers advertisers should have both the opportunity to comment on ASA draft adjudications, rather than merely Draft Recommendations written by ASA staff, and the opportunity to attend "an oral hearing in complex or sensitive cases ... as per Ofcom's own procedures."

### "...Legal Process"

- 3.23 Three considers "the ASA should apply the BCAP and CAP Codes in a manner that is consistent with the underlying legislation", citing the Consumer Protection from Unfair Trading Regulations, "which determines whether an act is misleading by reference to the 'average consumer'." In particular, Three notes "a new direct civil

right of redress for consumers against businesses for misleading and aggressive practices”, adding that “ASA[’s] adjudications may be used as evidence for such purposes.” Three considers “this development appears ... to require the ASA to apply suitably robust processes for the proper determination of such issues pursuant to the law...”.

## Ofcom’s response

### “Complaints process...”

- 3.24 Ofcom notes Three’s objection. Nevertheless, in parallel with the procedures for investigating non-broadcast advertising, ASA(B) Executives provide ASA(B) Council with material they consider relevant for it to reach fully informed decisions. Should an advertiser and/or broadcaster consider that material that is relevant to a decision has not been considered by Council members, the matter could be appealed for review by the Independent Reviewer, for consideration as an apparent “substantial flaw of process or adjudication.”

### “...Legal Process”

- 3.25 Ofcom notes Three’s view. However, we note that the BCAP Code states clearly that “The likely effect of an advertisement is generally considered from the point of view of the average consumer who it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.”
- 3.26 In relation to the “new direct civil right of redress”, we also note that the ASA has considered the matter fully, having acknowledged to Ofcom that its regulatory system could be undermined if *significant* manipulation occurred by those looking to build a case for financial redress against a company. However, the ASA considered this risk to be small, due to:
- 3.26.1 the UK Consumer Rights Bill providing for class action concerning only competition claims;
  - 3.26.2 the ASA’s assessment that the number of advertising cases brought before courts would be likely be relatively small, due to both the eligibility threshold (the proposals only apply to those who’ve made a transactional decision or entered into a contract) and consumers generally being averse to taking court action; and
  - 3.26.3 there appearing to be no evidence that self-regulatory organisations’ systems appear to have been undermined where similar private redress measures exist (within their jurisdictions).
- 3.27 Further, in the Government’s response to the ASA’s submission on the matter, it confirmed that “a finding that a trader had breached a self-regulatory code of practice would not mean that a consumer had an entitlement to get redress using the new rights. The legislation is distinct and separate – for a consumer to take action under the new rights, the trader must have breached the CPRs. The new rights are not sector specific and will apply across all sectors, except those specifically excluded”.<sup>29</sup>

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<sup>29</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/298983/bis-14-692-misleading-and-aggressive-commercial-practices-new-private-right-for-consumers-government-response-on-draft-regulations-1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298983/bis-14-692-misleading-and-aggressive-commercial-practices-new-private-right-for-consumers-government-response-on-draft-regulations-1.pdf)

- 3.28 The ASA has told Ofcom that it has, nevertheless, asked the Government, and reiterated its request to officials, to be mindful of the risk to its regulatory system.
- 3.29 Ofcom is therefore satisfied that ASA(B) should be able to continue investigating potentially misleading claims from the perspective of the 'average consumer', while taking into account possible implications of its adjudications in relation to a consumer's direct civil right of redress.

## **MoU section: Structure and Function of the Parties to the MoU**

### **BHF**

#### Enforcement of decisions

- 3.30 BHF does not consider the current enforcement powers are strong enough "to impress on the industry the harm that lax advertising of HFSS foods on children has", noting that, "where a complaint is upheld the ASA has the authority to pull the advert and ban further use". It considers that, "due to the lengthy complaints and adjudication process the bought media spend and life of [an] advert is very likely to have run its course by the time an outcome of the investigation is known", with the harm having already been done. BHF therefore considers "stronger enforcement penalties are required, alongside a quicker adjudication process, to truly have an impact on those who break the advertising Codes", and an alternative complaints process should be considered.

#### Funding the system

- 3.31 BHF considers "a co-regulatory system where the advertising industry effectively writes, maintains, enforces and pays for the system is not appropriate and presents a conflict of interest for all parties involved between profit, industry development and a commitment to responsible marketing."

### **Ofcom's response**

#### Enforcement of decisions

- 3.32 Ofcom notes BHF's view. However, we consider ASA(B)'s complaint investigation process provides appropriate consumer protection.<sup>30</sup> The pre-clearance process adopted by broadcast licensees ensures that investigations of broadcast advertising complaints generally concern matters of BCAP Code interpretation, as opposed to those of imminent harm to television viewers or radio listeners. Nevertheless, ASA(B) remains able to remove an advertisement from air pending a final decision, should it be considered appropriate.
- 3.33 Further, the process ensures potential Code breaches are considered fully before a final decision is made, with broadcast licensees prohibited from rebroadcasting an advertisement found in breach of the Code unless, where relevant, it is amended appropriately. Publication of the outcomes of complaints informs broadcasters and

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<sup>30</sup>The co-regulator's procedures for the processing of broadcast advertising complaints were last updated in July 2014 and can be found at:  
[http://www.asa.org.uk/Consumers/~media/Files/ASA/Misc/Broadcast\\_Complaint\\_Handling\\_Procedures.ashx?utm\\_source=Adestra&utm\\_medium=email&utm\\_term=&utm\\_content=Broadcast%20Complaint%20Handling%20Procedures&utm\\_campaign=Update%20-%20ASA%20refreshes%20procedures](http://www.asa.org.uk/Consumers/~media/Files/ASA/Misc/Broadcast_Complaint_Handling_Procedures.ashx?utm_source=Adestra&utm_medium=email&utm_term=&utm_content=Broadcast%20Complaint%20Handling%20Procedures&utm_campaign=Update%20-%20ASA%20refreshes%20procedures)

clearance bodies of how ASA(B) interprets BCAP Code requirements and informs guidance issued by BCAP.

- 3.34 Further, as noted in paragraph 3.14, above, ASA(B) may, in specific circumstances, refer a matter to Ofcom for consideration of the imposition of one or more statutory sanctions, which could include a financial penalty or revocation of the relevant licence to broadcast. Ofcom does not therefore currently consider an alternative complaints process needs to be considered.

### Funding the system

- 3.35 Ofcom notes BHF's view concerning the funding of the co-regulatory system and the fact that it is "calling on the Government to establish an alternative independent watchdog to develop and enforce marketing regulation in the UK". Nevertheless, ASA(B), as Ofcom's co-regulator, is required to be independent of industry in its decision making processes. We note that the ASA(B) Council is required by its constitution to have a significant majority of independent members.

## **Three**

### "Ofcom's role..."

- 3.36 Three considers there should be a procedure that enables advertisers to ask 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."

### "No appeals"

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

## **Ofcom's response**

### "Ofcom's role..."

- 3.38 Ofcom notes Three's view. In light of its duties under the Act, Ofcom retains ultimate responsibility for broadcast advertising and is therefore able to exercise its backstop powers and offer advice to ASA(B) in appropriate cases. (Any regulator may be approached by ASA(B) for advice on matters about which it considers that regulator to have specialist knowledge).
- 3.39 However, having contracted out the regulation of broadcast advertising in accordance with the legal principles set out in relevant legislation, Ofcom would not generally expect to be approached on matters concerning general advertising claims. The co-regulatory arrangements therefore recognise the need for the Co-Regulatory Parties to carry out their delegated functions with the necessary level of independence and autonomy. This is reflected in both the 2004 MoU and the 2014 MoU, which state that we do not anticipate interfering in the functioning of the co-regulatory system, "except in exceptional circumstances".

### “No appeals”

- 3.40 Ofcom notes Three's view. However, we would point out that, since June 2011, Ofcom's own procedures for investigating breaches of content standards for television and radio programming have not provided an opportunity for appeal. This position was reached by Ofcom “in light of the additional opportunities to make representations that Ofcom ... decided should be afforded to parties at early stages and throughout the Procedures ... Ofcom does not consider that fair and effective procedures also require the inclusion of review mechanisms. In particular, broadcasters ... have both the first and last chance to make representations ... which gives those Procedures the end to end fairness required of them.”<sup>31</sup>
- 3.41 In addition, Ofcom notes that ASA(B) does have an appeals process which permits an advertiser or broadcaster to appeal an adjudication by way of a request for review by an Independent Reviewer, on the grounds of a “substantial flaw of process or adjudication” or for consideration of “additional relevant evidence”. Under that review process, the matter may be referred back to ASA(B) to reconsider, if the Independent Reviewer considers the grounds of appeal are met. In the event of a recommendation by the Independent Reviewer for reconsideration of its adjudication, Ofcom remains confident that ASA(B) Council's independent structure, and the information available to it, is sufficient to ensure that its final decision on the matter is both fair and robust and the outcome in consumers' interests in accordance with our statutory duties.

## **MoU section: Monitoring and Performance Reporting to Ofcom**

### **Three**

- 3.42 Three notes that “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.” Further, Three notes that Ofcom's letter to Lord Smith referred 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 considers this could have provided “a very misleading picture”, as it appeared not to reflect the views of advertisers.

### **Ofcom's response**

- 3.43 In light of the fact that ASA(B) / BCAP co-regulates on Ofcom's behalf under the Communications Act 2003, Ofcom must be satisfied, when deciding in favour of a co-regulatory scheme that the co-regulator will meet certain criteria as discussed in paragraphs 2.8-2.14, above, and our letter to Lord Smith on 1 May 2014. The relevant criteria by which the success of co-regulation is assessed are reflected in both the 2004 MoU and the 2014 MoU. Our current assessment against these criteria is detailed in paragraphs 2.15-2.16, above, and was summarised in our letter to Lord Smith. Although, as part of this summary, Ofcom referred only to satisfaction surveys the ASA had carried out in relation to complainants' views, the surveys carried out in the review also found that, generally, approaching 80% of advertisers have been very or quite satisfied with the ASA's overall case handling, around 75% with its final decisions, and approaching 75% with its reasoning (as reported in paragraph 2.15.6 of this Statement).

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<sup>31</sup><http://stakeholders.ofcom.org.uk/binaries/consultations/broadcast-complaints/statement/statement.pdf>

## Conclusion

- 3.44 Having considered stakeholders' views, and for the reasons stated above, we are satisfied that none of the issues raised in their submissions prevent Ofcom from contracting out to the ASA for a further ten years, the broadcast advertising functions specified in the 2014 Authorisation ("the relevant functions") (see also paragraph 4.7.2, below); nor do any of these issues need to be reflected in the 2014 MoU.

## Section 4

# Decision to renew the co-regulatory arrangements

- 4.1 Ofcom has concluded that, for the reasons set out in this statement:
- 4.1.1 a co-regulatory system remains appropriate for broadcast advertising; and
  - 4.1.2 the performance of the Co-regulatory Parties over the last decade has satisfied the relevant legal and regulatory criteria.
- 4.2 Although we have considered carefully the view of stakeholders as described above, for the reasons given in Section 3 of this statement, we do not consider those views have raised substantive issues that prevent us from contracting out the relevant functions to the Co-regulatory Parties or that need to be reflected in the 2014 MoU. The 2014 MoU therefore updates the 2004 MoU by reflecting established practice and removing redundant material related principally to the inception and initial implementation of the co-regulatory system in 2004.
- 4.3 We have therefore decided, 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, to contract out the relevant functions to the Co-regulatory Parties for a further ten years, on the basis set out in:
- 4.3.1 the 2014 Authorisation dated 31 October 2014, which specifies the regulatory functions that are contracted out, together with the exceptions, limitations and conditions to which the Authorisation is subject<sup>32</sup>; and
  - 4.3.2 the 2014 MoU, which sets out the Parties' understanding of the day-to-day operation of the co-regulatory system<sup>33</sup>.

## Impact Assessment and Equality Impact Assessment

- 4.4 This statement has not contained a separate section on impact assessment. Instead, we have assessed the impact on stakeholders of Ofcom's decision to review and renew the co-regulatory arrangements for broadcast advertising at different places throughout this document.
- 4.5 Ofcom is also required by statute to have due regard to any potential impacts our decisions may have on equality in relation to gender, disability or ethnicity. An Equality Impact Assessment ("EIA") is our way of fulfilling this obligation<sup>34</sup>. An EIA is Ofcom's tool for analysing the potential impacts a proposed policy or project is likely to have on people, depending on their background or identity.

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<sup>32</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Authorisation\\_2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Authorisation_2014.pdf)

<sup>33</sup>[http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum\\_of\\_Understanding\\_2014.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Memorandum_of_Understanding_2014.pdf)

<sup>34</sup>See the Equality Act 2010



- 4.6 In relation to such equality (whether in Northern Ireland or the rest of the UK), we consider the result of our review has no particular implications for people to whom these considerations apply. We believe the decision Ofcom has made will affect all groups equally, in so far as:
- 4.6.1 it maintains the status quo and concerns the renewal of a co-regulatory system that has, in itself, raised no equality issues about which any of the Parties have become aware over the last decade (i.e. since inception); and
  - 4.6.2 Ofcom received no representations from stakeholders concerning issues of equality in relation to the proposals we have implemented.
- 4.7 In summary, Ofcom has, in reaching the decision to renew the co-regulatory arrangements for broadcast advertising, become aware of no retrospective, ongoing or predicted concerns on any matters of equality in relation to gender, disability or ethnicity.

## Implementation

- 4.8 The new co-regulatory arrangements for broadcast advertising commenced on 1 November 2014 and are intended to continue for a period of ten years, subject to the exceptions, limitations, terms and conditions set out in the Authorisation.