

## Broadcast advertising regulation: a summary of issues considered in relation to renewal of ASA contracting out

(by reference to the current Memorandum of Understanding (“MoU”))

MoU Section <i>(Summary of content)</i>	Issue considered	Conclusion	Reason for, or notes concerning, conclusion <i>(<b>Proposals</b> for amendments to the MoU, to reflect existing and effective working practices, <b>are set out in bold italics</b>)</i>
-	Is an MoU still required?	Yes	The current MoU formed an essential part of the co-regulatory implementation process and, although it is not legally binding, it remains the plain English document to which all parties can turn for clarity about their agreed understanding on the practical operation of the co-regulatory arrangements – for example, as to which party is responsible for what, when it is responsible for it and how the parties interact.
<b>10 – Functions to be Delegated</b>			
10a – Handling and resolution of complaints about advertising content on radio and television  <i>(Subject to agreed exceptions, Ofcom will not consider advertising complaints; it will pass them to ASA(B) for investigation; ASA(B) must maintain a set of published procedures)</i>	Should ASA(B) consider complaints concerning Participation TV and associated areas of gambling and message board telesshopping formats?	No	Ofcom has agreed to retain responsibility in these areas and does not anticipate change in this position.  (See also section 10c)

<p>10b – Advertising Code Setting, Monitoring and Enforcement</p> <p><i>(This code is BCAP’s responsibility; Ofcom may insist on policy changes, generally following senior level discussions; it is a licence condition of each Ofcom broadcast licensee to ensure compliance)</i></p>	<p>Should BCAP take on responsibility for <u>all</u> aspects concerning the scheduling of advertisements?</p>	<p>No</p>	<p>ASA(B) is primarily concerned with the regulation of advertising content and the protection of the audience, applying the standards set out in The UK Code of Broadcast Advertising (“the BCAP Code”)<sup>1</sup>, including Section 32 (Scheduling). However, Ofcom is responsible for regulating the scheduling of television advertising under its Code on the Scheduling of Television Advertising (“COSTA”)<sup>2</sup>, which is more focussed on the frequency and economic aspects of advertising.</p>
	<p>Should Ofcom reclaim responsibility for any aspects of Code setting that have been contracted out to it?</p>	<p>No</p>	<p>Ofcom is content that BCAP remains best placed to manage the BCAP Code in the areas of advertising that have been contracted out to it – Note: this currently excludes political advertising (see Section 7 of the BCAP Code<sup>3</sup> and item 10d, below) and Participation TV (see paragraph n of the Introduction to the Code<sup>4</sup>).</p>
	<p>Should Ofcom retain its function of approving all Code changes, including technical changes?</p>	<p>Yes</p>	<p>Ofcom has ultimate responsibility for the setting of broadcast advertising standards.</p>

<sup>1</sup> [http://www.cap.org.uk/Advertising-Codes/~/\\_media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx](http://www.cap.org.uk/Advertising-Codes/~/_media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx)

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

<sup>3</sup> <http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML/Section-7-Political-Advertisements.aspx>

<sup>4</sup> <http://www.cap.org.uk/Advertising-Codes/Broadcast-HTML/Introduction.aspx>

<p>10c – Teleshopping and other non-spot advertising content</p> <p><i>(Subject to agreed exclusions, ASA(B)/BCAP is responsible for the regulation of long-form advertising; Ofcom will provide to ASA(B) bi-annually a list of Licensees whose content is entirely regulated under the BCAP Code; there is a requirement for ASA(B)/BCAP to adhere to international obligations)</i></p>	<p>Should Ofcom provide bi-annually to ASA(B) a list of Licensees whose content is entirely regulated under the BCAP Code?</p> <p>Should Ofcom retain reference in the MoU to ASA(B)/BCAP's adherence to international obligations?</p>	<p>No</p> <p>Yes</p>	<p>The MoU should be updated to reflect Ofcom's current practice, which has proved effective over the past ten years. <b><i>(Ofcom therefore proposes to state in the MoU that it will inform ASA(B) of all new licence awards concerning services that will broadcast any advertising content, identifying the nature of such services – i.e. editorial, teleshopping or self-promotional.)</i></b></p> <p>In light of the standards objective in section 319 of the Communications Act that the international obligations of the UK with respect to advertising included in television (and radio) services are complied with, it is appropriate for the MoU (and other relevant documentation) to reflect the obligation of the ASA(B) (under the co-regulatory arrangements) to abide by any relevant international obligations in respect of the regulation of advertising content (retaining a note that Ofcom is responsible for complying with such obligations in relation to COSTA).</p>
<p>10d – Political Advertising</p> <p><i>(This is an area of advertising reserved by Ofcom; decisions will be published by ASA(B), making clear they have been made by Ofcom; RACC or BACC – now Clearcast – may consult BCAP for political advertising advice, which may seek a decision from Ofcom on the query raised)</i></p>	<p>Should Ofcom retain responsibility for political advertising?</p> <p>Should Ofcom retain reference in the MoU to the way in which decisions concerning political advertising are published?</p>	<p>Yes</p> <p>Yes</p>	<p>Any transfer of responsibility would require legislation, since paragraph 5(a)(i) of The Contracting Out Order 2004<sup>5</sup> does not allow Ofcom to authorise a third party to exercise its function under s319 (2) (g) of the Communications Act 2003 (as amended) to secure the standards objective relating to the prohibition of political advertising.</p> <p>However, the MoU will require amendment as it no longer reflects the current process, which has since been established and developed through precedent. <b><i>(Ofcom therefore proposes to state in the MoU that it will inform ASA(B) of its decisions concerning political advertising but will publish the relevant findings in the Ofcom Broadcast Bulletin.)</i></b></p>

<sup>5</sup> The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004

<p>10e – Scheduling of Spot Advertising</p> <p><i>(ASA(B) resolves complaints re scheduling of individual spot advertisements, including enforcement/imposition of restrictions, enforcement of watershed restrictions and inappropriate/insensitive scheduling; policy changes proposed by BCAP require Ofcom's approval)</i></p>	<p>Should Ofcom retain responsibility for the approval of policy changes in this area?</p> <p>Does Ofcom wish to expand this section by referring in particular to any specific product areas?</p>	<p>Yes</p> <p>No</p>	<p>Ofcom has ultimate responsibility for the scheduling of broadcast advertising and the relevant rules resulting from such policy likely to form part of the BCAP Code. A requirement for Ofcom approval of any proposed Code changes by BCAP relating to scheduling would maintain regulatory consistency, given the split of scheduling responsibility between Ofcom and BCAP/ASA(B).</p> <p>Maintaining a generic approach to scheduling in the MoU is considered desirable, since any attempt to list specific product areas runs the risk of quickly becoming outdated. <b><i>(However, Ofcom proposes to include in the MoU a generic reference to the fact that certain areas of advertising require special care – e.g. alcohol.)</i></b></p>
<p>10f – Broadcast sponsorship</p> <p><i>(Regulatory responsibility for sponsorship remains with Ofcom, due to its “strong links with programming and editorial issues”; future transfer under co-reg could be considered, starting with radio sponsorship credits)</i></p>	<p>Should Ofcom transfer regulatory responsibility to ASA(B)/BCAP for any of the following areas?</p> <ul style="list-style-type: none"> <li>• Product placement</li> <li>• TV sponsorship credit content</li> </ul>	<p>No</p> <p>No</p>	<p>Product placement rules form part of the regulation of editorial rather than advertising broadcast content. It does not therefore fall within the functions that Ofcom is authorised to contract out to a third party under the Contracting Out Order 2004<sup>6</sup></p> <p>Any transfer of responsibility would require legislation, as paragraph 5(a)(ii) of The Contracting Out Order 2004 prohibits Ofcom from authorising a third party to consider matters related to securing the prevention of unsuitable sponsorship.</p>

<sup>6</sup> The Contracting Out Order 2004 does not permit Ofcom to authorise the exercise of its functions relating to the prevention of unsuitable sponsorship to a third party under s319 (2) (j) of the Communications Act 2003 (as amended).

	<ul style="list-style-type: none"> <li>Commercial reference content on radio</li> </ul>	No	Transfer of responsibility under co-regulation was previously considered and consulted on when the rules concerning commercial communications on radio were liberalised. It was decided to maintain the current regulatory structure until such time as it was deemed appropriate to consider their full integration into programming, when the separation of programming and advertising would no longer be required. We do not intend to re-open this issue at this time.
10g – Interactive and Other New Forms of Advertising  <i>(Reference to GRITS (a 2001 ITC document re red button services) and “grey areas” of regulation)</i>	Should Ofcom note that the co-regulatory arrangements for the regulation of advertising included in On Demand Programme Services (“ODPS”) is separate from this MoU?	Yes	This section of the MoU is redundant. <b><i>(Ofcom proposes it should now reflect that separate arrangements exist for regulating advertising included in ODPS.)</i></b>
10h – Public Policy Requirements  <i>(ASA(B)/BCAP must lead on ensuring these are reflected in The UK Code of Broadcast Advertising. Ofcom may wish to make representations in this regard)</i>	Should Ofcom retain the formal understanding that it may wish to make representations in relation to public policy requirements, when it has responsibility for approval of changes to the BCAP Code?	Yes	Ofcom’s ultimate responsibility for broadcast advertising is central to the co-regulatory agreement. This section not only reflects this but also serves to ensure timely governance.

<p>10i – Audience Research</p> <p><i>(ASA(B)/BCAP must “establish a comprehensive programme of quantitative and qualitative research to, among (many) other things, monitor KPIs)</i></p>	<p>Should ASA be expected to maintain a programme of research?</p>	<p>Yes</p>	<p>Ofcom has ultimate responsibility for broadcast advertising and is keen that ASA(B)/BCAP continues to monitor and report on relevant KPIs and conduct other research as appropriate. <b><i>(Ofcom proposes to reflect an ongoing requirement in the MoU that ASA(B)/BCAP should “maintain a comprehensive programme of quantitative and qualitative research...”.)</i></b></p>
<p>10j – Publicity</p> <p><i>(ASA(B) must publicise its regulatory system. Ongoing, parties will liaise &amp; agree on the level, content &amp; timing of publicity (Section 328))</i></p>	<p>Should Ofcom retain the requirement on ASA(B) to publicise its role?</p>	<p>Yes</p>	<p>Ofcom considers ASA(B) should be responsible for maintaining its public profile in relation to regulating broadcast advertising and the manner in which its role should be publicised. <b><i>(Ofcom therefore proposes to note in the MoU that ASA(B) is responsible for ensuring its public profile in relation to broadcast advertising, which it should maintain through appropriate publicity.)</i></b></p>
<p>10k – Compliance with Control of Misleading Advertisements Regulations 1988 and Medicines Monitoring of Advertising Regulations 1994</p> <p><i>(Notes Ofcom’s legal duties and ASA(B)’s authorisation to assume such duties in relation to specific legislation)</i></p>	<p>Should Ofcom consider making references to the relevant legislative framework in a way which future proofs it as far as possible (because, for example, the 1988 regulations have now been repealed)?</p>	<p>Yes</p>	<p>Ofcom is keen to ensure arrangements, as set out in the MoU, are future-proofed, as far as possible, so MoU wording remains appropriate over time. <b><i>(Ofcom therefore proposes to note that the functions contracted out to ASA(B) are those authorised by Ofcom and as reflected in relevant legislation from time to time.)</i></b></p>

## 11-54 – Structure and Function of the Parties to the MoU

12-13 – Funding the System <i>(Outline of how broadcast advertising self-regulation is to be funded)</i>	Should Ofcom consider an alternative funding arrangement?	No	The current funding arrangements have proved adequate over the last decade and Ofcom is not therefore considering any other funding arrangements.
14-19 – Operation of ASA(B) <i>(Outline of the company's constitution and structure)</i>	Should Ofcom consider an alternative constitution for ASA(B)?	No	The ASA(B)'s established system was designed to reflect and complement the ASA's operation in relation to non-broadcast advertising and to ensure the ASA(B)'s independence as a co-regulatory body. It has been successful in achieving this end and no change to its constitution is therefore proposed.
20-24 – Powers of ASA(B) - Enforcement of Decisions <i>(Outline of ASA(B)'s regulatory complaints process)</i>	Should Ofcom consider an alternative complaints process for ASA(B)?	No	The ASA(B)'s system was intended to reflect and complement the ASA's established operation. ASA(B) has been successful in achieving this and carrying out effectively the functions delegated to it by Ofcom. It has not been necessary to consider any alternative process to date and no such process is therefore proposed. Should ASA(B) seek future change in this area, Ofcom would consider it.

<p>25-27 – Powers of ASA(B) – Further Action, including Referral to Ofcom</p> <p><i>(Outline of actions ASA(B) may take and how it refers cases to Ofcom for consideration of sanctions)</i></p>	<p>Should Ofcom consider an alternative referrals process?</p>	No	<p>The current referrals process has proved satisfactory and Ofcom does not therefore consider it necessary to propose an alternative.</p>
<p>28-33 – Operation of BCAP</p> <p><i>(Outline of BCAP's responsibilities)</i></p>	<p>Should Ofcom consider alternative responsibilities for BCAP?</p> <p>Do all code changes, including technical changes, need to be agreed with Ofcom?</p>	<p>No</p> <p>Yes</p>	<p>BCAP's responsibilities were intended to reflect and complement those of CAP. They have been successful in achieving this and no alternatives have therefore been considered necessary. Should BCAP seek future change in this area, Ofcom would consider it.</p> <p>Ofcom has ultimate responsibility for the setting of broadcast advertising standards. <b><i>(However, Ofcom proposes to note in the MoU that its approval should be given at an appropriate level of authority.)</i></b></p>
<p>34-36 – Accountability of Decisions</p> <p><i>(Outline of ASA(B)/BCAP's autonomy and Ofcom's ultimate accountability)</i></p>	<p>Should Ofcom consider any adjustment to ASA(B)/BCAP's autonomy?</p>	No	<p>ASA(B)/BCAP's autonomy as a decision-maker is consistent with its position as an independent co-regulatory body.</p>

37-40 – Ofcom’s involvement in Code making and review <i>(Outline of Ofcom’s role)</i>	Should Ofcom consider any change to its Role in BCAP Code reviewing?	No	Ofcom has ultimate responsibility for ensuring licensees comply with broadcast advertising standards, we are content with BCAP’s established role and we do not therefore consider it necessary to propose any change to Ofcom’s role.
41-50 – An Advertising Advisory Committee (AAC) for BCAP <i>(Outline of AAC’s terms of reference, procedures, obligations, composition and transparency)</i>	Should Ofcom consider any changes concerning BCAP’s AAC?	Yes	<p>Currently, the MoU provides that expert/lay members of the AAC are appointed “by a process involving ... selection by the Chairman of the AAC, the Chairman of BCAP and the Chairman of ASA(B) and an independent assessor from Ofcom.” However, this does not summarise accurately the present position, which has evolved over time. Since Ofcom remains keen to ensure the independence of AAC members, it has been agreed and established by precedent that our involvement (and that of the Chairman of BCAP) in the recruitment process is limited to providing input in relation both to selected candidates prior to invitation for interview and to the preferred candidate prior to appointment. (Ofcom does not decide which candidates should be selected or preferred.) <b><i>(Ofcom therefore proposes to reflect this established process in the MoU.)</i></b></p> <p>Currently, although only an observer on the AAC, the MoU anticipated that Ofcom might use the committee as “an alternative route for feeding policy issues into BCAP’s process.” However, Ofcom has never used its position to this end. Ofcom is keen to ensure that the AAC is independent of both BCAP and Ofcom. Further, Ofcom is able to feed policy issues into BCAP through other routes – either by asking the Executive to address a particular issue, which it can then refer to BCAP for a decision, or by using its retained power to force changes to the BCAP Code. <b><i>(Ofcom therefore proposes to remove the reference in the MoU to Ofcom using the AAC as “an alternative route for feeding policy issues into BCAP’s process”.)</i></b></p>

<p>51-54 – Liaison Arrangements at Executive and Board Levels</p> <p><i>(Outline of contacts to be maintained between Ofcom and ASA(B)/BCAP)</i></p>	<p>Should Ofcom consider any changes to liaison arrangements that are currently in place?</p>	<p>No</p>	<p>Liaison arrangements between ASA(B)/BCAP and Ofcom have proved effective over the past 10 years and no substantive changes to current arrangements are therefore required. <b><i>(However, Ofcom proposes to reflect established practice in the MoU, as appropriate)</i></b></p>
<p><b>55-79 – Monitoring and Performance Reporting To Ofcom</b></p> <p><i>(Detail of how performance will be monitored and reported to Ofcom)</i></p>	<p>Should Ofcom consider any changes to the monitoring and reporting procedures currently in place?</p>	<p>Yes</p>	<p>ASA(B) has regularly provided comprehensive reports to Ofcom concerning its performance against agreed performance indicators. <b><i>(However, Ofcom proposes to replace noted benchmarks and targets etc. that reflect legacy regulator practice, and are therefore redundant, with those upon which ASA(B) currently reports.)</i></b></p> <p>ASA(B)/BCAP are currently required to submit these performance reports to Ofcom, and attend a formal meeting with Ofcom, every three months. All parties agree that this is unnecessary, given established stability since the inception of co-regulation. <b><i>(Ofcom therefore proposes to require such reports at six-monthly intervals and to hold annual meetings, with the option of meeting for a six month review if appropriate.)</i></b></p>
<p><b>85-86 – Recovery Programme</b></p> <p><i>(Outline of what should happen in the event of co-regulatory failure)</i></p>	<p>Should Ofcom revise this section to relate to “significant problems” [reference currently made in section 3] that may arise?</p>	<p>Yes</p>	<p>This section currently focuses on failures in respect of, and following, the inception of co-regulation, which are out of date and no longer relevant. <b><i>(However, Ofcom proposes that it would be appropriate to include a generic reference to the need for senior management of all parties to agree an appropriate strategy in the event of significant problems arising.)</i></b></p>

<p><b>87-89 – Notice Period</b></p> <p><i>(Provides for a minimum notice period, from either regulator, of 6 months)</i></p>	<p>Should Ofcom consider changing the minimum notice period?</p>	<p>No</p>	<p>Ofcom considers it important that, should the circumstances arise, both parties must be able to ensure the transfer of broadcast advertising regulation solely to Ofcom within six months. We acknowledge, however, that it is in the interests of all parties to ensure that such an event should not arise unexpectedly.</p>
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1 May 2014