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RESPONSE OF THE ADVERTISING ASSOCIATION TO THE BETTER REGULATION EXECUTIVE CONSULTATIVE EXERCISE *EFFECTIVE CONSULTATION*

1. Preamble

1.1. The Advertising Association (AA) is a federation of 31 trade bodies and organisations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2006. Further information about the AA, its membership and remit, can be found at the following location: <http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The AA welcomes the opportunity to respond to this consultative exercise - entitled *Effective Consultation* - by the Better Regulation Executive (BRE), now located within the Department for Business, Enterprise & Regulatory Reform, on how policy across Government in this field might be improved upon. The AA responded back in 2003 to the last consultative exercise on enhancing the Cabinet Office's Code of Practice on Consultation ("the Code"), which was originally introduced in November 2000. The AA is grateful to the BRE for the short extension the Executive has granted to the Association for submission of this response.

2.2. The AA responds to all twelve of the Questions posed by the BRE in its consultation. In summary, in its response, the AA:

- (a) welcomes the existence of a set of criteria on proper consultation practice, against which Government Departments may be held to account;
- (b) strongly supports the principle that the formal, written element of consultations should run for 12 weeks;
- (c) contends that there may be a role for the National Audit Office (NAO) in monitoring the performance of Government Departments against the criteria set out in the Code;
- (d) takes the view that it is too early to comment usefully upon the success (or otherwise) of the new Impact Assessment (IA) regime introduced earlier this year;
- (e) argues that rather than being regarded as best practice, the principle that consultation should take place at regular stages throughout the policy development process should already be standard operating procedure across Government Departments;
- (f) judges that although there may be a place for alternative consultative exercises to run alongside formal written consultations, Government Departments should ensure they accord greatest weight to the latter;
- (g) endorses the calls for the adoption of better awareness-raising techniques by Government Departments around the launch of consultations and the introduction internally of more comprehensive systems to ensure all relevant stakeholders are alerted to them;
- (h) proposes how Government Departments might improve their mechanisms for providing feedback following consultations;

(i) establishes how “consultation fatigue” might be addressed through improving the transparency and quality of feedback from Government Departments following consultative exercises;

(j) considers that Government Departments should have a role in highlighting the existence of relevant consultations emanating from the European Institutions in addition to their own; and,

(k) advocates (of the alternatives put forward by the BRE) the adoption of an enhanced version of Option 1 - written consultation plus one other method – as being the consultation policy most likely to meet the objective of improving performance in this area across Government, whilst also being the one that will increase burdens on stakeholders least.

2.3. The AA also argues that the scope of the Code should be expanded to cover not just Government Departments, but be binding on all public bodies involved in conducting consultations.

2.4. The AA looks forward to publication by the BRE of: a summary of the responses it receives; a statement of how these will affect future consultation policy; and, an outline of future activity in this field (on its website) by 30 November 2007. The AA is not seeking for any part of this submission to be treated as confidential.

3. Response of the AA to the specific questions posed in *Effective Consultation*

Current policy

Question 1: Do you think the Government’s Code of Practice has led to an improvement in the way the Government consults and improved policy outcomes? Please illustrate the answer with any concrete examples you may have.

3.1. The AA does not consider it possible to answer this question with any certainty, but the Association anticipates that it is more likely than not that improvement has occurred. The AA certainly welcomes the existence of the Code as a formalised statement of how Government Departments should conduct consultation exercises and against which they may be held accountable.

Question 2: Are 12 weeks generally the right amount of time for the formal, written element of Government consultations to last? Do you think that there are circumstances where a shorter or longer duration may be more appropriate?

3.2. Yes, the AA agrees that 12 weeks is generally the right amount of time for the formal, written element of Government consultations to last. Whilst there may be occasions when a longer duration may be more appropriate, the AA considers that the period allowed for responses to be formulated should never be less than 12 weeks. (The AA notes that with this consultative exercise the BRE was able to offer a longer period, which is very welcome and provides an example of best practice, but is most notable for the fact that it is extremely rare for Government Departments to do this, at least in the experience of the Association.) Where the period allotted for consultation is set at less than 12 weeks this can cause considerable problems for organisations, given the existence of entirely separate consultative exercises (often emanating from different Departments or public bodies) running concurrently. Clearly this can have significant implications for how an organisation marshals its resources. The exertion of additional pressure as a consequence of shorter deadlines is therefore unwelcome and can have implications for the quality of responses (in terms of the provision of evidence and the like) that stakeholders are ultimately able to submit for consideration by Government Departments and other public bodies. Thus, by setting shorter

deadlines, civil servants may impact detrimentally on the quality of responses colleagues within their own Department or counterparts within one or more other Government Departments (as well as officials in public bodies) receive to the disadvantage of all concerned. Setting deadlines for responses of less than 12 weeks could therefore be perceived as something of a zero sum game.

3.3. In support of this call for the maintenance of “the 12 week principle”, the AA would cite the finding of the Stage 1 Small Firms Impact Test (SFIT) commissioned by the BRE that consultations with implications for such businesses last for at least that period. (The SFIT can be found at Annex 3 of the *Effective Consultation* document.)

Monitoring compliance

Question 3: Is the system for monitoring and promoting performance of departments in relation to the criteria in the current Code of Practice on Consultation right? What improvements could be made?

3.4. The AA considers that it is Government Departments themselves which are best placed to respond to Question 3 and not the usual stakeholder respondents to consultations. That said, in order to ensure the systems Government Departments have in place to monitor and improve performance are fit-for-purpose (and ideally the best available), the AA considers that there may be a role for the NAO here to identify areas which might benefit from tightening up.

Consultation and Impact Assessment

Question 4: Is the new approach to Impact Assessments sufficient to improve public consultation on the evidence base for Government policy-making? How could consultation policy improve consultation on Impact Assessments?

3.5. The AA considers that since the new IA regime only came into force midway through 2007 it is still too early to determine whether it will be sufficient to improve public consultation on the evidence base for Government policy-making. The AA does, however, want to register that it warmly welcomes the steps, albeit quite gradual, of the Government to make improvements in this field.

3.6. The AA is certainly of the view that it should be stated policy that Government Departments seek input from key stakeholders at the time an IA is being drawn up and policy options generated. Furthermore, based on one particular experience of the AA, there should be a duty placed on Government Departments to reflect the most recent available statistical data in each successive IA published, where an organisation is able to provide this. For example, where readily available industry statistics are cited in an IA, Government Departments should have a duty placed on them to check at each stage of the life-cycle of the Assessment in question that the most recent data are utilised. It is often the case with the implementation of European legislation, in particular, that several years may pass between any initial IA being drawn up and the final version being published alongside any implementing Regulations. To maximise the accuracy of such IAs it is essential that the most up-to-date data are utilised and incorporated within Assessments.

Consulting for the right reasons at the right time

Question 5: When in the policy development process do you think the Government should consult stakeholders? Please cite any relevant examples when you feel you have been consulted at the right or wrong time.

3.7. The AA supports the principle that consultation should take place at regular stages throughout the policy development process. The AA would argue that rather than being regarded as best practice this approach should be the only way in which consultations are conducted. In the view of the AA any other approaches should be regarded as serious deviations from what should be the normal operating practice of Government Departments. Whilst some may claim that the approach supported above could contribute to “consultation fatigue” (discussed in more detail in Paragraph 3.20 of this response below) the AA is unclear as to how any other method would, in fact, be preferable.

3.8. As to whether Government Departments break down consultations on big issues into “bite-sized chunks” for their own benefit rather than those of likely stakeholder respondents, the AA considers that it is the civil servants themselves who are best placed to answer this particular charge.

3.9. Although a rather unique example, the AA considers that the Department for Culture, Media & Sport (DCMS) should have involved the Association with the drafting of the legislation that eventually emerged as the London Olympic Games & Paralympic Games Act 2006, prior to its introduction to Parliament, given it contained a number of provisions that would impact on the advertising sector. Despite repeated attempts by the AA to engage with the DCMS prior to the ultimately successful bid, direct interaction between the advertising sector and the Government only commenced once the Bill had been introduced to Parliament. The consequence of this was the need for the AA to engage in a Parliamentary lobbying campaign in order to see improvements made to the Bill. This must have taken up resources not just on the industry side but also those of Government – a situation which might have been avoided if the DCMS had engaged with the AA at an earlier stage. The AA is hopeful that this situation will not be repeated should any similar issues arise as a consequence of the bid being made for Glasgow to host the Commonwealth Games in 2014. (Parties will only know whether the bid has been successful once the 71 Commonwealth Games Associations award the Host City Contract to either Glasgow or Abuja in Nigeria on 9 November 2007.)

How best to seek stakeholder input?

Question 6: Do you think that more emphasis should be placed on alternative or supplementary approaches to consultation in a revised consultation policy? What supplementary approach or approaches would work best for you/your organisation?

3.10. Whilst there may be a place for alternative or supplementary approaches to consulting in any revised policy approach in this sphere, the AA considers that formal written consultation should always constitute the foundation stone of any consultative exercise. The AA is already concerned that output from focus groups and citizens’ juries, and to a lesser extent online consultations, already enjoy undue weight in certain circumstances when compared with written submissions. Output from focus groups and citizens’ juries can offer a useful snapshot of views at any given moment in time, but written consultations offer the opportunity for Government Departments to receive considered responses, of which the content is likely to have been reflected upon over a period of several months from organisations with a particular expertise in a specific area. In addition, written consultation has the advantage of not requiring interested parties to have access to certain technologies nor does it oblige them to travel to particular locations. The AA is sure that Government Departments always take into account the quality of the arguments advanced and the evidence set out in written responses, rather than necessarily the simple quantity of them received that happen to support a particular view. The AA fears, however, that the placement of a greater emphasis on alternative forms of consultation could serve to

undermine that approach. Another benefit of written responses is that they are less open to different interpretations than more informal alternatives, such as output from focus groups, could be. Written submissions also constitute a more formal record of the issues raised around a particular policy proposal which may prove useful at a later date for officials as well as certain third parties, not least Parliamentary Select Committees. Indeed the Regulatory Reform Committee of the House of Commons, for example, drew on such sources in its consideration of the draft legislation from which the Legislative & Regulatory Reform Act 2006 eventually emerged - statute sponsored by the BRE itself. In conclusion, therefore, the AA is of the view that although they may have their place in the process, no additional emphasis should be placed on alternative or supplementary approaches to conducting consultative exercises in any revised consultation policy.

Awareness-raising

Question 7: How do you generally become aware of Government consultations and how would you like to learn about upcoming and current Government consultations?

3.11. The BRE cites the real-life example of a representative organisation not being included on the distribution list of a consultation exercise that had a clear bearing on the sector for which they acted. This is an experience to which the AA can also attest and encountered on more than one occasion. The most serious example was where the AA was only alerted to the existence of a consultative exercise by a third party just two weeks before the final deadline set by the Government Department in question for receipt of consultation responses.

3.12. In order to prevent the repetition of such episodes, the AA would recommend that all Government Departments allocate a staff member dedicated to “owning” relationships with key stakeholders and maintaining contact with them (as some already do), thereby ensuring relevant details are kept up-to-date. The responsibilities of these staff members should include a duty to ensure that relevant organisations are alerted to the launch of pertinent consultations. In this context, the AA should add that it is often surprised to see amongst the list of consultees usually appended to consultations incorrect or out-of-date monikers. Whilst on the subject of such appendices, on a far too frequent basis the AA has found itself cited as a consultee, yet was not directly alerted by the Government Department (or other public body) to the existence of the consultation by being sent a hard copy or, indeed, via any other means. This is clearly a deeply unsatisfactory situation, not least given its capacity to mislead third parties into believing that related entities are aware of a consultation when they are not – it is therefore an issue which should be addressed with considerable urgency.

3.13. In the normal scheme of things, the AA relies on a dedicated political monitoring company which, amongst other services, furnishes the Association with a comprehensive listing of the consultations by Government Departments and regulators (such as the Office of Communications) that the provider in question has become aware each week. (The AA is unsure of the exact mechanism used by the service provider in question to collate this information.) Whilst this service provider usually succeeds in capturing details of all such consultations, no system is fool-proof and there have been one or two occasions where the AA only became aware of a Government consultation as a consequence of, for example, a visit to a Departmental website for a completely different reason or objective.

3.14. Irrespective of the existence of such service providers, the AA is of the view that Government Departments should not shun their responsibility for ensuring they alert relevant stakeholders about pertinent consultations directly. This is not least because, whilst organisations such as the AA might be in a position to subscribe to a political monitoring service, not all stakeholders may be in a position to do so.

3.15. By way of conclusion, the AA would add that the Association entirely concurs with the comments accrued by the BRE through conducting the SFIT (referred to in Paragraph 3.3 of this response above) on the importance of Government using effective awareness-raising techniques around consultation launches, including a suitably wide range of communications channels, to achieve this objective.

Reporting back following consultations

Question 8: How do you rate the feedback you have seen from Government departments following consultations and what improvements or changes would you like to see in relation to reporting back?

3.16. Although the BRE states that it is of the view that one of the strengths of the Code is that under it Departments should report back within three months of the close of consultations, thereby mirroring the usual period given to stakeholders themselves to respond, this is not achieved by officials all too often. (In those exceptional circumstances where a Government Department may set a shorter period, such as six weeks, for stakeholders to respond, the AA considers that officials are under something of a moral obligation to publish a Government response within the same period after the deadline they have imposed on others. Once again, this does not happen all too often in practice.) The AA accepts that in some cases there may be a case for Departments delaying publication of Government responses. The AA is, however, of the view that when delays occur, in the interests of transparency, the Department in question should: notify respondents of the delay; give an adequate explanation of why the deadline will be missed; and, set a final revised (and binding) date for publication. The onus should be on Government Departments to do this rather than for organisations on their own initiative to follow up with officials on an *ad hoc* basis, as the AA has had to do on more than a few occasions. The AA considers that the BRE should monitor and record across Government the success (or otherwise) of Departments in meeting their own deadlines. This would also serve to remove the reliance of the BRE on anecdotal evidence received from stakeholders through consultations such as this one thereby enabling the Executive to adopt a more consistent and scientific approach towards monitoring the performance of Government Departments in this field.

3.17. The AA would echo the complaint levelled at Government Departments by those within business and third sector organisations (and cited by the BRE in *Effective Consultation*) that, given the time and effort stakeholders may have invested in participating, officials do not do enough to promulgate the fact that their own responses to consultative exercises have been published. (The AA also anticipates that those officials responsible for assembling Government responses might also be frustrated on those occasions where their work does not enjoy a readership simply because its availability is not publicised.) Meanwhile, the BRE states in *Effective Consultation* that: "On the consultation pages of most departmental websites, Government responses to closed consultations can be downloaded *but perhaps this is not enough.*" [BRE, June 2007: 15 (Paragraph 3.8) – emphasis added by AA]. The AA is firmly of the view that this approach is most certainly "not enough" and that the Government should become far more proactive in this area. Indeed, the AA is concerned to note that with regards to this very consultation, the BRE has only committed to publishing the response of the Executive on its website on a date on or before 30 November 2007. The AA would argue that the BRE should instead notify (via e-mail or otherwise) all respondents to the current consultative exercise just as soon as the Government response is published.

3.18. On the subject of the quality of Government responses, the AA agrees that a huge amount of variation exists and even amongst the best of such documents room can always be found for improvement. The AA considers that quality issues might best be tackled by

the development and introduction of a standardised template for Government responses, as is now the case with IAs, as well as for best practice in this area to be shared across Departments.

3.19. By way of conclusion, the AA would also add that it concurs with the view expressed in the SFIT (referred to in Paragraph 3.3 of this response above) that improved transparency should result from better provision of feedback to interested parties by Government Departments following consultation.

Consultation fatigue

Question 9: Is “consultation fatigue” an issue for you? If so, why is this and how do you think this issue could be overcome?

3.20. Although the AA recognises the issue of “consultation fatigue”, the Association considers that consultative exercises demanding a formal, written response should remain the foundation stone for best policy-making practice (as argued in answering Question 2 and Question 6 above) and that the BRE should not downgrade this status. It would be a pity if, in order to be seen to be addressing “consultation fatigue”, the BRE ignored this reality. Equally, the AA considers that Government Departments and other public bodies find themselves in something of a “damned if they do, damned if they don’t” situation in respect of consultation policy. The fact is, however, that good consultation at the outset and throughout policy development is the best way to minimise the likelihood of later regulatory failure occurring and, most importantly, safeguarding against bad laws with unforeseen consequences ever reaching the statute books. To reiterate, the pursuit of good consultation practices from the outset minimises the likelihood that resources will be invested in progressing a particular bad policy that might eventually gain a dangerous dynamic momentum of its own. The AA is firmly of the view that the best defence against “consultation fatigue” that Departments can possibly deploy is to ensure that Government responses are of the highest possible standard in terms of quality. If stakeholders can see in the most transparent manner possible how: decisions were arrived at; their views were taken account of; and, ultimately, policy determined, the AA considers that they will be encouraged to participate again in the future to the benefit of all concerned. Disengagement from Government Departments by stakeholders, if the latter perceive consultation as a complete waste of time, can surely not be to the benefit of anybody.

Other issues

Question 10: Please feel free to give us any other views you may have about the effectiveness of current consultation policy, the future of consultation policy, the case studies in this paper and other examples from the UK or elsewhere.

3.21. The AA considers that a duty should be placed on all UK Government Departments to alert stakeholders to the publication of consultations emanating from the European Institutions in which such parties are likely to have an interest. At present, awareness-raising in this area appears to occur on something of an *ad hoc*, informal basis. Further to the response of the AA to Question 7, the Association is of the view that any Departmental staff members dedicated to “owning” relationships with key stakeholders and maintaining contact with them, should also be responsible for alerting such parties to the publication of relevant consultations emerging from the European Institutions. If Departments requested copies of the responses of such stakeholders, such action would also help to inform the UK Government’s own negotiating position in Europe to the benefit of all. Such an approach may also serve to off-set the perception identified in the Stage 1 SFIT (referred to in Paragraph 3.3 of this response above) that consultation frequently appears to occur

relatively late in the policy development process, thereby making it more difficult to influence outcomes.

Options

Question 11: Do you think any of these options would make for a good consultation policy? If so, which option and what changes could be made to improve it?

3.22. The AA considers that Option 1 – written consultation plus one other method – is the core consultative policy (of the three advanced) most likely to meet with success. As the AA has already made clear on a number of occasions in this submission, support for this option is tempered by the caveat that written consultation should always enjoy primacy over any of the other consultative techniques that may run alongside it. (The reasoning for this is set out in the answers of the AA to Question 2 and Question 6 above.) In the view of the AA, this would go a considerable way towards mitigating the disadvantage identified by the Government of the possibility that “consultation fatigue” would not be addressed under Option 1 as a consequence of the existence of two consultation methods running in parallel (rather than just one, as was often the case previously). That said, clearly all stakeholders should be invited to participate in both the written consultation and any additional method. One further enhancement to Option 1 that the AA would call upon the BRE to try and achieve would be extending the scope of the Code to cover not just Government Departments, but all public bodies. Although many public bodies, such as the Gambling Commission, for example, seek to follow best practice and allow 12 weeks for responses to be submitted, the standard length of an Ofcom consultation is just 10 weeks. This 10 week period is far from ideal for the reasons already set out in this response. The AA therefore considers that this issue could most readily be resolved by bringing all public bodies within the scope of the Code and standardising the period of consultation at 12 weeks across the board.

3.23. The AA is opposed to the pursuit of Option 2 – the introduction of a new Code of Practice with a fast-track procedure – and the abandonment of the principle that consultative exercises should last 12 twelve weeks unless exceptional circumstances merit a shorter period – a policy which the Consultation Institute (CI) appears to favour. (The AA should make clear that it is not a member of the CI, which does not therefore speak for the Association, and is unclear as to the methodology by which the Institute arrived at its conclusions, upon which the BRE appears to be laying some weight by referring to the organisation in *Effective Consultation*.) As the BRE itself identifies, the benefits of shorter consultation periods fall primarily on the side of Government Departments. Furthermore, the analysis of the CI fails to take account of the fact that consultations are not necessarily launched in a neat consecutive fashion, but almost always overlap and run concurrently with at least one other consultative exercise (and often two or more) issued either by the same Department or an entirely different one. In addition to the points the AA made in its response to Question 2 above, a consultation period fixed at 12 weeks is the minimum necessary to provide an organisation with adequate time to consult internally and, in respect of a representative organisation such as the Association, its wider membership.

3.24. The AA opposes Option 3 – the adoption of a principles-based approach – given its strong support for Option 1 and because the Association can see no reason why many of the aspirations and best practice examples it contains could not be incorporated within its preferred consultation policy of having a written consultative exercise and one other additional method running alongside. For example, the AA considers that some Government Departments are already designing their consultative exercises more carefully and innovatively within the parameters set by the existing Code. In addition, the AA is concerned that in the absence of the six criteria within the existing Code, Government Departments

would revert to widely varying (and potentially more relaxed) approaches to consulting stakeholders, as was presumably the case prior to November 2000 when the document was first published. (The AA assumes that in the absence of a formal structure prior to November 2000 Government Departments must have relied upon individual principles-based approaches, yet the need for change was identified and subsequently introduced. The likelihood is therefore that reverting to a principles-based approach in respect of consultation policy would actually represent something of a retrograde step.

Question 12: Are you content with the Government's preliminary analysis that the options identified in the consultation document would not impose costs on the private or third sectors?
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3.25. No. The AA disagrees with the preliminary analysis by the Government, which concludes that the options identified in *Effective Consultation* would not impose costs on the private or third sectors. This disagreement is based on the fact that all three options have implications for internal resource allocation by stakeholders at an organisational level, even if these may be of a financial nature only indirectly. Furthermore, the opportunity costs associated with not responding to a consultation may in fact be detrimental and considerable in financial (and potentially other terms) for a particular sector. By way of conclusion, in the view of the AA, pursuing Option 2 represents the initiative most likely to increase burdens on stakeholders, whilst Option 1 is the policy least likely to do so.

5 October 2007