

MEMORANDUM OF UNDERSTANDING

BETWEEN

Office of communications (Ofcom)

and

**The Advertising Standards Authority (Broadcast)
Limited ('ASA(B)')**

and

**The broadcast committee of advertising practice limited
(('BCAP'))**

and

**The Broadcast Advertising Standards Board of Finance
Limited ('BASBOF')**

May 2004

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Foreword

Advertising is the lifeblood of most commercially-financed television and radio broadcasting in the UK, delivered primarily by broadcasters licensed by Ofcom under the 1990 and 1996 *Broadcasting Acts*. These broadcasters are bound by their licences to comply with various content standards, including advertising standards, and to comply with any directions made by Ofcom which result from a broadcaster failing to comply with such standards. The public expects high standards of broadcast advertising and of its regulation.

During 2004, Ofcom is intending to contract out the regulation of broadcast advertising content to a self-regulatory system under the banner of the Advertising Standards Authority ('ASA'), which would operate in a co-regulatory relationship with Ofcom. The system would be comprised predominantly of three new organisations: ASA(B), BCAP and Basbof. The purpose of this Memorandum of Understanding (the 'MOU') is to reflect the scope, nature and operation of the relationship between Ofcom and those bodies in the advertising industry, ASA(B), BCAP and Basbof which will together carry out the day-to-day regulation of broadcast advertising as agreed on Ofcom's behalf.

The MOU sets out undertakings and principles agreed between Ofcom, ASA(B), BCAP and Basbof (hereinafter referred to as 'the Parties'; and ASA(B), BCAP and Basbof as the 'Co-regulatory Parties'). It is framed in the context of ensuring that consumers, viewers and listeners can have continued confidence in the standards of broadcast advertising under the new arrangements. The Parties share a mutual interest in that overriding goal.

In agreeing to contract out certain of its functions (which, at present, remains subject to Parliamentary approval) to a new self-regulatory system – built on the long-established and valuable non-broadcast advertising experience of the ASA, suitably adapted – Ofcom is placing confidence in the structures and safeguards agreed between the Parties. It is also expressing confidence in the ability and will of all the Parties involved, not least those managers and staff carrying out the work on a daily basis, to deliver in spirit as well as in substance what is required to make the new system work effectively and efficiently.

The Parties do not intend this document to be legally binding, and this document shall not create any legally binding duties or obligations between the Parties. Any duties or obligations which are to have legally binding effect will be set out in separate legally binding contracts which may be drawn up between some or all of the Parties as necessary. They, together with the proposed De-regulation and Contracting-out Order ('the DCOA Order') and the proposed Ofcom authorisation made under the DCOA Order ('the Authorisation'), will form the legal basis of the new self-regulatory system (as explained in the 'Legal Context of the MOU' section below).

Purpose and background

1 This MOU sets out the working arrangements and describes the relationship between Ofcom and the other three Parties, ASA(B), BCAP and Basbof (the 'Co-regulatory Parties'). These three Parties between them will secure the delivery of broadcast advertising content regulation to the highest standards.

2 Section 3(4) of the *Communications Act 2003* ('the Act') stipulates that Ofcom should "have regard tothe desirability of promoting and facilitating the development and use of effective forms of self-regulation". Ofcom considers, in accordance with section 3(4), that certain of its functions in relation to the development and enforcement of standards codes relating to broadcast advertising could more appropriately be carried out by an effective and suitably assessed self-regulatory system which would operate in a co-regulatory relationship with Ofcom.

3 Having consulted on proposals to contract out broadcast advertising regulation, and having responded to a range of concerns expressed by suitably amending those proposals; the Parties agree to proceed in accordance with this MOU, as implemented by the Authorisation and the DCOA Order. This MOU is designed to reflect the Parties' agreement on which functions will be undertaken by the self-regulatory framework and which will be retained by Ofcom; on how the new system will operate and be accountable to the public and to Ofcom; and on how its efficacy will be assessed and reviewed. In the event of significant problems materialising with the self-regulatory system, the MOU also clarifies the actions which may be taken by the Parties.

Legal context of the MOU

4 The legal foundation for the self-regulatory system envisioned by this MOU is the *Deregulation and Contracting Out Act 1994* ('DCOA'). Where a Minister or other public authority (like Ofcom) has been given specific functions or duties by legislation, DCOA allows the Minister or public authority to delegate or 'contract out' those functions to another person or organisation. Ofcom has been given the power to contract out its functions under DCOA by Section 1(7) of the Act.

5 Ofcom's duties and functions in the area of broadcast advertising regulation derive in the main from Sections 319 to 328 of the Act. Ofcom is intending to use DCOA to contract out some of its functions under the Act and various related statutory instruments (discussed at 7 below). In particular, Ofcom is intending to contract out from the Act:

- (a) its functions relating to the setting, reviewing and revising of standards codes for broadcast advertising to BCAP (from section 319(1))
- (b) its functions relating to the handling and resolving of complaints about the observance of broadcast advertising standards codes to ASA(B) (from section 325(2)) and
- (c) other supplementary functions to ensure that BCAP and ASA(B) are invested with the appropriate legal authority they require

6 Ofcom is also intending to use DCOA to contract out to ASA(B) its functions relating to the handling and resolving of complaints about the compliance of broadcast advertising with the *Control of Misleading Advertisements Regulations 1988* and the *Medicines (Monitoring of Advertisements) Regulations 1994*.

7 Ofcom will contract out its functions by giving an authorisation ('the Authorisation') to BCAP and ASA(B) under the DCOA Order which will set out, in legal terms, the statutory functions to be delegated and the limitations and conditions on the exercise of those functions by BCAP and ASA(B). The limitations and conditions are necessary to ensure that Ofcom is able to fulfil its duties under the Act, and to ensure that due process is followed by BCAP and ASA(B) in exercising the delegated functions. As a matter of law, the DCOA Order and Authorisation will govern the scope of the delegated powers of BCAP and ASA(B), and the legally binding commitments of the Parties will be set out in contracts to be drawn up between the Parties. This MOU is intended to describe the intentions of the Parties in more detail, and at a more practical level, than is required to be reflected in the Authorisation (see, in particular, 'Functions to be delegated' below).

Independence of BCAP and ASA(B)

8 Ofcom agrees that it is essential that ASA(B) and BCAP enjoy autonomy over their day-to-day work as contracted out. As long as the undertakings, agreed processes and targets contained in the MOU are met, there is a presumption that Ofcom and the parties to the MOU operate their relationship through the agreed liaison and review arrangements, and Ofcom undertakes not to interfere in the functioning of the new system, except in exceptional circumstances. There are however areas, described below in paragraphs 10b, 35, 39, 40 and 53 of this MOU, where Ofcom has a right to be consulted, to approve or to initiate action in relation to the functions to be delegated.

9 All Parties acknowledge that both Ofcom on the one hand and the Co-regulatory Parties on the other have been allocated specific and legitimate areas of responsibility in relation to the delegation of Ofcom's broadcast advertising

functions, and there must be mutual recognition and respect for those areas at all times.

Functions to be delegated

10 Ofcom agrees that the following broadcast advertising regulation functions should, subject to the appropriate constraints identified in this document and the Authorisation, and for the time period specified in the Authorisation, henceforth be carried out by ASA(B) and BCAP:

a) Handling and resolution of complaints about advertising content on radio and television

The Parties agree that the handling and resolution of complaints will become the responsibility of ASA(B). This will be a key function and will help shape the public perception of the new system. Ofcom will support ASA(B) with broadcast advertising expertise as necessary during the early phases. Ofcom will pass all complaints it receives about broadcast advertising directly to ASA(B), and will not entertain complaints of this nature even when specifically requested by the viewer/listener. In accordance with Section 325 of the Act, ASA(B) should produce a set of procedures governing the handling and resolution of complaints. The procedures should be published, reflecting Ofcom's approach in this regard.

b) Advertising code setting, monitoring and enforcement

The Parties agree that code setting and monitoring will become the responsibility of BCAP. The relevant codes currently in force for the purposes of s. 319 of the Act ('the Advertising Codes')¹ will be owned by BCAP and the industry, but the parties recognize that, under the terms of the DCOA, Ofcom retains all its legal powers stemming from the Act, and is therefore ultimately able to make Code changes. It will however not normally seek to do so, as Ofcom recognises that BCAP is the "self" in self-regulation and in the spirit of the desire by all parties to ensure that the new system is a success, undertakes to use this power only in exceptional circumstances.

This allows for the fact that there may be occasions when, for example in response to a particular public policy issue, Ofcom has to insist that a rule(s) should be amended or introduced, and if BCAP is unwilling to do so then Ofcom may itself introduce a rule change or amendment. This may

¹ The Advertising Standards Code for Television, including the Associated Advertising Guidance Notes; Section 4 of the ITC Rules on the Amount and Scheduling of Advertising; Part C of the ITC Code for Text Services; the Guidance for Broadcasters on the Regulation of Interactive Television Services and those parts of the Advertising and Sponsorship Code for Radio as relate to advertising. Ofcom intends to amend these codes as required in order to separate advertising content rules from any others prior to ASA(B)/BCAP assuming their new functions as set out in this MOU.

include the introduction of a prohibition on certain categories of product/service. It is understood that in practice, Ofcom will seek to have any such changes introduced following consultation at Senior Partner or Director General level between Ofcom and BCAP.

The Parties further note that, via consultation with Ofcom, the Secretary of State may (in accordance with s.321 of the Act) issue directions in relation to prohibited categories of advertising. Such directions will be complied with by BCAP if so notified by Ofcom.

The Parties also note that any Code changes proposed by BCAP must be agreed by Ofcom.

Broadcasters will be required by the terms of their Ofcom licences to ensure compliance both with the BCAP Codes and with directions made by and or other directions of ASA(B).

c) Teleshopping and other non-spot advertising content

ASA(B)/BCAP will be responsible for all broadcast content which is subject to the Advertising Codes. This content is not limited to traditional spot advertising, but also encompasses:

- long-form advertising (including teleshopping), either as extended advertising items in programme-based output, or as the entire output of dedicated teleshopping channels
- any output involving a transactional element which Ofcom has determined is subject to Advertising Code provisions, having regard to the requirements of the Television Without Frontiers Directive

In some cases the entire broadcast content of a channel, other than teleshopping channels, may be regarded as subject to the provisions of the Advertising Code. In order to assist ASA(B) in its monitoring and enforcement functions, Ofcom undertakes to draw up and periodically review a list of those licensees whose content is considered to be subject the Advertising Code, and to update this list to ASA(B) twice yearly. Ofcom will also where practicable notify ASA(B) of any changes in the nature of the service, or of its launch date.

The Parties accept that, due to the rapid evolution of this New Media segment of the market and to the multiplicity of different services, this is an area where there will need to be regular, and case-by-case, liaison between Ofcom and ASA(B)/BCAP.

ASA(B)/BCAP will liaise with the British Teleshopping Association (BTSA) or company compliance officers where appropriate. The Parties also note that there are provisions in the Television Without Frontiers Directive (TWF) relating to teleshopping channels, teleshopping windows and teleshopping spots, as interpreted by Ofcom's Rules on the Amount and

Scheduling of Advertising (RASA), the enforcement of which will remain Ofcom's responsibility, except for Section 4 which will be transferred to BCAP – see paragraph 10e.

It should be noted that responsibility for compliance with those Articles of the TWF Directive that relate to the insertion of advertising breaks, to the amount of advertising permitted and to sponsorship have been specifically excluded from the remit of ASA(B)/BCAP in the Authorisation. However, ASA(B)/BCAP are expected, where appropriate, to take account of any other relevant international obligations of the UK with respect to advertising included in television and radio services in carrying out their delegated functions.

d) Political advertising

Ofcom is required, under the Act, to ensure that political advertising is not included in the television and radio services regulated by Ofcom. The Parties agree that it is appropriate that Ofcom itself remain responsible for carrying out this function, notwithstanding that it involves the control of advertising content. The rules relating to political advertising will be determined by Ofcom but will remain in the Advertising Codes for consistency and transparency. In practice, should ASA(B) or BCAP have grounds to believe, either through complaints or through its own monitoring, that an advertisement may contain political content, it shall refer the matter as soon as practicable to Ofcom. Ofcom will investigate and determine whether the advertisement is political advertising, and therefore prohibited, or not political advertising, in which case the matter should remain within ASA(B)'s remit. Any adjudication made by Ofcom relating to political advertising which has been broadcast will be published in the ASA(B) bulletins, but it shall be made clear that any such adjudication has been made by Ofcom, which is responsible for such decisions. Should the BACC or the RACC need advice in this area, they should consult BCAP which will seek a decision from Ofcom on the query raised.

e) Scheduling of spot advertising

It is agreed that ASA(B) will resolve complaints relating to the scheduling of individual spot advertisements, which will include enforcement or imposition of scheduling restrictions, enforcement of watershed policy, and issues of inappropriate or insensitive scheduling (the relevant rules are currently at Section 4 of RASA as well as in various places in the Advertising Standards Code for Television). Any policy changes in this area proposed by BCAP would need Ofcom's approval.

f) Broadcast sponsorship

Due to sponsorship's strong links with programming and editorial issues, Ofcom will at the outset retain responsibility for the entirety of the ITC

Code of Programme Sponsorship, and for the sponsorship elements of the Radio Advertising and Sponsorship Code². These latter are to be extracted from the Radio Advertising and Sponsorship Code prior to transfer to the new system, and incorporated as separate radio rules within Ofcom's Codes. Radio sponsor credits will continue to be cleared by the RACC.

This position does not preclude a transfer by agreement between the Parties of some (eg. regulation of sponsorship credits) or all elements of sponsorship regulation to the new self-regulatory system at some future date. Radio sponsorship credits could be the first to be considered, as it has been a successful example of self-regulation for some years prior to transfer of responsibility to Ofcom.

g) Interactive and other new forms of advertising

ASA(B)/BCAP will in general assume responsibility for advertising content on broadcast interactive services which fall within the scope of Ofcom's Guidance to Broadcasters on the Regulation of Interactive Television Services ('GBRITS'), whilst ASA/CAP will continue to be responsible for non-broadcast interactive services.

The Parties accept that there will be some grey areas where communication between Ofcom and ASA(B)/BCAP will need to take place on a case-by-case basis. This is a new and fast moving market, and it will be the responsibility of the Parties to keep the Guidance under review and bring forward proposals as appropriate.

h) Public Policy requirements

ASA(B)/BCAP will take the lead in ensuring that public policy requirements are reflected in the Advertising Codes as necessary. It is nonetheless expected that Ofcom may from time to time wish to make representations about such requirements to ASA(B)/BCAP or others, e.g. when issues run across both advertising and programming, or where Government makes public policy considerations known directly to Ofcom. Ofcom is at liberty to make, and if it regards as appropriate, to publish any such representations. Where such representations are made to ASA(B)/BCAP these parties undertake to take account of them.

i) Audience Research

ASA(B)/BCAP will be expected to establish a comprehensive programme of quantitative and qualitative research to:

- monitor and evaluate the degree to which the co-regulatory regime is meeting the Key Performance Indicators agreed with Ofcom and set

² and for any Ofcom Codes which amend or replace these documents

out at paragraphs 56 onwards below e.g. on compliance and customer/industry satisfaction;

- keep abreast of public opinion, incorporating specialist views and being mindful of public policy objectives where relevant; and
- investigate audiences who are not traditionally minded to complain and issues of potential detriment to society that may not be the subject of complaint;
- ensure that decisions on Code reviews, rule change proposals and policy positions are evidence-based, robust and well-informed.

None of the above precludes Ofcom from undertaking its own research in any of these areas (in consultation with BCAP) nor precludes joint research being undertaken between either Ofcom and ASA(B)/BCAP and/or any other relevant body. All research undertaken by ASA(B) and/or BCAP must be objective and independent. In no circumstances must the integrity of the research be compromised. External research partners should therefore not have vested interests in the results (eg. car manufacturers should not contribute to research on perception of car advertisements).

Ofcom is obliged under Section 15 of the Act to publish all its research, and the presumption is that ASA(B)/BCAP will also publish its research. Where it does not do so, such research will be shared with Ofcom.

j) Publicity

The new self-regulatory system for the handling and resolving of advertising standards complaints will be required to be publicised by licensees in accordance with section 328 of the Act. The Parties will liaise and agree as to the appropriate level, content and timing of such publicity so as to ensure that the way in which advertising standards complaints can be made is brought to the attention of the public through a variety of media as appropriate.

k) Compliance with the Control of Misleading Advertisements Regulations 1988 (CMARS) and the Medicines Monitoring of Advertising Regulations 1994 (MMAR)

Ofcom has a legal duty to ensure that broadcast advertising is not misleading under the terms of CMARS, and that it complies with the provisions of MMAR. The Parties agree that ASA(B)/BCAP will assume these duties as authorised by Ofcom.

Structure and function of the parties to the MOU

11 This section aims to encapsulate the basic building blocks of the new system, which may be further detailed as necessary in any relevant contractual documents.

Funding the system

12 The new broadcast advertising self-regulatory system is to be funded via a voluntary levy on broadcast advertising which will be collected by a newly incorporated company, the Broadcast Advertising Standards Board of Finance Ltd (Basbof). Members of Basbof will be representative of broadcasting and advertising interests.

13 ASA(B), BCAP and Basbof agree that the funding shall always be such as to secure the effective discharge of all the functions contracted out in accordance with the undertakings and standards set out in this MOU, the Authorisation and in any relevant contracts. This will be reviewed annually as part of the formal reporting process to Ofcom. It is also agreed that ASA(B) or BCAP are under a duty to inform Ofcom in writing immediately if Basbof is unable to provide adequate funding to meet these obligations. In this event, Ofcom itself will not make up, or contribute to making up, any shortfall but will invite Basbof to propose alternative means of doing so. In the unlikely event that the regulatory work fails to be carried out to the requisite standards, the recovery programme will need to commence as appropriate to the circumstances (see paragraph 85 below).

Operation of ASA(B)

14 ASA(B) Limited, a newly incorporated company, will be responsible for carrying out those functions specified in paragraph 10 in relation to the enforcement of the Advertising Codes and the investigation and adjudication of complaints. The Parties agree that it is more efficient for these functions to be carried out by ASA(B) in close liaison with, and under the organisational umbrella of, the ASA. Noting the interest and involvement of the ASA, the Parties recognise that the broadcast and non-broadcast advertising regulatory work is different, not least because of the differing status of the broadcast Codes (which have a statutory foundation) and the non-broadcast CAP Code (which is non-statutory), and because of the significant pre-clearance which operates in broadcast advertising. At the ASA, the functions designated by Ofcom will require governance, structural and operational changes to be made to the current system, new processes to be adopted and relevant expertise to be recruited.

15 ASA(B) Ltd is a company limited by guarantee and it is intended that the Memorandum and Articles of Association (M&A) will not be amended after the date of this MOU without prior consultation with Ofcom. ASA(B)'s Chairman will also be the Chairman of the ASA. Therefore the current Chairman of the ASA will be appointed automatically to this post. When the present incumbent steps down,

however, the new Chairman of the ASA and of ASA(B) will be appointed by Basbof and Asbof by a proper process after due consultation in line with the M&A's of Basbof and Asbof to preserve his or her independence from Ofcom, industry and Government. The person appointed to these two posts will be appropriately qualified and of good standing, and free of interests in the advertising and media industries. Ofcom will be consulted regarding the appointment of the ASA(B) Chairman but will have no right of appointment or veto.

16 The person with primary responsibility to Ofcom for the delivery of an effective self-regulatory system will be the Director General of ASA(B)³, though he/she may depute a senior executive to be the day-to-day point of contact and liaison for Ofcom – see paragraphs 51 onwards for more details.

17 The ASA Council (the 'Council') is presently the body which adjudicates on non-broadcast advertising content. Adjudications on complaints about broadcast advertising content will be made by a group of persons (the "ASA(B) council") appointed by and representing ASA(B). All members of the ASA(B) council will be directors of ASA(B) and will be drawn from an appropriately enlarged Council. The new members of Council (whether or not members of the ASA(B) council) will be appointed by the ASA/ASA(B) Chairman, independently advised as appropriate, and by a proper process. There will be a ratio of 2:1 independent/industry membership on the enlarged Council reflecting its current composition (with the non-industry members being recruited by public advertisement, and the industry members selected by the independent ASA/ASA(B) Chairman). Membership will be expanded to include further lay representation and a member with broadcast advertising expertise, who can participate however only in the work of the ASA(B) council and its broadcast adjudications. A member of the Council will serve for a maximum of six years. All current members of the Council serving at the time the new system launches and who are to serve on the ASA(B) council, will receive suitable familiarisation and training in broadcast advertising rules and procedures. This training will be incorporated into the induction programmes as appropriate for future members of the ASA(B) council. Following any appropriate consultation, ASA(B) shall, before the date when Ofcom transfers to it the functions set out in the Authorisation, adopt and publish rules and procedures which shall govern the manner in which ASA(B) handles and resolves complaints relating to broadcast advertising.

18 The manner in which the ASA(B) council and ASA Council will make their adjudications shall ensure that separate and proper consideration will be given to broadcast and non-broadcast complaints, and the ASA(B) and ASA councils will be supported by the staff accordingly. This is to ensure that broadcast complaints are dealt with in accordance with the requirements of law, and in particular those set out in the Act and the Authorisation.

³ The Director General of ASA(B) will be the same person as the Director General of the ASA

19 Appeals for a review of an adjudication by the ASA(B) council can be made to an Independent Reviewer in accordance with specific terms of reference. The existence of an Independent Reviewer is a new departure for broadcast advertising, and it is intended that this should be an improvement on the internal appeals process which previously existed. A review by the Independent Reviewer may be requested by a complainant or by a body complained about within 21 days of the date of the ASA(B)'s letter of notification of an adjudication. Specific grounds are required for a review to take place (ie. substantial flaw or new evidence), and during the review process, the original adjudication would stand. The Independent Reviewer would make a recommendation to the ASA(B) council, stating whether the adjudication should be reversed, amended or confirmed. The Independent Reviewer could ask the ASA(B) council to reconsider its decision, but the ASA(B) council would retain the power to take the final decision on the appeal.

Powers of ASA(B)

Enforcement of decisions

20 It is a condition of all relevant licences under the Broadcasting Acts that all licensees comply with directions issued by any body to which Ofcom has contracted out its functions under DCOA (see footnotes 12 & 13 of the Authorisation).

21 ASA(B) will communicate its decisions clearly and promptly to all parties in response to a complaint/challenge. The initial contact will be with the broadcaster, which as a *Broadcasting Act* licensee carries the ultimate responsibility for what appears on its channel(s), or with the relevant pre-Clearance Centre (eg BACC, RACC, BTSA) acting as the broadcaster's agent. The advertiser/agency will also be kept informed at all times.

22 Decisions in relation to upheld complaints/challenges may:

- instruct the advertiser and broadcaster to change the advertisement prior to further broadcast,
- instruct the broadcaster to restrict transmission as directed, or
- instruct the broadcaster to cease broadcasting the advertisement altogether.

Publication of decisions will follow within 14 days via the weekly publication of adjudications on the ASA(B) section of the ASA website.

23 It is the responsibility of ASA(B) to notify the relevant clearance house or broadcaster(s) of decisions. Decisions take effect as soon as they are notified. The implementation of a decision would not normally be suspended following a request for a review, but the Director General of ASA(B) has discretion to do so, or to delay publication, pending the outcome of such a request for review.

24 Broadcasters will be required forthwith to cease transmission of, or to re-schedule any advertisement on the direction of ASA(B) either:

- a) following a decision to that effect or
- b) in certain circumstances, for example, where there is *prima facie* public detriment, pending the outcome of an investigation.

ASA(B) will not have the power to fine licensees; this sanction will remain Ofcom's.

Further action, including referral to Ofcom

25 Further proportionate action beyond the suspension of the advertising may be taken by ASA(B) in order to achieve prompt compliance with the Advertising Codes and with ASA(B) adjudications. ASA(B) and BCAP may take such further measures as may be considered appropriate to ensure future compliance with the Advertising Codes by the broadcasters, advertisers and agencies. These could include:

- Calling the broadcasters, clearing houses, advertisers or agencies in for a meeting
- Seeking assurances as to future compliance
- Ruling out eligibility for industry award competitions

26 A system of Ad Alerts to broadcasters would alert those who do not use the Clearance Centres – e.g. local radio and smaller TV channels – of problems with an advertiser.

27 If, in the opinion of the Director General of ASA(B), a broadcaster:

- a) fails to comply fully and promptly with a decision of ASA(B),
- b) fails to co-operate fully and promptly with a reasonable request of BCAP,
- c) demonstrates a repeated disregard for decisions of ASA(B) or the reasonable requests of BCAP, or
- d) commits one or more code breaches of sufficient seriousness to warrant in ASA(B)'s opinion a statutory sanction

the Director General of ASA(B) shall, after ASA(B) has reached any relevant decision(s), refer the matter, together with copies of all relevant evidence and submissions, to Ofcom for Ofcom to consider further action. Ofcom undertakes to consider any such referrals promptly and to impose any such proportionate sanctions as it deems appropriate in the circumstances in support of ASA(B), taking into account any representations from the broadcaster(s) concerned. Such sanctions may include a formal reprimand, a fine, a warning about possible revocation of the broadcaster's licence or, ultimately, the actual termination of the licence. Ofcom undertakes to keep ASA(B) informed of its intended actions during this process, subject to any confidentiality requirements of the proceedings.

Operation of BCAP

28 The industry has established a new Committee, BCAP, to exist alongside and separate from the parallel, unincorporated CAP. BCAP will be responsible for setting and monitoring compliance with the Advertising Codes, which will become BCAP Codes, with CAP retaining the non-broadcast CAP Code. The two Committees will have a single Chairman and partly overlapping members to provide an adequate level of liaison between the two code-owning bodies, albeit it that they are operating with different Codes.

29 Broadcasters will be required by the terms of their Ofcom licences to ensure compliance both with the BCAP Codes and with the directions of ASA(B).

30 BCAP will:

- set, review and from time to time revise the Advertising Codes;
- help the broadcast advertising communications industry to operate in the interest of the public;
- coordinate the action required to ensure compliance with the Advertising Codes, for example by monitoring broadcast advertisements and broadcast teleshopping services;
- give advice, information, training and support on matters relating to broadcast advertising self-regulation to broadcast licensees and the advertising industry (with the exception of copy clearance of specific advertisements which remains the responsibility of BACC, RACC or individual licensees);
- support the maintenance and preservation of broadcast advertising standards.

31 BCAP will establish a BCAP Advertising Advisory Committee comprising an independent Chairman, industry representatives, expert/ lay members (see paragraphs 41 onwards).

32 BCAP will be responsible for reviewing, initiating and proposing changes to the Advertising Codes, subject to the paragraphs below and, in particular, the procedural requirements set out in section 324 of the Act. BCAP will consult widely on proposed significant changes with licensees, other industry stakeholders, its Advertising Advisory Committee, consumer representatives, Ofcom and other interested persons. BCAP will publish the results of those public consultations together with its subsequent decision.

33 In any case, all rule changes, including minor or technical changes, or changes stemming from changes in legislation, must be agreed with Ofcom and licensees must be informed.

Accountability of decisions

34 Decisions of the ASA(B) council are sovereign under the self-regulatory system. However ASA(B) will have in place an independent review procedure to consider appeals for a review of its adjudications (see paragraph 19). Both the ASA(B) and BCAP are, of course, responsible and accountable for specific decisions and actions and may therefore be open to Judicial Review).

35 Ofcom will not normally intervene in specific decisions and actions of ASA(B) or BCAP in respect of matters that have been contracted out to them. However, 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.

36 Ofcom will remain accountable to the Secretary of State and to Parliament, and open to judicial review, in respect of its statutory duties.

Ofcom's involvement in Code making and review

37 The Parties recognize that, under the terms of DCOA, Ofcom retains all its legal powers stemming from the Communications Act 2003, and is therefore able to implement Advertising Code changes itself.

38 Ofcom however accepts that BCAP is the "self-" in self-regulation, and in the spirit of the desire by all Parties to ensure that the new system is a success, undertakes to use the delegated powers only in exceptional circumstances.

39 This allows for the fact that there may be occasions when, for example in response to a particular public policy issue, Ofcom has to insist that a rule(s) should be amended or introduced, and if BCAP is unwilling to do so, Ofcom may have to amend or introduce a rule(s) itself. This may include the introduction of a prohibition on certain categories of product/service. It is understood that in practice, Ofcom will seek to have any such changes introduced following consultation, at Senior Partner or Director General level, with BCAP.

40 Ofcom also reserves the right to conduct research into advertising policy issues in co-operation with BCAP, and may from time to time request that BCAP review a section of the Advertising Code. BCAP would feed such a request into its normal rule-making process. The new Advertising Advisory Committee (see below) will provide an alternative route for feeding policy issues into BCAP's process.

An Advertising Advisory Committee (AAC) for BCAP

Background

41 Under the arrangements agreed between the advertising industry taskforce and Ofcom, BCAP will be the body responsible for the Codes governing television and radio advertising. Whilst BCAP will be the effective owner of the Codes, it nonetheless makes sense for it to seek input from a wide variety of sources.

42 BCAP will therefore set up an expert advisory committee (the AAC - Advertising Advisory Committee), based on the established precedent of the ITC's AAC set up as a result of the 1954 Television Act. The AAC will be a committee of BCAP and established so as to be part of BCAP. It will act as an independent advisory 'sounding board' to BCAP in exercising its functions with respect to the Advertising Codes.

Terms of reference

43 To provide independent, third party advice to BCAP on advertising issues, particularly in relation to the Advertising Codes.

Procedures and obligations

44 The AAC will provide timely advice to BCAP on Advertising Code issues and on other advertising issues as appropriate. Correspondingly:

BCAP will:

- make all relevant research it undertakes available to the AAC,
- keep the AAC fully informed of its plans for code revision, both with respect to timing and substance,
- request AAC input on these plans in a way that allows the AAC time to give it timely advice, and

Basbof will make the necessary funding available to AAC.

ASA(B) and Ofcom will additionally make any relevant research they undertake available to the AAC through BCAP.

ASA(B) will include in its annual report a section written by the independent Chairman of the AAC on the year's activities of the AAC.

Composition

45 The membership of the AAC will have non-executive roles and will include an independent Chairman, the Chairman of BCAP, and 4-6 independent expert or lay individuals who can represent the interests of citizens and consumers in relation to the requirements of Section 3(1) of the Communications Act. Ofcom will have observer status.

46 The Chairman of the AAC will be appointed by the independent Chairman of ASA(B), independently advised, as appropriate, and by a proper process after due consultation to ensure his or her independence from Ofcom, industry or Government; he/she will be appropriately qualified and of good standing, free of interests in the advertising and media industries. The Chairman of the ASA(B) should consult with Ofcom on the appointment, but Ofcom will have no right of appointment or veto.

47 The expert/lay members of the AAC will be appointed by a process involving public advertisement and selection by the Chairman of the AAC, the Chairman of BCAP and the Chairman of ASA(B), and an independent assessor from Ofcom.

Transparency

48 Expert/lay members of the AAC would be required to participate as individuals, not as representatives of any particular organisations or interest groups. All members of the AAC would be required to respect Chatham House "substance not source" rules.

49 All contributions, whether from Ofcom or the AAC, should be evidence-based wherever possible. Ofcom will commit to maintaining its stance of a "bias against intervention".

50 The AAC will not generally publish its advice, but BCAP shall listen carefully to the AAC's advice and insights, and let the AAC know how it had responded and the outcomes of decisions. The Chairman of BCAP will have a duty to report to BCAP on the deliberations of the AAC.

Liaison Arrangements at executive and board levels.

51 A member of senior staff at Ofcom (the "Executive") will be appointed as the key contact between Ofcom and the appropriate managers of the system.

52 Regular contact should be maintained between ASA(B)/BCAP and Ofcom, to the effect that:

- Procedures to be in place at ASA(B)/BCAP that any staff members involved in a broadcasting issue should have a route to contact Ofcom should advice, information or assistance be required
- Colleagues in Content & Standards in Ofcom to give appropriate priority to contact from ASA(B)/BCAP, to help further the speedy resolution of outstanding issues.
- Formal and regular contact to be maintained between the Executive in Ofcom and the Director General of ASA(B).
 - Until the end of 2005, meetings to be held bi-monthly
 - Thereafter, intervals to be agreed by both parties.
- Code issues will be discussed with the BCAP Chairman as appropriate.

53 Ofcom will keep the new system under continuous review to ensure that the appropriate advertising standards are maintained.

- The Executive at Ofcom will be responsible for reviewing the system
- ASA(B) to provide Ofcom with performance data against key performance indicators (KPI's) – see below
- Should the Executive at anytime have grounds to believe that there is a performance problem with the system, he/she can call for data or information from ASA(B)/BCAP outside the regular reporting intervals
- The Executive may instigate audience/industry research as required on Ofcom's behalf and paid for by Ofcom, either relating to system performance or, in consultation with BCAP, to advertising policy issues
- The Executive must not act so as to interfere with the independence of ASA(B)/BCAP
- ASA(B)/BCAP may at any time comment on the working of the KPIs and suggest changes, either to the measures themselves or to the timing of the reporting. Any changes will be negotiated between the parties
- The Executive shall report at regular intervals to the Content Board and to the Ofcom Board on the degree to which the new system is delivering Ofcom's statutory responsibilities

54 The Parties are committed to good communication, including a "no surprises" policy based on notifying each other where possible of significant announcements and policy developments. The Parties understand, however, that each may speak separately in public and to the media as necessary.

Monitoring and performance reporting to Ofcom

55 The effectiveness of the co-regulatory system will be judged by the degree to which the standards objectives, laid down in section 319(2) of the Act, are met in relation to broadcast advertising. The system must also have regard to Ofcom's general duties in section 3 of the Act.

56 In order for Ofcom to monitor the effectiveness of the system, ASA(B)/BCAP shall report to Ofcom, at a timetable to be agreed, on a number of agreed Key Performance Indicators (KPI's) as outlined below.

Quantitative

Complaint response times

57 The intention is that complaints handling in the new arrangements will be no less prompt than under the Ofcom/ITC/RAU regimes; but a different system may be quicker at some things and slower at others. In particular, a feature of

the new system will be the involvement of the ASA(B) council. This additional stage in the process will need to be taken into account when assessing performance against benchmarks for response times.

58 It is agreed by the Parties that benchmarks for average complaints turnaround times to be achieved by ASA(B) will be set at 80% of the average turnaround times achieved by the ITC in its last six months of operation. It is noted that data analysis has indicated that the following benchmarks would be broadly consistent with average turnaround times achieved by the ITC of:

- | | |
|-----------------|---|
| 5 working days | for straightforward complaints requiring no investigation |
| 10 working days | for complaints where the advertisement must be viewed |
| 8 weeks | for cases requiring standard investigations and contact with licensees |
| 3 months | for complex cases, requiring high level and extended investigations. NOTE: Complex cases requiring resolution of disputes between competitors have typically taken longer than this to resolve. |

ASA(B) will be expected to meet these benchmarks in respect of 80% of complaints during the probationary period or, if appropriate, during a shorter period by mutual agreement between the Parties. In accordance with paragraph 70 below, if factors subsequently emerge within or without the new system that may unavoidably influence turnaround times, ASA(B) and Ofcom will agree and publish revised targets.

Trend data on complaints received and handled

59 Trend data on complaints received and handled will not be associated with any particular target, but will give insight into the caseload and ASA(B)'s productivity.

Trend data on upheld complaints and complaints leading to sanctions

60 Again, trend data on upheld complaints and sanctions will not be associated with any particular target, but may indicate the extent to which the self-regulatory system is winning compliance with the Advertising Codes. Such trend data should provide an analysis of the percentage of advertisements broadcast on radio and television against which ASA(B) has intervened, either as a result of complaints or of staff monitoring. An otherwise inexplicable increase in this percentage would imply that the self-regulatory system was failing to convince the broadcasters and advertisers of the need to comply with the Codes.

61 ASA(B) will also ensure that Ofcom is kept abreast of the level of requests for review to the Independent Reviewer (see para. 19 above). However, not too much should be read into the number of such requests. A large number of such

requests might indicate that something was indeed seriously amiss. But the number of appeal applications by advertisers or broadcasters against the ASA(B) council's decisions might indicate merely that the new system was becoming better known than the previous ITC/RAu complaints handling arrangement and that as a consequence more advertisers were prepared to try appealing in order to avoid an upheld judgement against them. It would not necessarily be the case that the total of appeals would show how successful ASA(B) had been in justifying its case for intervention.

Qualitative

62 Additionally, ASA(B) and BCAP will report quarterly to Ofcom under the following qualitative heads:

Policy initiatives and activity (including in those socially important areas where few complaints may be received)

63 ASA(B) and BCAP will undertake initiatives in sensitive sectors and to keep Ofcom informed.

Assessment of compliance in particularly contentious areas

64 ASA(B) and BCAP undertake to monitor compliance in any sensitive policy sectors, and in particular public policy sectors, which may be high on the public agendas of the moment, and to keep Ofcom informed.

Research undertaken (including public attitude surveys to determine the public's satisfaction with the degree and effectiveness of regulation)

65 ASA(B) and BCAP will be prepared to share the results with Ofcom of any Customer Satisfaction Surveys and Attitudes and Awareness research.

Code changes and rule reviews

66 BCAP will keep Ofcom informed of any upcoming proposals for either a review or a change to the codes and any external campaign aimed at changing the codes.

Assessment of internal performance

67 ASA(B) and BCAP will share the performance information with Ofcom on a quarterly basis.

Reports to Ofcom on significant external criticisms of the regulatory regime

68 As well as routine reporting, ASA(B) and BCAP will ensure that Ofcom are made aware of significant public affairs concerns as soon as they arise.

Assessment Reports by Ofcom to self-regulatory system

69 Ofcom will be obliged to keep ASA(B), BCAP and Basbof informed through its regular liaison meetings about any concerns it may have, or which

have been brought to its attention, so that these can be addressed at an early stage

Running the performance monitoring programme

70 A probationary period of two years shall operate from the date of implementation of the new arrangements. After this time, complaint levels will be clearer and the parties will be better able to assess the volume of regulatory activity required of the self-regulatory system. During the probationary period, the Parties should take a pragmatic view of performance requirements that may turn out to be unrealistic if, for example, the level of complaints were significantly, and to a degree not currently predictable, higher in comparison with the aggregate of complaints received by the former regulators, the Independent Television Commission ('ITC'), the Radio Authority ('RAu') and the Broadcasting Standards Commission ('BSC') in their final year of operation. ASA(B) should not be penalised for performance factors beyond its control.

71 Once the probationary period has expired, ASA(B) undertakes to alert Ofcom formally if quantitative targets are exceeded for two consecutive quarters. In such circumstances, Ofcom may consider initiating remedial action as described below.

72 ASA(B) will also advise Ofcom if the forecast number of complaints about advertisements carried on licensed broadcast services is more than 20% above the aggregate of such complaints received by the former ITC, RAu and BSC in 2003. In such circumstances, the Parties may discuss whether the turnaround targets need to be adjusted.

Performance reporting to Ofcom

73 The ASA Annual Report will be published in April of each year, reporting on the previous calendar year. It will contain a section dealing with the work processes and performance of ASA(B) and BCAP and Basbof. ASA(B) Ltd and BCAP Ltd's year end will be 31 December.

74 ASA(B) and BCAP will publish an annual statement in October of each year setting out its performance for the past period and its objectives and targets for the forthcoming calendar year. Performance information will update the results reported in the Annual Report for the previous year, drawing on the results for the first six months of the year.

75 The statement will inform Ofcom's own Annual Plan and will also fit with the Basbof business planning cycle. Public reporting against the KPI's would thus take place formally at year-end and at half-year.

76 Rolling Customer Satisfaction surveys will feed into the six-monthly public reporting (Annual Report and annual statement). Customer Satisfaction

surveys will cover both complainants and advertisers/broadcasters. The interpretation of complainant satisfaction scores must take into account the fact that more than 75% of current customers have their complaint rejected by the system.

77 An annual Attitude and Awareness survey will feed into the annual statement.

78 The Chairman of ASA(B) (and, where appropriate, the Chairman of BCAP) will attend the Ofcom Board by invitation to discuss the ASA(B) part of the ASA Annual Report and also at such other times as may be appropriate for the consideration of advertising on licensed broadcast services.

79 Ofcom will report on ASA(B)/BCAP's and its own performance in relation to the new system in its annual report in July.

Transfer of files, staff, data, work in progress

This section refers to transition arrangements prior to, and shortly after, the launch of the new self-regulatory body, which have been agreed between the Parties. Whilst it is not intended that they should be ongoing issues once the system is running, it is felt that they are of sufficient importance to be included in the Memorandum of Understanding.

Files, data, and work in progress

80 Ofcom will transfer to ASA(B)/BCAP all relevant files on advertising policy issues, having due regard to any confidentiality or data protection arising from the relationship between Ofcom and any of its stakeholders including Government departments. Copies of some files may be retained by Ofcom.

81 Ofcom will transfer ownership of the Tracker Complaints Database and Information system to ASA(B)/BCAP at no cost, subject to consent by the system developers, TAH, and to any relevant intellectual property and data protection considerations. ASA(B)/BCAP will be liable for any costs incurred directly from the process of transfer.

82 Ofcom will transfer all advertising complaints case files to ASA(B)/BCAP, either paper-based, or as part of the Tracker system transfer, subject to data protection considerations. ASA(B)'s use of personal data relating to individual complainants is restricted to historical, research or statistical purposes only.

83 The Parties acknowledge that there may be some Advertising Policy issues and/or complaints cases which will still be work in progress at the time of the launch of the new system. After the Order is approved by Parliament, Ofcom will alert all complainants, whose complaints are still open, about the forthcoming

change in the system and that undetermined complaints by 1 November may have to be concluded under ASA(B) procedures.

Staffing issues

84 The parties are committed to ensuring that there is adequate staffing within ASA(B), BCAP and Ofcom to deliver an effective co-regulatory system, and that appropriate training and support is provided to those staff. Arrangements for the deployment of staff and for the provision of support and expertise from Ofcom are under active discussion and will include consultation with staff affected and the relevant trades unions. The details will be set out in the contracts to be agreed between the parties.

Recovery programme

85 If the new system consistently fails to meet the agreed standards, the Parties would open discussion at Senior Partner or Director General level about appropriate corrective measures. These might include:

- A review by Ofcom of "case handling" procedures and outcomes
- Ofcom entering into discussion with broadcasters and advertisers, with the co-operation of the co-regulator, to determine where and why the system is failing
- If necessary, proposing that an Ofcom trouble-shooting team works with co-regulator staff to iron out problem areas
- As a last resort, suspending the co-regulatory system and taking broadcast advertising regulation back into Ofcom.

86 It is agreed that such a breakdown of the proposed arrangements would be unsatisfactory from every point of view and all parties commit themselves to making the new system work through co-operation in good faith and with goodwill. It is not intended that any of the Parties will attempt to extract themselves from the arrangements set out in this MoU and the Authorisation within the initial probationary period of two years.

Notice period

87 Notwithstanding Ofcom's statutory powers, it is the intention of the Parties that the system described in this document should operate for a minimum of two years from inception, and thereafter for a further eight years (a total of ten years), with the intention it should be renewable thereafter. After the first two years, any Party may give advance notice in writing to end the delegation of Ofcom's powers under the Authorisation and this MOU, and the minimum notice period shall be 6 months. The exact details of what should happen as regards the allocation of costs and liabilities incurred by the Co-regulatory Parties as regards

the self-regulatory system set out in this MOU, in the event of the delegation of Ofcom's powers under the Authorisation and this MOU being terminated, shall be agreed by the Parties in due course and set out in a legally binding contract(s). But the Parties agree the following general principles to govern the allocation of costs and liabilities in the relevant contract(s).

88 If the Authorisation is terminated by Ofcom because of the incompetence of any of the Co-regulatory Parties, or material breach by any of the Co-regulatory Parties of terms of the Authorisation or of other material obligations (whether legally binding or made in good faith as reflected in the MOU, an opportunity to remedy having been given where appropriate), Ofcom shall not be liable for any costs or liabilities incurred by the Co-regulatory Parties other than those referred to in paragraph 89. In any other circumstances (including, without limitation, the Co-regulatory Parties ending the delegation of Ofcom's powers under the Authorisation as a result of Ofcom interfering in the exercise by the Co-regulatory Parties of the Ofcom functions delegated to them contrary to the terms of the Authorisation, or in breach of other material obligations, whether legally binding or made in good faith as reflected in the MOU, an opportunity to remedy having been given to Ofcom where appropriate), Ofcom will compensate the Co-regulatory Parties for reasonable and unrecovered system costs as part of a financial settlement to be set out in more detail in the legally binding contract(s) referred to above. This settlement will include any reasonable financial liabilities incurred as a result of having to give up premises.

89 In any case, reasonable costs and liabilities in connection with the transfer of staff from the Co-regulatory Parties to Ofcom will be borne by Ofcom.

Amendments to the MOU

90 Any Party to this MOU may propose alterations to it at any time, and all other Parties promise in good faith to discuss any such proposals as soon as practicable with a view to reaching agreement and amending the MOU accordingly.

Signatories to this MOU:

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