



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

Solicitor to the Leveson Inquiry  
c/o Royal Courts of Justice  
Strand  
London  
WC2A 2LL

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## **Leveson Inquiry into the culture, practices and ethics of the press**

### **Witness statement**

**The Rt Hon. Lord Smith of Finsbury, Chairman, Advertising Standards Authority**

#### **Introduction**

Thank you for your letter of 8 August, requesting a submission from the Advertising Standards Authority (ASA) to assist your Inquiry, and including a Notice under section 21(2) of the Inquiries Act 2005. I am delighted to make a submission, as requested, on behalf of the ASA.

The Advertising Standards Authority (ASA) is the UK self-regulatory body for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.

In line with the requirements of the section 21(2) Notice, my submission will include the following:

1. A brief summary of my career history.
2. A comprehensive overview of the ASA system covering its origins, status, history, organisation, remit, authority and powers.
3. The steps the ASA system takes to discharge its regulatory function.
4. The ASA's experience of regulating the media, in particular in relation to phone hacking, computer hacking, "blagging", bribery and/or corruption.
5. My views on the strengths and weaknesses of the ASA system and what steps might be taken to improve our regulatory framework.

Chairman Rt Hon Lord Smith of Finsbury • Chief Executive Guy Parker  
ASA Council • Louisa Bolch • Sally Cartwright • Rachel Childs • Elizabeth Fagan • Ray Gallagher • David Harker • Gareth Jones • John Mayhead • Andrew Motion • Martin Narey • Hamish Pringle • Ruth Sawtell • Anthony Wilkes

The Advertising Standards Authority Limited, registered in England No 733214, Mid City Place, 71 High Holborn, London WC1V 6QT.  
The Advertising Standards Authority (Broadcast) Limited, registered in England No 05130991, Mid City Place, 71 High Holborn, London WC1V 6QT.

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It is worth clarifying from the outset that the UK advertising self-regulatory system is broadly divided into three parts, which together create a cohesive regulatory system.

First of all the Committee of Advertising Practice (CAP) is the industry body that writes and creates the UK Advertising Codes. The Committee of Advertising Practice (non-broadcast) writes the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing and the Committee of Advertising Practice (broadcast) writes the UK Code of Broadcast Advertising.

The UK Advertising Codes are administered by the ASA, which legally is split into two bodies, the ASA (non-broadcast) and the ASA (broadcast), but is viewed as a single body by the public.

Finally there is the Advertising Standards Board of Finance (non-broadcast) and the Broadcast Advertising Standards Board of Finance, which are the arms-length industry bodies responsible for raising the funds to pay for the system.

Together, I will describe these bodies as 'the ASA system', and this statement will provide a detailed overview of all aspects of the system.

The documents which are to form the second part of my submission are referenced throughout my statement as **Annexes A-U**.

## **1 Career History**

- 1.1 I am Rt Hon Lord Smith of Finsbury (Chris Smith), and I have been Chairman of the ASA since July 2007.
- 1.2 For 22 years, from 1983, I was the Labour Member of Parliament for Islington South and Finsbury, and from 1997 to 2001 I served in the Cabinet as Secretary of State for Culture, Media and Sport. I was a Member of the Committee on Standards in Public Life from 2001 to 2004. I stood down from the House of Commons in 2005, and became a Life Peer in July that year; as a result of my public positions I now sit as a non-affiliated Peer on the Crossbenches in the Lords.
- 1.3 I was the Founding Director of the Clore Leadership Programme (a charity providing leadership development in the arts and culture) from 2003 to 2008; I became Chairman of the ASA in 2007; and I also became Chairman of the Environment Agency for England and Wales in July 2008. I have recently been re-appointed for a further term to both

positions. I have also recently been asked to chair a review of policy on the film industry for Ministers in the Department for Culture Media and Sport (DCMS), due to report in December.

- 1.4 One of the requirements for appointment as Chairman of the ASA is that you must not have had any prior involvement within the advertising industry.

## **2 An overview of the ASA / CAP system**

### **2.1 Origins / History**

- 2.1.1 In 1961 the Advertising Association<sup>1</sup>, together with other industry associations, coalesced around the principle that it was important to ensure that advertisements in non-broadcast media were welcomed and trusted by consumers (broadcast ads were at that point controlled by legislation and overseen by statutory regulation).
- 2.1.2 The body now known as the Committee of Advertising Practice (CAP)<sup>2</sup> was formed. It comprised (and still does) representatives from all parts of the advertising industry, namely the tripartite of advertising agencies, media space owners and advertisers. CAP produced the first edition of the British Code of Advertising Practice in 1961 and established the Advertising Standards Authority (ASA)<sup>3</sup> in 1962 to administer the Code independently and in the public interest.
- 2.1.3 The Advertising Standards Board of Finance (Asbof<sup>4</sup>) was set up in 1975 to put the system on an independent and secure financial footing. It did this through the introduction of a voluntary 0.1% levy on advertising spend and a voluntary 0.25% levy on direct mail bulk contracts (since reduced to 0.2%). The levy is collected at arms-length, so the ASA does not know who is paying for regulation.
- 2.1.4 In 1988, the introduction of the Control of Misleading Advertisements Regulations 1988 (implementing the Misleading Advertising Directive) provided the ASA with a legal backstop. This means that since this date

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<sup>1</sup> The Advertising Association (AA) is the UK trade association that represents all sides of the advertising industry - advertisers, agencies, media, and research services. More information is available at [www.adassoc.org.uk](http://www.adassoc.org.uk).

<sup>2</sup> More information about CAP can be found at [www.cap.org.uk](http://www.cap.org.uk).

<sup>3</sup> More information about the ASA can be found at [www.asa.org.uk](http://www.asa.org.uk)

<sup>4</sup> More information about ASBOF is available on its website <http://www.asbof.co.uk/>

we have been able to refer businesses that refuse to comply with ASA rulings to the Office of Fair Trading (OFT).

- 2.1.5 In 2004, Ofcom, in a move approved by Parliament, took the decision to contract-out responsibility for broadcast (TV and radio) advertising to the ASA system in a co-regulatory partnership. New institutions were created: the ASA (broadcast), CAP (broadcast) and Basbof. These mirrored the existing institutions responsible for non-broadcast advertising regulation. CAP (broadcast) was created to write and maintain the TV and radio Advertising Codes (which, since September 2010 have been merged into a single Code); ASA (broadcast) was established to administer the rules and Basbof to raise the funding for regulation. This co-regulatory agreement created for the first time in the UK, a 'one-stop shop' for advertising complaints.
- 2.1.6 In December 2009, following the UK government's decision that new EU legislation relating to video-on-demand (VOD) services should be delivered under a co-regulatory framework, the ASA (non-broadcast) entered into a co-regulatory partnership with Ofcom to regulate advertisements accompanying VOD services.
- 2.1.7 In March 2011, a landmark development saw the ASA's online remit extended further to include advertisers' own marketing communications on their own websites and in other non-paid-for space online under their control (e.g. on Facebook and Twitter). The ASA's online remit had previously applied only to advertisements in paid-for space (e.g. display ads and paid search) and sales promotions wherever they appeared.<sup>5</sup>
- 2.1.8 A detailed history and timeline of the ASA system is available on our website at <http://www.asa.org.uk/Regulation-Explained/History-of-Ad-Regulation.aspx>.
- 2.1.9 An extract from the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, 'History of self-regulation' is enclosed alongside my statement at **Annex A**.

## 2.2 Status

- 2.2.1 The Advertising Standards Authority Limited (ASA) and The Advertising Standards Authority (Broadcast) Limited (ASA(B)) are separate, incorporated companies limited by guarantee, and usually referred to in

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<sup>5</sup> CAP's document detailing the new digital remit and sanctions **Annex H**

a joint capacity as the Advertising Standards Authority (ASA)<sup>6</sup>. The ASA is a non-statutory, not-for profit private company<sup>7</sup>.

2.2.2 The Committee of Advertising Practice (non-broadcast) is, for the time being at least, an unincorporated association. In August 2011, CAP took an in-principle decision to incorporate. The Committee of Advertising Practice (broadcast) is an incorporated company limited by guarantee. They frequently are known, and operate, as separate committees. Although they are collectively known as the Committee of Advertising Practice (CAP). They are the industry bodies responsible for writing and maintaining the UK Advertising Codes<sup>8</sup>. They are also separate entities to the ASA (non-broadcast) and ASA (broadcast).

2.2.3 The Boards of Finance (Asbof and Basbof) are companies limited by guarantee which do not have share capital.

2.2.4 The six entities that comprise the ASA system are separate, having their own discrete functions.

### 2.3 Overview of the ASA system

2.3.1 The system is predicated upon a separation of powers between Code writing, Code administration and the funding of the system. The design of the arrangement ensures the independence and transparency of the system when exercising its regulatory functions.

2.3.2 CAP and the ASA are supported by an Executive which comprises more than 100 members of staff.

#### 2.3.3 Committee of Advertising Practice

2.3.4 CAP is responsible for writing and updating the UK Advertising Codes, ensuring they remain fit for purpose in an ever changing media landscape. The aim of the Codes is to uphold the principle that all advertising, wherever it appears, should be legal, decent, honest and truthful.

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<sup>6</sup> Memorandum and Articles of Association of the ASA and ASAB are enclosed at **Annexes B & C**.

<sup>7</sup> ASA and ASAB Ltd's Report and Financial Statements are enclosed at **Annexes D & E**.

<sup>8</sup> CAP (broadcast) Report and Financial Statements 2009 are enclosed at **Annex F**.

- 2.3.5 CAP members (non-broadcast and broadcast) comprise trade associations representing the three main parts of the advertising industry, namely the advertising agencies, media owners (e.g. poster site owners and newspaper publishers) and advertisers. Representatives of broadcasters licensed by Ofcom sit directly on the CAP (broadcast) Committee (as opposed to being represented solely through trade associations).
- 2.3.6 As previously mentioned, CAP (non-broadcast) writes and maintains the UK Code of Non-broadcast, Advertising, Sales Promotion and Direct Marketing and CAP (broadcast) maintains the UK Code of Broadcast Advertising. The Advertising Codes can be viewed in full on CAP's website: <http://www.cap.org.uk/The-Codes.aspx>.
- 2.3.7 In addition, three industry panels provide an objective opinion of advertising regulatory matters from an industry perspective. They are the Sales Promotion and Direct Response Panel (SPDRP), the General Media Panel (GMP), and the Online Publications Media Panel (OPMP). Members of the Panels represent different parts of the marketing industry who give up their time voluntarily in support of the self-regulatory system. All three Panels advise CAP (non-broadcast) and the GMP advise CAP (broadcast) in the development of the Advertising Codes. All three Panels may advise the ASA in its interpretation of the Codes, if asked, although the ASA is not bound by the advice it receives from the Panels. More information about the work of the Panels is available on CAP's website [www.cap.org.uk](http://www.cap.org.uk).
- 2.3.8 The Advertising Advisory Committee (AAC) gives independent advice to CAP (broadcast) on potential changes to the UK Code of Broadcast Advertising and the development of associated guidance. The members of the AAC reflect the interests of citizens and consumers and are independent of the advertising industry. The AAC is presently chaired by Elizabeth Filkin.
- 2.3.9 As well as writing and maintaining the Advertising Codes, CAP also plays an important role in co-ordinating industry sanctions to ensure that ASA rulings are followed. Further details on industry sanctions can be found in section 2.6.
- 2.3.10 CAP also provides a wealth of advice and training to the industry to help it get its ads right prior to publication. Further details can be found in section 3.

### 2.3.11 The Advertising Standards Authority

2.3.12 The ASA is the independent body responsible for administering the Advertising Codes (including through its complaints handling functions) and, in doing so, for maintaining standards in advertising content across all media in the UK.

2.3.13 The body responsible for deciding whether the Advertising Codes have been breached is the ASA Council. Two-thirds of the 13-strong Council are independent of industry and the remaining members have a recent or current knowledge of the advertising or media sectors. Nearly all members judge both non-broadcast and broadcast advertisements, although there are two alternating industry members – one who looks at broadcast advertisements only and another who looks at non-broadcast ads.

2.3.14 Collectively, the members offer a wide range of skills and experiences, representing the perspectives of a wide cross section of society, including young people, families, charities and consumer groups.

2.3.15 I am Chairman of the Council. The role, which I have held since 2007, is appointed in line with Nolan principles by Asbof and Basbof following consultation with the Advertising Association, the Department for Business, Innovation and Skills (DBIS), DCMS, the OFT and Ofcom. The Chairman is required to be someone who has never been engaged in the advertising business<sup>9</sup>.

2.3.16 The Council is supported in its work by an Executive, which deals with complaints from members of the public and industry.

### 2.3.17 Asbof and Basbof

2.3.18 The system is funded via a voluntary levy (a 0.1% levy on advertising spend and a 0.2% levy on mailsort contracts). The levy is collected by the Boards of Finance, Asbof and Basbof, at arms' length from the ASA. This ensures a proper separation between the system's regulatory functions and its industry funders.

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<sup>9</sup> ASA Guidance on managing conflicts of interest **Annex G**

2.3.19 The levy is the only part of the system that is voluntary.

2.3.20 All advertisers must comply with the Advertising Codes and ASA decisions, but they do not have to pay the levy. Last year, Asbof provided the ASA with £6.9m to run the system.

2.3.21 The levy supports an Executive of a little over 100 members of staff, servicing the ASA Councils and the CAP Committees. Asbof maintains its own secretariat at separate premises.

## 2.4 Remit

2.4.1 The ASA's remit covers ads and other marketing communications, including:

- Magazine and newspaper ads
- Radio and TV commercials (not programmes or programme sponsorship)
- Teleshopping
- Ads appearing around video-on-demand programmes, and on video-on-demand services generally
- Posters (but not fly posters, which are illegal)
- Ads in leaflets and brochures
- Cinema commercials
- Direct marketing (ads addressed to the individual personally, e.g. by post, e-mail and SMS text message)
- Door drops and circulars (ads posted through the letter box are not personally addressed)
- Ads on the internet, including banner and display ads and paid-for (sponsored) search ads
- Advertisers' own marketing communications on their own website and in other, non-paid-for space online under their own control
- Ads on CD ROMs, DVD and video, and faxes
- Sales promotions, such as special offers, prize draws and competitions wherever they appear.

## 2.5 Authority

2.5.1 Compliance with the Advertising Codes and ASA adjudications is binding on all advertisers. It is not voluntary.

2.5.2 Ultimately, the authority of the ASA system both derives from and is dependent on the long-term commitment of all those involved in the



advertising industry. Without this commitment self-regulation simply could not work effectively.

- 2.5.3 The Advertising Codes sit within the legal framework, which means that, where appropriate, they reflect the standards required in law, e.g. misleading advertising.
- 2.5.4 The system works across the spectrum of self-/co-regulation, from near pure-self-regulation in most matters relating to harm, offence and social responsibility in non-broadcast advertising, through self-regulation backed by a legal framework in most matters relating to unfair, misleading or aggressive advertising (under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)), to full co-regulation in broadcast advertising with Ofcom as our legal backstop. Following are some examples of how the system has a mixed self-/co-regulatory approach.
- 2.5.5 **Pure self-regulation** - For matters relating to harm, offence and social responsibility in non-broadcast advertising, the ASA system can be regarded as being one of pure self-regulation. The ASA administers the Advertising Codes, without recourse to a legal backstop.
- 2.5.6 **Self-regulation with a legal backstop** - The ASA is recognised by the Office of Fair Trading (OFT) as the established means<sup>10</sup> for regulating misleading and comparative ads in non-broadcast media in the UK. On the rare occasions when we are unable to secure compliance with the Codes, we can ask the OFT to consider taking action under the CPRs or the Business Protection Regulations (BPRs)<sup>11</sup>. The OFT can seek undertakings from a company that it will change its ads; it can also seek injunctions from the Court to prevent companies from making misleading claims in their ads.

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<sup>10</sup> ASA and OFT case handling principles are enclosed at **Annex I**. This documents identifies the OFT's role as being to act in support of, and to reinforce, existing advertising controls or 'established means', such as the Advertising Standards Authority. Under the CPRs and BPRs all enforcement authorities, including Trading Standards, should have regard to 'established means'.

<sup>11</sup> CAP Code document 'Appendix 1: The CPRs and BRPs enclosed at **Annex J**.

- 2.5.7 The ASA's status as the 'established means' for bringing about compliance with the advertising-related elements of the CPRs and BPRs were spoken about in Parliament, when the then Government spokesperson, Lord Tunnicliffe, was moving that the draft CPRs and BPRs be approved, "*The Office of Fair Trading and Trading Standards will have a duty to enforce the regulations. However, where there are effective systems of self-regulation, such as those administered by the Advertising Standards Authority and PhonepayPlus, we would usually expect complaints to be referred to them in the first place for action, as established means under both these regulations and the business protection regulations.*" (Hansard, House of Lords, 23 Apr 2008 : Column 1565)
- 2.5.8 **Self-regulation with legal underpinning** - Under the Gambling Act 2005 the Gambling Commission was entitled to issue code of practice provisions on non-broadcast advertising. Instead, it asked CAP to perform that function and the ASA to administer the new rules<sup>12</sup>. The Commission has made compliance with the Advertising Codes a provision of its own Code of Practice. Furthermore, the Gambling Act contains reserve powers for the Secretary of State to issue regulations on advertising, but this has not been necessary. The ASA has a close working relationship with the Gambling Commission and DCMS, but does not formally report to either body<sup>13</sup>.
- 2.5.9 **Co-regulation** - Since 2004, the ASA has been operating a formal co-regulatory partnership with Ofcom for broadcast advertising<sup>14</sup>. Although the day-to-day operation of the system is contracted-out, under the MOU, Ofcom retains all its legal powers stemming from the Communications Act 2003. However, Ofcom will not normally intervene in specific ASA (broadcast) or CAP (broadcast) decisions and actions in respect of matters that have been contracted-out to them. Also under the MOU, on an annual basis ASA (broadcast) and CAP (broadcast) are required to provide Ofcom with performance data against agreed key performance indicators.

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<sup>12</sup> Under the Gambling Act and the Contracting-out Order with Ofcom, BCAP was automatically responsible for developing broadcast advertising rules and ASA(B) for enforcing them.

<sup>13</sup> Gambling Commission Case Handling Principles are enclosed at **Annex N**

<sup>14</sup> This arrangement is underpinned by an enabling statutory instrument - The Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (**Annex K**) - and a formal Deed between Ofcom and the ASA (Broadcast), BCAP and Basbof (**Annex L**). The ASA's MOU with Ofcom is enclosed at **Annex M**.

## 2.6 Powers

- 2.6.1 The ASA has no formal legal or statutory powers; we work by persuasion and consensus. That said, the strength of the system means that our rulings have the effect of bringing about a cessation of a particular practice.
- 2.6.2 If a marketing communication is judged to be in breach of the Advertising Codes, the marketer or broadcaster responsible is told to amend or withdraw the ad. The overwhelming majority do so willingly. If they do not, the system has a range of effective industry-led sanctions at its disposal.
- 2.6.3 In the rare event that advertisers do not to work with us, then we are, in certain circumstances, able to refer cases to statutory regulators (i.e. OFT and Ofcom).
- 2.6.4 The ASA system has consistently proven that it is prepared to take strong action against those advertisers that breach the Codes.

## 2.6.5 Sanctions

- 2.6.6 **Adverse publicity** - One of the ASA's key sanctions is the adverse publicity generated by an upheld adjudication. ASA adjudications often receive significant media attention and, as well as causing reputational damage, serve to warn the public of advertisers who have breached the rules. The latest adjudications are published in full every Wednesday on the ASA's website and are available to view for five years from the date of publication. This is one of our most important and used sanctions.
- 2.6.7 **Refusal of media space** – In the event of non-compliance we can ask media space owners to consult the Copy Advice team before accepting ads from advertisers named in an alert. This is an extremely effective sanction, which removes from the advertiser the decision of whether to comply with our rulings. The media frequently and consistently acts in a responsible manner as a 'gate-keeper', refusing to carry ads that do not comply with the rules and foregoing much-wanted commercial revenue.
- 2.6.8 **CAP member intervention** - The compliance teams can ask CAP member bodies to intervene when one of their members is not playing by the rules. Usually an informal intervention is enough to secure future

compliance but if that's not successful the relevant CAP member body could threaten the withdrawal of membership privileges or recognition.

**2.6.9 Poster pre-vetting** - CAP's poster industry members can invoke mandatory pre-vetting for advertisers who have broken the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing on taste and decency or social responsibility grounds – the mandatory pre-vetting usually lasts for two years.

**2.6.10 Sanctions in the digital space** – With the extension of the ASA's online remit earlier this year, it was vital that the system developed new sanctions to ensure compliance in a media landscape for which traditional industry-led sanctions might be less effective. These new sanctions include:

- Enhanced 'name and shame'. Non-complying website owners can appear in a dedicated section of the ASA website.
- The use of paid-for search advertisements by the ASA to highlight a website owner's non-compliance.
- The removal of a marketer's paid-for search advertisements when those advertisements link directly to a page on the marketer's own website that hosts non-compliant marketing communications.

**2.6.11 Legal Backstops** – The ASA can ultimately refer misleading non-broadcast advertisers to the OFT. This is rarely necessary because most advertisers comply voluntarily with the self-regulatory system. Since 2000 just 30 advertisers have been referred to the OFT. Although the ASA has a close working relationship with the OFT, it is not formally accountable to it. By referring advertisers to the OFT, the ASA and CAP have played an important role in successfully stopping advertisers misleading the public.

**2.6.12 Compliance with the UK Code of Broadcast Advertising** is a requirement of a broadcaster's licence under the Communications Act 2003. In the case of serious or repeated breaches of the Code, ASA (broadcast) may refer a broadcaster to Ofcom. Ofcom may impose sanctions including a fine or even licence revocation.

### **3 How we discharge our regulatory functions**

**3.1** The system does not simply write the rules and administer complaints, but rather understands the value of taking a comprehensive approach to

regulation. This includes giving the industry the information it needs to ensure ads are responsible before they appear, pro-active monitoring of advertising sectors to nip potential problems in the bud and rigorous engagement activity with various stakeholders to make sure the ASA system stays in-tune with public opinion and is responsive to societal concerns.

### 3.2 Advice and pre-clearance

3.2.1 As well as writing the rules, CAP provides a range of bespoke advice, training seminars and online resources to help advertisers stay on top of the requirements of the Codes and prevent breaches from occurring in the first place. This includes Copy Advice<sup>15</sup>, a free, confidential pre-publication advice service for advertisers, agencies and media.

3.2.2 Most TV and radio advertisements are centrally pre-cleared by Clearcast and the Radio Advertising Clearance Centre (RACC) respectively. These bodies have been set up and funded by the broadcasters to help ensure compliance with the UK Code of Broadcast Advertising. Clearcast and RACC approval does not prevent the ASA from acting on complaints.

#### 3.2.3 Complaints and Investigations

3.2.4 The ASA considers complaints about breaches of the Advertising Codes from both industry and consumers. Just one complaint can be enough to trigger an investigation, which could lead to the withdrawal of an ad campaign.

3.2.5 In 2010, the ASA received 25, 214 complaints about 13,074 ads. ASA action led to 2,226 ad campaigns being amended or withdrawn. Complaints from the public represented 96% of the complaints received. Further details can be found in our Annual Report<sup>16</sup>, which is available on the ASA website.

3.2.6 All complaints are examined carefully and those that bring to light possible Code breaches are sent for thorough investigation<sup>17</sup>. All decisions on formally investigated ads are made by the independent

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<sup>15</sup> [www.copyadvice.org.uk](http://www.copyadvice.org.uk)

<sup>16</sup> <http://www.asa.org.uk/About-ASA/Annual-Report.aspx>

<sup>17</sup> The ASA's Broadcast and Non-Broadcast Complaints handling procedures are enclosed as **Annexes O & P**. The ASA's mission and standards of service document is enclosed as **Annex Q**

ASA Council. ASA Council members must withdraw from the discussion if there is a conflict of interest<sup>18</sup>.

- 3.2.7 Adjudications set out a summary of the advertiser's response to the complaint. The ASA seeks a written assurance that it will not do so.

### **Independent Review**

- 3.2.8 If a complainant or advertiser is unhappy with an ASA decision on the grounds that the ASA did not take into account relevant evidence, that there was some other substantial flaw in the process or that the adjudication itself is substantially flawed, then they can request a review by the Independent Review of ASA Adjudications, currently Sir Haden Philips GCB DL, who can refer cases back to Council, including with his recommendation on changes to the Council's original decision. The decision as to whether or not to accept the Independent Reviewer's recommendation remains with the Council<sup>19</sup>, whose decision is final.

### **Cross-border complaints**

- 3.2.9 The ASA is a founding and active member of the European Advertising Standards Alliance<sup>20</sup>, which brings together national advertising self-regulatory authorities and organisations representing the advertising industry in Europe. EASA co-ordinates the cross-border complaints mechanism in which the ASA participates, ensuring that consumers are protected across the Single-Market.

### **3.2.10 Monitoring Compliance**

- 3.2.11 We don't just wait for complaints to come in; we also place a significant emphasis on conducting a substantial monitoring programme. We monitor ads on an ad hoc basis and as part of wider surveys. Surveys can involve assessing all ads from a particular sector that have appeared during a defined period. Ads are assessed against the Codes and ads that are obviously in breach of the Codes are brought to the attention of the advertiser and are either amended or removed.

- 3.2.12 Monitoring surveys are published on our website - <http://www.asa.org.uk/Resource-Centre/Reports-and-surveys.aspx>.

<sup>18</sup> ASA Guidance on managing conflicts of interest in enclosed at **Annex G**

<sup>19</sup> The Independent Review process is detailed in **Annex R**

<sup>20</sup> For more information about EASA visit <http://www.easa-alliance.org/>

### 3.2.13 Consumer engagement

3.2.14 As we make judgments on behalf of the public it is crucial that we continue to listen to and understand their concerns. Some of the ASA's key corporate objectives are to understand better the public's views on advertising and, in particular, how it influences young people, and to feed those views into our work.

3.2.15 To this end we undertake annual consumer conferences around the UK, where we talk directly with consumers about our work. Most recently the ASA carried out consumer engagement activity in the Cardiff area, in order to open dialogue with young people, parents and those who work with children and young people. The ASA's report, Advertising and young people, is available on our website.

3.2.16 Updates to the Advertising Codes are frequently subject to public consultation, where the public can express their views on the rules. The Advertising Codes were subject to a root and branch review followed by a full public consultation in 2009 in order to ensure they remain effective and relevant for the future. The new Codes came into effect in September 2010.

3.2.17 If policy makers have concerns about the strength of the rules in place or the administration of the advertising self-regulatory system, we believe that the self-regulatory system is best placed to assess the evidence in the first instance.

3.2.18 For example, in 2005 the alcohol rules in the Advertising Codes were significantly strengthened in response to the 2004 Alcohol Harm Reduction Strategy and societal concerns over binge drinking. Rules for food and soft drink advertisements were tightened in 2007<sup>21</sup> following a report on childhood obesity by Ofcom, and an extensive public consultation. The updated rules are a proportionate response to the evidence linking advertising and potential harm.

3.2.19 We will also assess policy concerns on an ad hoc basis. For example last year we agreed to look into a number of studies and policy proposals submitted to us by the Campaign for Body Confidence. Although it did not lead to rule changes, we very much welcomed the

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<sup>21</sup> Background Briefing – Children & Food ([www.asa.org.uk/Resource-Centre/Background-Briefings](http://www.asa.org.uk/Resource-Centre/Background-Briefings))

opportunity to listen to the Campaign's concerns and have left the offer open to assess further proposals and evidence. CAP's evaluation can be read at <http://www.cap.org.uk/Media-Centre/2010/Impact-of-advertising-on-body-image.aspx>.

3.2.20 The ASA system aims at all times to be as transparent as possible, and makes available a significant amount of information on its websites designed to help the public and industry understand advertising regulation and the work we do. This includes 'background briefings' on key issues of interest and regularly updated news items.

#### 3.2.21 **Our work with other regulators**

3.2.22 In the event of non-compliance or in circumstances where we know that self-regulatory sanctions will be ineffective due to, for example, illegal activity (e.g. direct mail scams) the ASA system will seek to work with the relevant statutory authority to try and bring about consumer or industry redress.

3.2.23 For example, from time to time the ASA communicates with the OFT, exchanging information about complaints that either side has received, which might be in breach of consumer law.

3.2.24 In the rare instances where marketing is identified as fraudulent by law enforcement agencies, for example by the OFT or the Police, the ASA can complement the action of those agencies by providing information from our own investigations that could help facilitate a prosecution.

3.2.25 The ASA has long been involved with the OFT's Scams Group, which includes many regulators and law enforcement agencies and investigates scam mailings targeting UK consumers.

#### **4 ASA experience of regulating the media, in particular in relation to phone hacking, computer hacking, 'blagging', bribery or corruption.**

4.1 The ASA is responsible for regulating marketing communications to ensure they are legal, decent, honest and truthful. We have no experience of regulating, or otherwise dealing with, issues of phone-hacking, computer hacking, 'blagging', bribery or corruption. These issues fall outside of the remit of the advertising self-regulatory system.



4.2 From an interrogation of our complaints database and records we have ascertained that these are issues about which the ASA has not received complaints from consumers. I am, therefore, unable to offer further comment on these specific issues.

**5 Your views on the strengths and weaknesses of the Advertising Standards Authority and, in particular, your views on the steps which might be taken to improve the regulatory framework and effort.**

5.1 The ASA system is often considered by policy makers as an example of best-practice regulation.

5.2 Through our institutional set-up and the way in which we exercise our regulatory functions, the ASA system is able to meet the ten best practice features<sup>22</sup> of advertising self-regulation as defined by the European Advertising Standards Alliance (EASA). The ASA works closely with its international partners to establish high standards for the principle of advertising self regulation, and these standards have been recognised formally by the European Commission. They are:

5.2.1 **Universality of the Self-Regulatory System:** Adherence to the ASA system by advertisers, agencies and media is mandatory. It is not a membership system. Even if an advertiser chooses not to pay, the rules and the ASA's rulings still apply to them. The system covers all significant forms of advertising, including new media. The widespread support of all media for the system, including newspaper publishers, direct marketers, outdoor media and the various trade associations, is vital, lending credibility to the system and ensuring that sanctions have real teeth.

5.2.2 Without industry backing, the ASA would not, ultimately, be able to function, and regulation of non-broadcast advertising would be required to be undertaken by a statutory body (to enforce the CPRs) with the regulation of broadcast advertising reverting to Ofcom.

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<sup>22</sup> <http://www.easa-alliance.org/About-EASA/EASA-projects/Best-Practice-Recommendations/page.aspx/162>

- 5.2.3 **Independent and impartial adjudications:** All decisions on formally investigated ads are made by the independent ASA Council.
- 5.2.4 As already mentioned, the system benefits from a separation of powers at an institutional level, ensuring the independence of operation of our regulatory functions. It also benefits from the size and diversity of the industry it regulates. The industry itself is difficult to define as a single industry and the business objectives represented within the tripartite differ, even though they each deal with the same business practice. These features ensure that the ASA is not only transparent, but also is not hamstrung by powerful or other vested interests within the industry it regulates.
- 5.2.5 Each year the ASA pitches to Asbof and Basbof for its funding for the following year. The separate funding mechanism ensures that the ASA does not know which advertisers choose to fund the system or the amount they contribute. This means that the ASA can take on the most powerful multinational companies without worrying about next year's subscriptions. The ASA is never aware of how much any company contributes to the system, or indeed whether they contribute at all.
- 5.2.6 **Effective Sanctions:** In the significant majority of cases advertisers voluntarily comply with ASA rulings. However, on the rare occasions they do not the self-regulatory system can employ a range of effective sanctions, many deployed by the industry itself, to enforce its decisions. Whilst 'naming and shaming' advertisers has a powerful deterrent effect, the ability to refer advertisers, in certain circumstances, to statutory backstops in the event of serious non-compliance provides a powerful incentive for advertisers to work within the framework of self-regulatory system in the first instance.
- 5.2.7 **Sustained and Effective Funding:** The arms-length funding arrangement guarantees the ASA's independence and ensures the system is adequately funded to ensure standards are kept high. The mandatory nature of the system means that even if an advertiser chooses not to pay the levy, they are still liable for ASA action in the event they breach the rules. The system receives no tax payer funding.
- 5.2.8 **Universal and Effective Codes:** The system benefits from a commitment by the advertising industry to maintain and strengthen the self-regulatory system in the face of new regulatory challenges – for example by strengthening the alcohol and food and soft drinks rules in 2005 and 2007 respectively, or by extending the ASA's online remit in

March 2011, closing an emerging regulatory gap and enhancing protections for consumers in a significant – and commercially growing – media space.

5.2.9 The Codes themselves are regularly reviewed to ensure they remain fit for purpose – with the latest edition of the Codes coming into force in September 2010, after full public consultation.

5.2.10 **Prompt and Efficient Complaints Handling:** A key strength of the ASA system is that, whilst behind the scenes there may exist several different parts of the system with various interactions with the law or other regulators, the consumer experiences no difference in protection, regardless of medium or statutory backstop. All complaints are made to the ASA one-stop-shop. In 2010 the ASA exceeded turnaround targets (to resolve 80% of cases within target time) for every category of complaint investigation for both broadcast and non-broadcast ads.

5.2.11 The ASA takes a flexible and non-legalistic approach to complaints handling. For example, in dealing with the large influx of complaints about complementary health practitioners following the extension of our online digital remit, and aware that it will take some time before all web-based advertisers fully get to grips with the ASA's new remit and the Code rules, we have adopted a pragmatic approach to securing compliance.

5.2.12 **Efficient and resourced Administration:** The levy system means the ASA has the necessary resources to handle more than 26,000 complaints each year and CAP is able to fulfil its code-writing and code compliance responsibilities.

5.2.13 **Advice and Information:** The system provides for comprehensive regulation including significant advice and guidance for advertisers, agencies and media owners on how to comply with the Codes. This helps to prevent problems emerging in the first place and helps keep standards high. In 2010 CAP provided advice and training on 45,462 occasions.<sup>23</sup> In 2010 our survey of Copy Advice users found that 92% were pleased with the quality of the service.

5.2.14 **Efficient Compliance and Monitoring:** The system acknowledges that to be a truly effective self-regulatory system it cannot simply handle complaints. Alongside the advice and guidance functions of CAP, the

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<sup>23</sup> The number of discrete occasions when training or advice was provided.

system pro-actively monitors specific sectors or problems areas, and evaluates compliance rates with the Codes. This allows us to spot potential problems and discuss them with Industry before they become serious.

- 5.2.15 An example of this type of action can be seen in our latest Gambling Compliance Survey 2010<sup>24</sup>, which identified ads offering “free bets” (but which did not include significant terms and conditions) as an area of concern. The ASA has subsequently undertaken a significant amount of work across the sector to make sure ‘free bet’ promotions are advertised fairly.
- 5.2.16 **Effective Industry and Consumer Awareness:** The ASA recently undertook a successful national two phase publicity campaign (both to consumers and industry) to raise awareness of the ASA’s extended online remit. This work depended entirely on free space donated by media owners and creative work carried out on a pro bono basis.
- 5.2.17 The ASA system places a great emphasis on being transparent and accessible to all our stakeholders, particularly the general public. The ASA works hard to ensure it is simple and straightforward for consumers to interact with the system, and the recent Bailey Review (into the sexualisation and commercialisation of childhood, which was commissioned as an independent review by the Department for Education) highlighted our good practice in this regard.
- 5.2.18 We conduct ongoing customer satisfaction surveys and a biennial Attitudes and Awareness Survey, which are independently carried out by GfK.
- 5.2.19 Whilst I firmly believe, for the reasons hitherto outlined, that the ASA system has been and remains an effective regulator of advertising in the UK, we are of course mindful of the need to remain vigilant of ways to improve still further to ensure that the self-regulatory system keeps pace with the ever changing media landscape it regulates.
- 5.2.20 Our 2009-2010 Process Review, undertaken by independent experts from Berkshire Consultancy, made a number of challenging recommendations on how we could improve, including with respect to speeding up our investigations, improving consistency both in terms of our decision making and with Trading Standards services (in judging

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<sup>24</sup> <http://www.asa.org.uk/Resource-Centre/Reports-and-surveys.aspx>

whether an ad is misleading) and improving our relationships with our stakeholders.

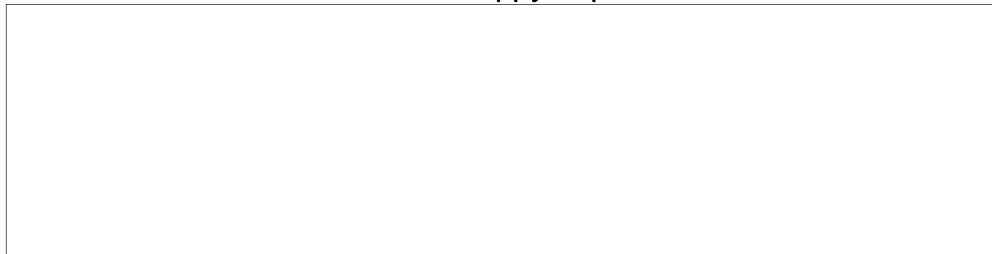
- 5.2.21 Following the Process Review we have set about streamlining our complaints processes and improving our communications with complainants and advertisers. We have looked to create a common pool of experts with the bodies that pre-clear TV and radio ads to provide greater certainty for advertisers and, although we have not found evidence that we are inconsistent with Trading Standards, we plan to establish regular meetings with the OFT and Trading Standards, as well as undertake several other measures, to ensure a joined-up approach to judging misleading practices<sup>25</sup>.
- 5.2.22 The ASA's ongoing commitment to protect young people from inappropriate or misleading ads has been enhanced by listening to parents' views and concerns. Our engagement with parents and young people in Wales earlier this year was a fascinating and valuable exercise, from which we have learned much. In particular, parents highlighted their concerns about untargeted ads of a sexual nature – issues subsequently examined by the Bailey Review. The ASA and CAP are now responding constructively to the recommendations of the Bailey Review, including by helping to raise awareness of the work of the ASA amongst parents and children and to ensure they know that their concerns will be listened to carefully.
- 5.2.23 A mark of the advertising self-regulatory system is the way in which the interests of both advertisers and consumers are aligned. Practitioners in every sphere share an interest in seeing that marketing communications are welcomed and trusted by their audience. Unless they are accepted and believed, marketing communications cannot succeed. If they are offensive or misleading, they discredit everyone associated with them and the industry as a whole.

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<sup>25</sup> Our three public updates on the Process Review are enclosed as **Annexes S, T and U**.

5.2.24 Finally, the ASA system recognises that some problems stem from criminal activity and are better tackled by statutory authorities. The ASA seeks to complement, rather than provide a substitute to, legal enforcement bodies. Where matters are of a legal nature, be they scams or fraud, or in the limited circumstances where our sanctions are not effective (for example fraudulent leaflets delivered by hand), we seek to maintain and build upon effective relationships with other regulators to achieve the best possible consumer redress.

I hope that I have been able to provide a comprehensive and clear overview of the ASA system, and that this will be of use to the Inquiry. Of course, should you require any more detailed information about any of the areas outlined above, I would be more than happy to provide it.



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