

OFCOM CONSULTATION: INITIAL ASSESSMENTS OF WHEN TO ADOPT SELF- OR CO-REGULATION

Response from The Advertising Association

Summary

1. Ofcom's remit to promote self- and co-regulation is important, but limited to the communications industries it regulates.
2. Ofcom's starting point should be to consider whether intervention is necessary at all, but if it is, promoting self-regulation (the lightest-touch option) should be the default position, rather than regulation or co-regulation.
3. The purpose of this consultation is to establish new internal guidelines for Ofcom managers to follow in promoting the above remit, not to set standards for self- and co-regulation in general.
4. Ofcom's criteria for self- and co-regulation are sensible, but intended for the mature markets of telecoms and broadcasting and not necessarily appropriate for developing markets in the communications sector.
5. Different models of self- and co-regulation are appropriate for different industry sectors and should be as light touch and flexible as possible.
6. The Advertising Association's Digital Media Group is currently leading an initiative to consider the future-proofing of the ASA/CAP self-regulatory system for advertising in digital media, and this is entirely industry-led.
7. A greater distinction needs to be made between pure self-regulation (no legal/regulatory backstop) and co-regulation (where a statutory regulator has greater power to intervene).

1. The Advertising Association

- 1.1. The Advertising Association is the policy formulator and lobbying organisation uniquely representing advertisers, agencies and media owners. It is the only organisation representing the entirety of the advertising business. More information about the Advertising Association and its members can be found at <http://www.adassoc.org.uk/>

2. Purpose of paper – Ofcom's role

- 2.1. The purpose of Ofcom's consultation is to establish commonly-agreed findings that can be incorporated into new internal guidelines for Ofcom managers to follow. It should not be to set standards for self- and co-regulation in general. Different models are appropriate for different industries and should be as light touch and flexible as possible.
- 2.2. As Ofcom "operates with a bias against intervention" (2.44), the promotion of self-regulation should be its default position, in line with the overall thrust of the Government's Better Regulation Agenda. Self-regulation is more flexible, cost-effective and swift to put in place than regulatory and co-regulatory models. (The latter involves negotiation with the regulatory body about the model and the responsibilities of the co-regulatory partners, as mentioned in 4.7, with the drawing up of a Memorandum of Understanding).

- 2.3. Ofcom has no role in evaluating or judging self-regulatory schemes outside its competence, including ones that may operate in parts of the online and non-broadcast communications sector, and yet the reader might be led to think so by this paper.
- 2.4. The principles set out for making an initial assessment whether to apply self- or co-regulation, and the list of subsequent factors in implementing self- or co-regulation are sensible, and they draw on well-tested and long-established self- and co-regulatory models such as the ASA. There is a risk, however, that if they are applied rigidly they may not give the flexibility which self-regulation, in our experience, needs.
- 2.5. The paper therefore needs to establish with greater clarity that Ofcom's remit to promote self- and co-regulation and make judgements on the acceptability or not of such schemes relates only to the communications services it regulates.
- 2.6. Pure self-regulatory schemes are usually established and led by the industry concerned. They do not rely on a regulator to assess their value or to give prior approval. Such schemes are self-governing and accountable to industry, although to be successful and publicly/politically accepted, they must operate openly, transparently and independently, and be seen to act in the public interest. Indeed, as a very last resort, self-regulatory bodies like the ASA do have recourse to legal action through other regulatory agencies and the courts, and can be held accountable through both internal and legal appeal/judicial review.
- 2.7. Some examples of successful and long-standing self-regulatory schemes established by industry that are not mentioned in Ofcom's paper, but which have been operating very successfully for many years, include:
 - the Advertising Standards Authority (ASA) (in respect of non-broadcast advertising).
 - the Portman Group for the alcoholic drinks industry
 - the Press Complaints Commission (PCC)
 - PhonePayPlus (formerly ICSTIS)
 - The preference services run by the Direct Marketing Association (DMA) that allow consumers to "opt out" of unsolicited messages by telephone, email, fax, and mail.
- 2.8. These are all long-established and operationally successful self-regulatory systems that operate in areas outside Ofcom's remit and which were all set up at industry's own initiative.
- 2.9. The Advertising Association's Digital Media Group is currently evaluating how to future-proof the self-regulatory ASA/CAP system to take into account digital media developments. In the interests of transparency, information about the DMG is available via a website that can be accessed at: <http://www.digitalmediagroup.co.uk/?q=frontpage>, and is also promoted from the home page of the Advertising Association's site. The DMG will publish a consultation document in the autumn. This is happening at the industry's own initiative; and any changes made to the ASA self-regulatory system will be made by the industry following public consultation.

3. *Self-regulatory schemes must be as light touch and flexible as possible*

- 3.1. Ofcom refers to the Internet Watch Foundation as its principal example of effective self-regulation, attributing its success to tough laws, a sophisticated system of intelligence transfer to the police, an ISP community committed to notice and take down, an informed public, and financial support by a diverse community of industry stakeholders.
- 3.2. Ofcom asks consultees for other examples and five are mentioned above. It would be worth Ofcom highlighting in the “self-regulation” section (2.17-2.32) the ASA self-regulatory model for non-broadcast advertising, which has been ring-fenced from the broadcast co-regulatory part of the ASA “one stop shop”.
- 3.3. The non-broadcast side of the ASA is a well-established, independent, robust and well-funded self-regulatory model of almost 50 years’ standing. It was set up by the advertising industry in 1962 entirely separately from any Government or regulatory intervention or initiation. It has been consistently successful in promoting confidence in the strength and efficacy of self-regulation and is regarded as a model for the rest of Europe.
- 3.4. But it is important to recognise that self-regulation can take many forms to address a variety of market situations where some level of consumer protection is required. The Internet Watch Foundation is very effective, but it is an example of self-regulation that is focused on the “extreme” - the removal of criminal online content. As such, it is backed by strong laws.
- 3.5. Other self-regulatory schemes can be effective even though they are light touch and flexible, as long as they reflect the circumstances of the market and address the needs of consumers who use the service concerned.
- 3.6. This is particularly important in nascent, fast-developing digital markets, where new products are launched in a very competitive and low-cost environment and developments happen at too fast a pace for intervention by statutory co-regulators.
- 3.7. Ofcom’s principles for effective self-regulation, which include for example KPIs, independent appeal mechanisms, and the involvement of independent members in the governing body, may be too burdensome and too costly particularly in the early days of a new scheme, and therefore not feasible. Industry may be motivated to put in place a light touch, flexible scheme that is viable, low-cost and effective, even if it does not tick all of Ofcom’s best practice boxes, and such initiatives should not be deterred.
- 3.8. One example of good practice online is the Code of Conduct agreed by IASH (Internet Advertising Sales Houses) to encourage best practice by minimising the risk of display ads placed via their networks appearing on websites which advertisers would consider inappropriate or damaging for their brands. This is an example of industry’s interests (protecting advertisers’ brands through corporate responsibility) being aligned with the interests of users in what would be a difficult-to-regulate area.

4. **Distinction between self- and co-regulation**

4.1. Ofcom’s paper sets out a common set of criteria for self- and co-regulation, but there are some important differences between the two that should be underlined. Self-regulatory models are entirely industry-initiated and run, whereas co-regulatory models involves some Government or regulatory backstop intervention. Though this key difference is mentioned briefly in paragraphs 2.17 and 2.33, there are implications for the model. This would be better highlighted if, in addition to the broadcast ASA example given under “co-regulation”, Ofcom’s examples of self-regulation could include the purely self-regulatory part of the ASA.

4.2. The following chart highlights the key differences between the purely self-regulatory part of the ASA, and the broadcast part that operates within a co-regulatory framework:

ASA self-regulation (non-broadcast) (CAP, asbof, ASA)	ASA self-regulation within co-regulatory framework (broadcast) (BCAP, basbof, ASA(B))
Set up voluntarily by industry, as a result of fear of legislative intervention, but without a Direction from Government or a regulator	Industry proposed, but subject to Ofcom contracting out (requiring the drawing up of a detailed Memorandum of Understanding between the co-regulatory Parties), as well as Parliamentary approval.
Remit covers advertising in non-licensed media (eg press, internet, direct marketing, etc). Advertisers are responsible for compliance with codes.	Remit covers broadcast media with Ofcom licences which require broadcasters to ensure compliance with codes.
Industry Code body, CAP, entirely sovereign. Neither Government nor regulator can direct it to change Codes.	Industry Code body, BCAP, can propose / make code changes, but these are subject to Ofcom approval / veto. In exceptional circumstances, Sec of State can direct, and Ofcom can instruct BCAP to make code changes.
CAP best practice is to run public consultations on major code changes, but this is not a legal or regulatory obligation.	Significant Code changes are subject to public consultation and BCAP must take advice from a consumer panel, the Advertising Advisory Committee (AAC), though BCAP can choose whether or not to follow the AAC’s advice.
Complaints adjudications published; ASA has own KPIs that demonstrate transparency and accountability, and publishes an annual report, but there is no external regulatory oversight of KPIs.	Complaints adjudications published; ASA(B) has agreed KPIs to Ofcom and must report to Ofcom how it has met them.

Annex 4

Consultation Questions

- Q1. *Do you agree that there is a need for Ofcom to have straightforward means of making an initial assessment of when to adopt a self- or co-regulatory approach rather than rely solely on its powers as a statutory regulator?*

It is helpful, for purposes of transparency, as long as it is clear that Ofcom's power to do so only extends to services within its regulatory remit. Ofcom's starting point should be to consider whether intervention is necessary at all, and, if it is, self-regulation (as the lightest-touch approach) should be the preferred option.

- Q2. *Do you believe that it is possible to define a set of objective criteria for determining co- and self-regulation?*

It is possible to set out objective criteria, but what must be avoided is the perception that all the criteria set by Ofcom must always be met. The criteria are quite onerous and costly to implement, and may act as a deterrent to responsible industry self-regulation in developing markets where low cost, light touch, and flexibility are key objectives.

The criteria could also constitute a high standard for new schemes to meet if the expectation is set that a new scheme must meet all criteria at the time it is first established. In our experience, self regulation is an evolutionary process and new schemes aspire to grow and meet good practice but that this takes time to develop.

- Q3. *Do you agree with Ofcom's proposed incentives-based approach to co- and self-regulation?*

We agree with an incentive-based approach. There have to be incentives anyway for industry to shoulder the cost and administrative burden of self- and co-regulation.

- Q4. *Do you agree with the subsequent factors Ofcom is proposing to consider for the institutional design of self- or co-regulatory schemes?*

Yes, but they are based on the most sophisticated and costly-to-run models that exist. Ofcom should not exclude simple, light touch solutions which can deliver genuine benefits to consumers. As mentioned above, flexibility is important in self-regulation so we would counsel against developing an institutional "blueprint".

- Q5. *Do you have suggestions for possible co- and self-regulatory schemes within the UK Communications sector?*

The AA is running an industry-wide Digital Media Group to agree how to future-proof the ASA system for the fast-moving digital advertising environment. It is envisaged that any changes will be made within the entirely self-regulatory part of the ASA system.