



**Designation pursuant to section 368B of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of advertising included in on-demand programme services**

**WHEREAS:**

- (1) Section 368B(2) and (3) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of on-demand programme services following the coming into force of the Audiovisual Media Services Regulations 2009 ("the 2009 Regulations")<sup>1</sup> and the Audiovisual Media Service Regulations 2010 ("the 2010 Regulations")<sup>2</sup>;
- (2) Section 368B(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368B(9) to be, to the extent provided for in the designation, the appropriate regulatory authority for the purposes of any provision of Part 4A of the Act;
- (3) Ofcom has, by way of a consultation document entitled Proposals for the Regulation of Video on Demand Services published on 14 September 2009<sup>3</sup>, proposed to designate certain of its functions in relation to the regulation of on-demand programme services to the Advertising Standards Authority Limited (Registered number 733214) ('the ASA');
- (4) Ofcom, in making this Designation, has duly considered and taken into account all the responses to that consultation document as set out in Ofcom's statement published on 18 December 2009<sup>4</sup>;
- (5) Ofcom is satisfied on the basis of ASA's written undertakings to Ofcom, dated 23 July 2010 and annexed to this Designation, and on the basis of the relevant information provided to it, including the ASA's proposal to be designated as the co-regulator for advertising included in video on-demand programme services (attached as Annex 8 to Ofcom's September consultation<sup>5</sup>) that:
  - (i) the ASA is a fit and proper body to be so designated,

<sup>1</sup> SI 2009/2979

<sup>2</sup> SI 2010/419

<sup>3</sup> <http://www.ofcom.org.uk/condocs/vod/vod.pdf>

<sup>4</sup> <http://www.ofcom.org.uk/consult/condocs/vod/statement/vodstatement.pdf>

<sup>5</sup> *ibid*

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- (ii) the ASA will ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular:
    - a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Communications Act 2003 ('the Act') as appear to be relevant to it in the circumstances;
    - b. to consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act;
    - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
  - (iii) the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Function;
  - (iv) the ASA is sufficiently independent of providers of on-demand programme services; and
  - (v) the ASA has consented to being so designated.
- (6) Ofcom is satisfied that in making this Designation it has acted in accordance with its duties under the Act;

**NOW THEREFORE BY VIRTUE OF PART 4A OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:**

1. Ofcom in exercise of the powers conferred on it under section 368B of the Act hereby designates the ASA, for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368R of the Act) for the purpose of carrying out the function set out in Paragraph 5 of this Designation in relation to advertising included in on-demand programme services to the extent and subject to the Obligations, Conditions and other such circumstances as are described in this Designation ('the Designated Function').
2. This Designation incorporates the Schedules and Annex which form part of this Designation for all purposes and includes such variations as from time to time may be made by Ofcom in accordance with paragraphs 9 and 10 of this Designation.

3. This Designation shall be legally binding and, as Ofcom's designee, the ASA shall be liable to Ofcom for any failure to carry out the Designated Function in accordance with the terms of this Designation.

#### Interpretation of terms

4. The following terms referred to in this Designation shall have the following meanings:
  - (i) 'Designated Function' has the meaning given in Paragraph 1 of this Designation;
  - (ii) 'Rules' shall be construed in accordance with Paragraphs 6(ii) and 7(iv) of this Designation;
  - (iii) 'relevant requirements of the Act' means the requirement set out in section 368D(1) of the Act as it applies in relation to sections 368E (insofar as they relate to advertising included in an on-demand programme service) and section 368F of the Act;
  - (iv) 'Service Provider' means a provider of an on-demand programme service;
  - (v) for the purposes of this Designation, 'advertising' is included in an on-demand programme service and therefore subject to the exercise of powers under this Designation, if, in accordance with section 368R(3) of the Act, it can be viewed by a user of the service as a result of the user selecting a programme to view; and
  - (vi) other terms and expressions used in this Designation shall have the meanings given to them in the Act.

#### The Designated Function

5. Ofcom designates the ASA to carry out the following function:

In accordance with section 368C(1) of the Act, to take such steps as appear to the ASA best calculated to secure that the relevant requirements of the Act are complied with by Service Providers.

#### Powers

6. In carrying out the Designated Function the ASA shall exercise the following powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:
  - (i) to decide what constitutes 'advertising included in an on-demand programme service' in accordance with section 368R(3) of the Act for the sole purpose of applying the Rules and having regard to guidance that has been approved by Ofcom;

- (ii) to publish (or have published) Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act;
- (iii) to secure that accompanying guidance to aid interpretation of those Rules is prepared and published;
- (iv) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the Rules and to require the Service Provider to co-operate fully and promptly to secure compliance with its decision;
- (v) to refer any particular case to Ofcom to determine whether there has been a contravention of any of the relevant requirements of the Act;
- (vi) to carry out, commission or support (financially or otherwise) research in connection with its Designated Function (section 368B(11)); and
- (vii) to use any recording, script or transcript provided to it in connection with its performance of any of the Designated Function as permitted under section 69(5) of the Copyright, Designs and Patent Act 1988 (as inserted by Regulation 12(2)(c) of the Regulations).

#### Obligations and Conditions

7. In carrying out the Designated Function and in exercising the Powers set out in Paragraph 6 above the ASA shall comply with the following Obligations and Conditions:
- (i) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:
    - (a) to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
    - (b) to consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
    - (c) to comply and secure that its staff comply with section 393 of the Act (confidentiality);

- (ii) following referral or appeal to Ofcom, to accept any decision of Ofcom as to whether advertising is included in an on-demand programme service;
- (iii) to require every Service Provider to secure that advertising included in the service they provide complies with the Rules;
- (iv) to ensure that the Rules are expressed as the relevant requirements of the Act are expressed without material additions or omissions, as follows:
  - (a) that advertising included in on-demand programme services does not contain any material likely to incite hatred based on race, sex, religion or nationality;
  - (b) that if advertising included in such a service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it;
  - (c) that advertising of the following products is prohibited in on-demand programme services:
    - i. cigarettes or other tobacco products;
    - ii. any prescription-only medicine (as defined in section 368R of the Act);
  - (d) that advertising of alcoholic drinks is prohibited in on-demand programme services unless —
    - i. it is not aimed at persons under the age of eighteen, and
    - ii. it does not encourage excessive consumption of such drinks;
  - (e) that advertising included in an on-demand programme service:
    - i. must be readily recognisable as such; and
    - ii. must not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously;
  - (f) that advertising included in an on-demand programme service must not:
    - i. prejudice respect for human dignity;
    - ii. include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
    - iii. encourage behaviour prejudicial to health or safety;
    - iv. encourage behaviour grossly prejudicial to the protection of the environment;



- v. cause physical or moral detriment to persons under the age of eighteen;
  - vi. directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;
  - vii. directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
  - viii. exploit the trust of such persons in parents, teachers or others; or
  - ix. unreasonably show such persons in dangerous situations.
- (v) to consult with Ofcom in securing the preparation of interpretative guidance to the Rules (and any subsequent material changes to that guidance), and to obtain Ofcom's prior written approval of such guidance before it is published, or any changes to it are published;
- (vi) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:
- (a) that it is provided only in order to aid interpretation of the Rules in light of the relevant requirements of the Act; and
  - (b) that compliance with the Rules will not necessarily be taken by Ofcom to be compliance with the relevant requirements of the Act;
- (vii) to have in place and publish appropriate and robust complaints handling processes in order to carry out the Designated Function, such processes to be formulated in consultation with Ofcom;
- (viii) to handle complaints received by it and any passed to it by Ofcom in accordance with its obligations in this Designation;
- (ix) to comply with the reporting obligations set out in the Schedule this Designation;
- (x) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xi) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the Rules, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as he or she may authorise, a Service Provider has:
- (d) failed to comply fully and promptly with a decision of the ASA;
  - (e) failed to co-operate fully and promptly with a decision of the ASA;

- (f) demonstrated a repeated disregard for the reasonable requests or decisions of the ASA; or
- (g) has committed one or more breaches of the Rules of sufficient seriousness so as to warrant in the ASA's opinion investigation by Ofcom;

and to refer those matters to Ofcom (together with copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom;

- (xii) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a Service Provider may have breached the Rules due to the inclusion in the service of advertising that contains material likely to encourage or to incite the commission of crime, or to lead to disorder and where the potential contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
- (xiii) to cooperate fully with Ofcom at all times, including:
  - (h) to consult Ofcom, as appropriate, in cases where there is any doubt in connection with the Designated Function and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
  - (i) to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xiv) to consult Ofcom and the Association of Television on Demand (ATVOD) as appropriate in cases where there is doubt or disagreement as to whether a service constitutes an on-demand programme service for the purposes of section 368A(1) of the Act or, as appropriate, in connection with any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
- (xv) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Function for any reason and/or can no longer satisfy the relevant requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Function and in each case to use its best endeavours to resolve any such issues promptly; and
- (xvi) in the event that the ASA no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Function and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Function, setting out its reasons.



8. For the avoidance of doubt, this Designation shall not be revoked except in accordance with Paragraphs 15 and 16 below.

**Variation of this Designation**

9. Ofcom may vary this Designation at any time, subject to Ofcom notifying the ASA in writing not less than thirty days prior to the date that the proposed variation is to come into force in order to give the ASA a reasonable opportunity to comment or, exceptionally, in such lesser period as Ofcom considers appropriate.
10. The ASA may also request a variation of this Designation at any time for Ofcom's consideration. Any variation will take effect only on Ofcom signing and issuing a notice of variation to that effect.

**Duration of this Designation**

11. This Designation is to have effect from 1 September 2010 and to continue for a period of ten years from the date it has effect ("the expiry date") or until such time as it is revoked in accordance with Paragraphs 15 and 16 below.
12. No less than twelve months before the expiry date, Ofcom and the ASA shall discuss in good faith a renewal of this Designation for a further ten year period, or for such other period as they may agree; the decision whether or not to renew shall rest with Ofcom.

**Review of this Designation**

13. This Designation shall be subject to a formal review by Ofcom at the expiry of two years from this Designation taking effect.

**Publication of this Designation**

14. Ofcom shall publish this Designation in such manner as it considers appropriate for bringing it to the attention of persons who, in its opinion, are likely to be affected by it. The ASA shall publish this Designation in the same manner as Ofcom and subsequent to Ofcom having first published it.

**Revocation of this Designation**

15. Ofcom may revoke this Designation in accordance with section 368B(7) of the Act.
16. Ofcom must revoke this Designation if it is no longer satisfied that the ASA is able to satisfy the requirements for being the appropriate regulatory authority set out in section 368B(9) of the Act or if the ASA no longer consents to being designated, having first notified Ofcom in accordance with the obligations in Paragraph 7(xvi) above.



17. In exercising its powers to revoke under Paragraphs 15 and 16 above, Ofcom will give reasonable notice to the ASA of its intention to revoke and will give the ASA an opportunity to make representations and, where in the circumstances Ofcom considers it appropriate, an opportunity to take any remedial steps within such period as Ofcom requires; that period of notice being of such period as Ofcom shall determine to be appropriate in all the circumstances.

#### For the Avoidance of Doubt

18. The duties and obligations that apply to each of Ofcom and the ASA as an appropriate regulatory authority include those referred to in Paragraph 7(i) of this Designation as well as public law duties such as the duty to act reasonably in all the circumstances.
19. The ASA is only empowered to carry out the Designated Function and exercise the powers specifically designated to them in this Designation. Accordingly, and for the avoidance of doubt, the ASA is not the appropriate regulatory authority in relation to any function set out in the Act that does not form part of the Designated Function (including in particular, all of the functions designated to ATVOD, the power under section 368I of the Act to determine in relation to advertising included in an on-demand programme service that a Service Provider is contravening or has contravened the relevant requirements of the Act and the powers under section 368I, 368K and 368L associated with the enforcement of those requirements).
20. Compliance by Service Providers with the Rules will not necessarily be taken to be compliance with the relevant requirements of the Act and the ASA's investigation and recommendation will not be binding on Ofcom;
21. Any Notice given by the ASA under Paragraph 7 (xv) and (xvi) above, would not have the effect of revoking this Designation unless or until Ofcom decided to revoke in accordance with Paragraphs 15 and 16 above.
22. The ASA may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
23. Where the ASA is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of the ASA (section 368B(3) of the Act) and will notify the ASA as appropriate.
24. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368B(2) of the Act).
25. Where there is any inconsistency or conflict between the provisions of this Designation and the provisions of the Act, the provisions of the Act shall prevail.

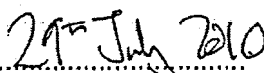
#### Ofcom's Commitments to the ASA

26. Ofcom shall consider any referrals from the ASA promptly and if having taken into account any representations from the relevant Service Provider, Ofcom determines that section 368D of the Act has been contravened, take such steps as it considers appropriate by way of enforcement action against the Service Provider.
27. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements.
28. Subject to any restriction in law, Ofcom shall provide the ASA with such assistance and information as the ASA may reasonably require from time to time under section 368B(4) and (10)(c) of the Act, including, where appropriate, assisting in relation to the carrying out of impact assessments.
29. Ofcom shall have regard to any comments made by the ASA under Paragraph 9 and shall consider in good faith any requests made by the ASA from time to time under Paragraph 10 for a variation of this Designation.

Signed:

Date:

  
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**Stewart Purvis,**  
Partner, Content and Standards, Ofcom

Person duly authorised in accordance with Paragraph 18 of the Schedule to the Office of Communications Act 2002

## SCHEDULE

### Reporting Obligations and Key Performance Indicators

#### Reporting Obligations

1. The ASA shall report to Ofcom on the carrying out of its Designated Function as set out below.
2. The ASA shall by no later than the end of April each year, provide Ofcom with a written report detailing its exercise of the Designated Function in the preceding calendar year.
3. The report shall include quantitative and qualitative information regarding complaints received and handled and the monitoring of the standards set out in the Rules.
4. In particular, the report in paragraph 3 of this Schedule, shall include the following information:
  - (i) the number of complaints received;
  - (ii) the number of advertisements about which complaints have been received;
  - (iii) the number of complaint cases investigated by the ASA and the status of those cases i.e. 'informal investigation', 'not investigated after preliminary work' and 'full investigation' (using the same categories as for completed broadcast advertising cases);
  - (iv) the number of cases where advertising in on-demand programme services has been (a) upheld and (b) upheld in part as a breach or breaches of the Rules.
5. The Chairman and/or Chief Executive of the ASA will report in person on the matters set out in this Designation to Ofcom's Content Board at meetings of the Content Board as reasonably requested by Ofcom.
6. The ASA shall forthwith provide such information and assistance to Ofcom as Ofcom shall from time to time reasonably require for purposes connected with Ofcom's (or another designated body's) functions under Part 4A of the Act and generally to assist Ofcom to review how effectively the ASA has exercised, or is exercising its Designated Function.

#### Key Performance Indicators

The ASA shall seek to resolve 80% of cases within the number of working days indicated in the table below, depending on the nature of the case.

Turnaround times for complaints	
Not Investigated	5
Not Investigated after preliminary work	10
Not Investigated after Council decision	25
Informal investigation	35
Standard investigation	85
Complex investigation	140

**ANNEX**

**Written undertakings provided by the ASA to Ofcom**



Advertising Standards Authority  
Mid City Place 71 High Holborn London WC1V 6QT  
Telephone 020 7492 2222 Fax 020 7242 3696  
Textphone 020 7242 8159 E-mail enquiries@asa.org.uk  
Online www.asa.org.uk

Stewart Purvis  
Partner, Content and Standards  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HAT

23 July 2010

By email and post

Dear Stewart,

I am writing as Chairman of the Advertising Standards Authority ("the ASA") to provide the ASA's written undertakings in relation to each of the criteria which need to be satisfied before it can be designated by Ofcom as the appropriate regulatory authority for VOD advertising content, including each of the statutory criteria set out in Section 368B of the Communications Act 2003 ("the Act"). We also confirm our consent to being designated below. For the avoidance of doubt, all references to "the ASA" in this letter refer to the ASA (non-broadcast).

In light of Ofcom's statement of 18 December 2009 on the regulation of video-on-demand services, following public consultation, ASA believes it satisfies the criteria for designation as the appropriate regulatory authority for video-on-demand advertising content. We note in particular Ofcom's comment, in that statement, that

*The regulation of video on demand advertising*

1.22 In our Consultation, we outlined the ASA Proposal for designation as the co-regulator for VOD advertising. In Section 5 of this Statement, having undertaken our assessment according to both the statutory and the regulatory criteria; and noting respondents' support for the ASA Proposal, Ofcom is of the view that the ASA satisfies the criteria required by the Regulations for a designated body. Accordingly, we are continuing to discuss with the ASA the appropriate terms for designation. In the meantime, Ofcom will deal with any issues relating to the relevant statutory VOD advertising standards, as listed in paragraph 5.4 below as they arise.

Accordingly, the ASA now undertakes that:

(a) it is a fit and proper body to be designated;

- *The ASA has proved itself an efficient and effective regulator of advertising. It has robust governance structures, maintaining a separation between the industry-led committees that maintain the Codes (CAP and BCAP) and the*

Chairman Rt Hon Lord Smith of Finsbury • Chief Executive Guy Parker  
ASA Council (Non-broadcast) James Best • Louisa Bolch • Sally Cartwright • Elizabeth Fagan • Gareth Jones • John Mayhead • Andrew Motion • Colin Philpott • Ruth Sawtell • Anthony Wilkes • Diana Whitworth • Neil Watts

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*independent adjudicatory body (ASA Council). It is widely recognised and respected by consumers and those involved in the advertising industry (advertisers, agencies and media owners). ASA has no reason to consider that it is not in any respect a fit and proper body to be designated;*

(b) it has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;

- *The Chairman of the Advertising Standards Board of Finance, which funds the ASA, is writing to you separately to confirm that it will make sufficient funds available to the ASA.*

(c) it is sufficiently independent of providers of on-demand programme services;

- *The ASA (non-broadcast) Council consists of four members who have experience in the advertising or media industries (James Best, Elizabeth Fagan, Sally Cartwright and John Mayhead) and eight lay members (Louisa Bolch, Gareth Jones, Andrew Motion, Colin Philpott, Ruth Sawtell, Anthony Wilkes, Diana Whitworth and Neil Watts). Whilst the members of the Council change regularly, the ratio of industry to lay members is always 1:2.*

and

(d) it will, in performing any function to which the designation relates, have regard in all cases ----

(i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;

and

(ii) to such of the matters mentioned in section 3(4) of the Act as appear to the body to be relevant in the circumstances;

- *The ASA has a long-standing commitment to realising the principles of better regulation. It will perform its designated functions in a manner which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;*
- *The ASA will have regard, among other factors, to the desirability of preventing crime and disorder. It will promptly refer to Ofcom any advertising that it considers may have failed to comply with any requirement of section 368E to 368H of the Communications Act, and that accordingly may have contravened section 368D(1), due to the inclusion of material likely to encourage or to incite the commission of crime, or to lead to disorder;*
- *The ASA will take all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular the obligation to consult and carry out impact assessments in relation in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and*

- *The ASA will comply and secure that its staff comply with section 393 of the Act (confidentiality).*

In addition, I confirm that the ASA consents to being designated by Ofcom as the appropriate regulatory authority for the purpose of carrying out the functions which Ofcom delegates to it, to the extent specified by, and on the terms and conditions set out in Ofcom's published designation document.

Yours sincerely

**Rt Hon Lord Smith of Finsbury**  
**Chairman**