



The Advertising Association

7th Floor North, Artillery House, 11-19 Artillery Row,
London SW1P 1RT

Telephone: +44 (0) 20 7340 1100 Fax: +44 (0) 20 7222 1504
e-mail: aa@adassoc.org.uk web: <http://www.adassoc.org.uk>

RESPONSE OF THE ADVERTISING ASSOCIATION TO THE OFFICE OF FAIR TRADING COMPLIANCE PARTNERSHIPS CONSULTATION ON DEVELOPING THE USE OF 'ESTABLISHED MEANS' (OFT1043con)

1. Preamble

1.1. The Advertising Association is a federation of trade bodies and organizations 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 2007. Further information about the Advertising Association, its membership and remit can be found at the following location: <http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The Advertising Association welcomes the opportunity to respond to the Office of Fair Trading (OFT) consultation OFT1043con. The consultation sets out, in draft, the principles that the OFT proposes to apply when working with regulatory partners to maximise compliance with, and reflect the intentions behind and objectives of, the Business Protection from Misleading Marketing Regulations 2008¹ (BPRs) and the Consumer Protection from Unfair Trading Regulations 2008² (CPRs). These two sets of Regulations implement the provisions of the consolidated Misleading and Comparative Advertising Directive³ (MCAD) and the Unfair Commercial Practices Directive⁴ (UCPD) respectively.

2.2. Regulation 13(4) of the BPRs and Regulation 19(4) of the CPRs impose key duties on the OFT and every other authority having responsibility for enforcing these two Statutory Instruments. The duties in question oblige these authorities, when determining how to adhere to their obligations to enforce the BPRs and CPRs, to have regard to the desirability of encouraging compliance with those two sets of Regulations via 'established means'. At present the only two bodies recognised by the OFT as 'established means' are the Advertising Standards Authority (ASA) and PhonepayPlus. In the case of the ASA, it has enjoyed the OFT treating it as 'established means' in the field of misleading and comparative advertising for the last twenty years. This has formed a key element in the successful enforcement of the legislation governing this field, and thus the protection of consumers and indeed businesses, over that period.

2.3. In summary, in this submission, the Advertising Association:

- argues that if the OFT bestows 'established means' status on new bodies, it should seek to minimise the risk of this important and proven alternative to direct statutory regulation becoming devalued as a consequence of any expansion in its use;

¹ Statutory Instrument No. 2008/1276

² Statutory Instrument No. 2008/1277

³ Directive 2006/114/EC "concerning misleading and comparative advertising"

⁴ Directive 2005/29/EC "concerning unfair business-to-consumer commercial practices in the internal market"

- encourages the OFT to clarify in the Principles themselves, through minor amendments, that they are meant to cover both business-to-consumer and business-to-business activities; and,
- proposes that in order to achieve 'established means' status, a body would have to demonstrate to the OFT possession of all twelve of the factors it has drawn up for assessing the likely ability, or otherwise, of a regulatory partner to encourage compliance with the BPRs and CPRs.

2.4. The Advertising Association looks forward to publication by the OFT of a formal summary of the responses it receives to this consultative exercise in spring 2009 together with the final version of the Principles to be adopted. The Advertising Association is grateful to the short extension granted to it by the OFT for submitting a response. No part of this submission should be treated as if it were confidential in nature.

3. General comments of the Advertising Association on 'established means' status

3.1. The Advertising Association welcomes the attempt by the OFT to define what it considers as constituting 'established means' and allowing that status to be bestowed, if certain minimum criteria are met, on organisations other than the ASA and PhonepayPlus. In doing so, the OFT should ensure that as a result of extending 'established means' status to new bodies, the currency of this important and proven alternative to direct statutory regulation is not diluted or diminished. Given that the draft OFT Principles represent minimum criteria, if organisations do achieve 'established means' status, they should still be encouraged to exceed those standards once gained. It is noteworthy in this context that one of the specific questions posed by the OFT in its consultation is whether the requirement for public accountability should be more demanding. The Advertising Association is of the view that it almost certainly should.

3.2. There are many self-regulatory systems that: operate very successfully; encourage compliance with some or all of the same activities governed by the BPRs and CPRs; and, are widely respected. It will therefore be important for the OFT to avoid portraying 'established means' as some sort of special standard against which existing or future self-regulatory systems should be encouraged either to measure themselves or seek to achieve that status. Whilst the Advertising Association considers that the explicit reference to 'established means' in the BPRs and CPRs (and the duties they impose on enforcement authorities) is helpful, the Directives they implement both allow for self-regulatory mechanisms⁵ for delivering their objectives. The absence of explicit references to self-regulation in the BPRs and CPRs should not therefore deter the OFT and enforcing authorities from encouraging compliance with those Regulations through self-regulatory mechanisms as well as 'established means', even if the statutory duty only explicitly makes reference to the latter term.

4. Specific comments of the Advertising Association on the draft set of OFT Principles

OFT Principle 1: "In circumstances where the OFT is aware of or suspects non-compliance with the Regulations, it may seek to refer the matter to 'established means' in line with its prioritisation principles."

4.1. Whilst the Advertising Association anticipates that the Principles will not be published in isolation, it would still be considered helpful were the OFT to spell out more precisely in

⁵ Whilst the MCAD explicitly refers to "self-regulation", the UCPD does not. The terminology used in the UCPD is, however, equivalent.

Principle 1 their applicability to the CPRs *and* the BPRs, if there is to be a single set of criteria for 'established means' covering both these sets of Regulations.

4.2. The view is also taken that, in order to preserve the value of 'established means' status, Principle 1 deserves to be rendered more positive by replacing "may" with "should" or, preferably, "will". The fact that Principle 1 requires the OFT (and presumably, through its leadership role, other enforcement authorities) to "seek to refer", rather than automatically refer matters to 'established means' already provides the Office with more than sufficient flexibility and latitude in determining how it will encourage compliance with the BPRs and CPRs.

4.3. In order to reflect the points made above, the following re-draft of Principle 1 is recommended: "In circumstances where the OFT is aware of or suspects non-compliance with the BPRs and/or CPRs, it will seek to refer the matter to 'established means' in line with its prioritisation principles."

OFT Principle 2: "The OFT will seek to refer a matter to the compliance partner best placed to resolve the problem."

4.4. The Advertising Association fully supports the wording of Principle 2 in isolation, but considers it necessary to comment on the factors that the OFT will take into account when assessing the suitability of partners to encourage compliance with the BPRs and CPRs.

4.5. In introducing the assessment factors that appear beneath Principle 2, the OFT couches its language in terms of the CPRs alone (which are aimed at protecting consumers) rather than both that Statutory Instrument and the BPRs, which cover marketing practices between businesses. The Advertising Association considers that, if this introduction to the assessment factors is to survive (and to avoid having a separate set of Principles covering the BPRs and CPRs), then the OFT must address this discrepancy.

4.6. Following the same logic and in terms of the assessment factors themselves, the Advertising Association recommends that the OFT should, accordingly, extend the existing criteria concerning the nature and seriousness of the unfair commercial practice to misleading marketing practices that may damage businesses as well. This could be achieved by expanding the existing assessment factor about the "degree of compliance partner's alignment with consumer interests" to talk of "the public interest", thereby covering off both consumers and businesses within its scope.

OFT Principle 3: "In certain circumstances there may be multiple mechanisms for addressing non-compliance."

4.7. The Advertising Association considers that Principle 3 constitutes guidance around Principle 2 (rather than a separate entity in its own right) and could therefore safely be merged through appending the sub-clause "which may in turn seek to liaise with other interested parties" to the second Principle. A significant risk would otherwise exist that regulatory confusion would be the outcome if there was not understood to be a lead 'established means' in a particular set of circumstances.

4.8. This concern is well-illustrated by the hypothetical scenario created by the OFT to support the rationale behind Principle 3, which causes the advertising industry considerable anxiety, if it represents an accurate portrayal of the current view of the Office. The Advertising Association is firmly of the view that in the event that the OFT received a complaint about the misleading nature of an advertisement produced by a gas provider (as the scenario portrays), that complaint should be referred in the first instance to the ASA

alone and not Ofgem (or indeed both organisations in tandem). To be clear, a complaint received by the OFT about a supply of service issue involving a gas provider should be referred to its fellow statutory regulator - Ofgem, but any about an advertisement by that same company should be referred to the ASA. This would not prevent the ASA subsequently liaising with Ofgem about a questionable advertisement or indeed with any other relevant body with regulatory responsibilities in a particular sector. The scenario described by the OFT also appears at odds with the Ministerial statement offered during the passage of the BPRs and CPRs through Parliament in 2008 that complaints about advertising would ordinarily continue to be referred by the Office to the ASA⁶.

4.9. The ASA, supported by the industry it regulates, has worked hard to establish itself over many years as the one-stop shop for advertising complaints across both different media and sectors. The Advertising Association would therefore appreciate some comfort from the OFT that the scenario the Office sets out to support the intention behind Principle 3 does not actually describe how it would, on reflection, deal with a complaint about, for example, a misleading advertisement published by a gas provider.

OFT Principle 4: "Compliance partners that may be considered to be effective means of addressing non-compliance are likely to be able to demonstrate a combination of the following factors:"

4.10. The Advertising Association supports the intent of the OFT in drawing up Principle 4 and the factors it will look for in those bodies to which it is considering awarding 'established means' status. These factors are made up of four qualities (including that it be recognised by the community from which it seeks regulatory compliance) and eight mechanisms (for example, possessing systems to set requirements), all of which are regarded as sensible and desirable.

4.11. Whilst the Advertising Association considers that the twelve factors form a sufficiently exhaustive list, where it diverges from the position of the OFT is that in its view bodies being considered for the award of 'established means' status should be able demonstrate (like the ASA does) all twelve factors and not just various combinations thereof. The following redraft of OFT Principle 4 is therefore recommended: "In order for compliance partners to be considered effective means for addressing non-compliance they should be able to demonstrate possession of all the following factors:".

OFT Principle 5: "The OFT continues to be under a duty to enforce legislation."

4.12. The advertising industry considers Principle 5 to be an accurate reflection of the requirements of the BPRs and CPRs, in addition to being proportionate and reasonable. It is considered, however, that once 'established means' status has been granted to a body in a specified field of activity, this duty to enforce legislation by the OFT (and other enforcement authorities) should be applied directly as sparingly as possible. If this approach is not adopted, there appears little point either to the OFT bestowing 'established means' status on a body, or indeed for the organisation in question to expend resources on seeking to achieve it in the first place. Principle 5 could be amended so as to reflect the fact that although the OFT does indeed have a duty to enforce legislation, it would not ordinarily intervene where 'established means' are already in place. The following redraft of Principle 5 is therefore recommended: "Ultimately the OFT continues to be under a duty to enforce legislation."

12 March 2009

⁶ Lord Tunnicliffe, House of Lords, 23 April 2008, Hansard Column 1566