

Advertising Association response to the BIS consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement

September 2011

1) The Advertising Association

The Advertising Association (AA) is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media. In the UK, the advertising industry employs nearly 250,000 people. In 2010, advertising expenditure was £15.5bn.

We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry. Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

2) Overview

The Advertising Association supports any moves towards less and better regulation. Therefore, the Government's drive towards strong consumer protection delivered by a clearer and more proportional regulatory system is something we support.

We believe it is essential that both the Advertising Association and Advertising Standards Authority (ASA) are closely engaged with the process of developing the new model for consumer protection in relation to advertising. As such, we welcome the Government's recognition in this paper of the ASA's important role in resolving advertising complaints.

3) The self-regulatory system

As stated in the BIS paper, the advertising codes administered by the ASA supplement legislation and fill gaps where the law does not reach by also ensuring that advertisements are tasteful, decent and socially responsible. The system is highly effective and considered to be gold standard in self-regulation both in the UK and internationally.

The system of advertising self-regulation comprises two major elements. Firstly, advertising codes to which marketers must abide. Secondly, the ASA itself which is charged with monitoring, policing and enforcing these codes. The codes are underpinned by consumer protection legislation and reflect UK and EU law. The self-regulatory system is funded by industry but operates independently from industry in order to ensure impartiality.

The ASA is a non-statutory body and as such does not have the power to fine or take advertisers to court. The ASA's primary sanction is to have advertisements that are judged to be in breach of the advertising codes withdrawn and so prevent them from appearing again. In the vast majority of cases advertisers agree to withdraw their advertisements following an upheld complaint and these sanctions are effective. In the case of misleading non-broadcast advertising, should an advertiser fail to comply with an ASA adjudication or persistently offend, the ASA is able to refer a case to the OFT. The ASA has long been recognised as the 'established means', with referral to the OFT (or TSS) only undertaken very occasionally. While referrals are infrequent, the ASA's ability to refer cases to the OFT serves as a useful tool for the ASA in the rare circumstances of persistent non-compliance.

There are a number of reasons for the ASA's success as a self-regulatory body. But perhaps the most important is that it incorporates the national tripartite system. When advertisers, agencies, and media are all involved in the process, the chances of compliance are greatly enhanced. The ASA's effectiveness also results from proving itself to be a credible and transparent body. The effectiveness of the self-regulatory system leads to a very high compliance rate and, as such, referral to the OFT takes place only very occasionally.

4) The ASA, OFT and Trading Standards – current relationship

As stated above, the ASA is able to refer advertisers who fail to comply or persistently offend to the OFT for legal action. The OFT is able to act under the Consumer Protection from Unfair Trading Regulations 2008, which governs how businesses interact with consumers, and the Business Protection from Misleading Marketing Regulations 2008, which govern how businesses advertise to each other. Under agreement with the OFT, the ASA is considered the 'established means' for gaining compliance with both these pieces of legislation. This means that the ASA is the first point of call for addressing any problems under the advertising codes and the law is not usually enforced formally. As we have made clear, this self-regulatory approach is effective for both consumers and business, and furthermore, it reduces pressure on the court system.

The relationship between the Trading Standards Service (TSS) and the ASA is less formalised than the relationship between the OFT and the ASA. The local Trading Standards office should refer a case to the ASA as it also recognises the ASA as the established means. The TSS has enforcement powers under the same broad range of legislation governing advertising practices that the OFT has. However, the majority of referrals from the ASA are made to the OFT and not TSS. The ASA may refer a case to the local TSS if it is felt that a local TSS is more suited to settling the case. For example, if the complaint relates to misleading advertising in flyers circulated in a relatively small geographic area and it has not been easy to identify the perpetrators or to at least draw out compliance from those involved.

Both TSS and the OFT can investigate advertising complaints relating to misleading or illegal advertising but this usually only occurs after referral by the ASA. The ASA will refer cases to these bodies should persistent offence take place or if a company fails to adhere to the advertising codes. If a referral is deemed necessary, the ASA will usually refer cases to the OFT who will make the decision as to whether the case is best addressed by themselves or TSS. However, on occasions when a case relates to a localised campaign by a persistent rogue advertiser which is clearly best addressed by TSS, then the ASA may refer directly to TSS.

It is important that the relationship between the self-regulatory system and statutory bodies is maintained in the new system. The ASA's role as the "established means" for advertising regulation must be preserved.

5) AA response to Question 32: Do you believe that an enforcement model branded as run by Local Authority Trading Standards Services would deter illegal behaviour? If not, how could the threat of enforcement needed to back up self-regulatory schemes be made more credible?

We are not convinced that an enforcement model branded Local Authority Trading Standards Services would deter illegal behaviour. We believe that it is essential that the enforcement body has a name that will more clearly signal its authority and thus ensure that companies comply with self-regulatory systems such as that administered by the ASA. We believe that work needs to be done to develop effective branding for the new enforcement body. A potential improvement would be for LATSS to be renamed the "National Enforcement Office", "National Enforcement Unit", or

“Fair Trading Enforcement Unit”. Currently the ultimate threat of referral to the OFT is detailed in correspondence between the ASA and a company under investigation - this serves as a reminder of the ASA’s ability to take the case to a statutory body. It is essential that any new enforcement body has a credible, recognisable name which encourages speedy action by companies and we do not think that this is achieved by a model as branded as run by Local Authority Trading Standards Services.

While a strong name or brand for the enforcement body is essential, what is even more important is that the body created is a strong, well publicised national coordination body that is able to manage action on ASA referrals. The new body will be judged by its actions and its ability to function. Therefore, the new body will require proper funding, quality and experienced personnel, and needs to be respected as a genuine authority by Government. The effectiveness of the OFT as a consumer protection body must be recognised and it is essential that the changed structure does not diminish the high level of consumer protection that the OFT currently provides.

While it is important for the consumer protection body to be effective and able to act as the ASA’s statutory backstop in the rare cases when the ASA makes a referral, it is essential that the body does not unnecessarily duplicate the work of the ASA. The new body should focus on being intelligence led and must provide effective national leadership for TSS. We believe that the focus should be on consistent and proportionate enforcement action with the core target being against the actions of rogue traders and in the areas where there is evidence of the greatest consumer detriment. The ASA has a proven record of protecting consumers from misleading advertising and as such we anticipate that the advertising related workload for the new enforcement body will be low, as is currently the case with the OFT. Therefore, there is no need for a specific advertising division in the new enforcement body or a Primary Authority with specific expertise in advertising as this would unnecessarily duplicate the work of the ASA.

In conclusion, we ask for the new enforcement body: to be appropriately branded so as to recognise its power; to have sufficient resources so that it can be recognised as an effective body; and to only act when is necessary and not duplicate the work of other, effective self-regulatory systems, such as the one administered by the ASA.

For further information, please contact William Blomefield – 020 7340 1109/ william.blomefield@adassoc.org.uk
