

**Authorisation by virtue of The Contracting Out (Functions relating to
Broadcast Advertising) and Specification of Relevant Functions Order
2004¹**

WHEREAS-

- A. Part 2 of the Deregulation and Contracting Out Act 1994 ('the 1994 Act') allows, if a Minister by order so provides, certain statutory functions to be exercised by, or by employees of, such person as may be authorised in that behalf by the office-holder or Minister whose function it is;
- B. Section 1(7) of the Communications Act 2003 ('the 2003 Act') gives effect to Part 2 of the 1994 Act in relation to the functions conferred on OFCOM by or under any enactment as if OFCOM were an office-holder within the meaning of Part 2 of the 1994 Act. Section 1(7)(b) of the 2003 Act limits the effect of section 69 of the 1994 Act such that Ofcom's functions in respect of the making of subordinate legislation may be contracted out except where such functions are to be exercised by statutory instrument;
- C. Sections 319 to 328 of the 2003 Act confer functions on OFCOM with respect to programme and fairness standards for television and radio, including the duty to set, and from time to time review and revise standards for the content of programmes to be included in television and radio services, and the duty to establish procedures for the handling and resolution of complaints about the observance of such standards;
- D. Regulations 8 to 11 of the Control of Misleading Advertisements Regulations 1988 (as amended) ('the 1988 Regulations') confer functions on OFCOM with respect to the consideration of complaints about misleading and prohibited comparative advertisements within the terms of those regulations;
- E. Regulations 9 and 11 of the Medicines (Monitoring of Advertising) Regulations 1994 (as amended) ('the 1994 Regulations') confer functions on OFCOM with respect to the consideration of complaints about prohibited advertisements within the terms of the Medicines (Advertising) Regulations 1994;
- F. The Secretary of State has, by order under sections 69 and 77 of the 1994 Act, provided that certain functions of OFCOM conferred by the 2003 Act, the 1988 Regulations and the 1994 Regulations may be exercised by, or by such employees of, such person as may be authorised in that behalf by OFCOM, to such extent as may be specified in the authorisation:

¹ SI 1975/2004

G. OFCOM have, by way of a consultation document titled *The Future Regulation of Broadcast Advertising* published on 27 October 2003, expressed their intention to contract out certain of their functions in relation to the regulation of broadcast advertising to certain industry co-regulators working together with and under the umbrella of the existing framework of advertising self-regulation currently carried out by the Advertising Standards Authority, namely:

(a) the Advertising Standards Authority (Broadcast) Limited² ('ASA(B)');
and

(b) the Broadcast Committee of Advertising Practice Limited³ ('BCAP');

H. In that consultation document, OFCOM set out, amongst other things, their proposals to contract out:

(a) their functions in respect of the setting, reviewing and revising of standards codes for broadcast advertising to BCAP; and

(b) their functions in respect of the handling and resolving of complaints about the observance of broadcast advertising standards codes to ASA(B);

I. Further, in that consultation document, OFCOM recognise the benefits to consumers and industry members alike of, where appropriate, a coordinated and consistent approach to advertising standards regulation across broadcast and non-broadcast media;

J. OFCOM have duly considered and taken into account all the responses to that consultation document in giving this Authorisation;

K. OFCOM have, on 26 May 2004, concluded a Memorandum of Understanding with ASA(B), BCAP and the Broadcast Advertising Standards Board of Finance (BASBOF) setting out their agreed understanding in relation to the practical operation of the exercise by ASA(B) and BCAP of the OFCOM functions proposed to be contracted out to them, including the arrangements for adequate funding and staffing of ASA(B) and BCAP to enable those functions to be properly carried out;

L. OFCOM are satisfied that the co-regulatory scheme envisaged by the Memorandum of Understanding will promote and facilitate the development and use of effective forms of self-regulation such as and in conjunction with that already established by the Advertising Standards Authority;

² Company number 5130991

³ Company number 5126412

M. For the reasons set out in "Ofcom's decision on the future regulation of broadcast advertising" published 17 May 2004, OFCOM are satisfied that they have acted in accordance with the relevant duties set out in section 3 of the 2003 Act in giving this Authorisation;

NOW, THEREFORE, BY VIRTUE OF THE CONTRACTING OUT (FUNCTIONS RELATING TO BROADCAST ADVERTISING) AND SPECIFICATION OF RELEVANT FUNCTIONS ORDER 2004, OFCOM HEREBY GIVES THE FOLLOWING AUTHORISATION SUBJECT TO THE EXCEPTIONS, LIMITATIONS AND CONDITIONS SET OUT HEREIN-

Standards functions to be exercised by BCAP

1. BCAP are authorised to exercise any function of OFCOM conferred by section 319(1) of the 2003 Act (a 'standards function').

2. BCAP shall only exercise a standards function for the purpose of setting, reviewing or revising standards relating to advertising as appear to them best calculated to secure the standards objectives. The following standards objectives are excluded for these purposes:

(a) the objective set out at paragraph (c) of section 319(2), namely that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 of the 2003 Act are complied with;

(b) the objective set out at paragraph (d) of section 319(2), namely that news included in television and radio services is reported with due accuracy;

(c) the objective set out at paragraph (g) of section 319(2), namely that advertising that contravenes the prohibition on political advertising set out in section 321(2) of the 2003 Act is not included in television or radio services;

(d) the objective set out at paragraph (j) of section 319(2), namely that the unsuitable sponsorship of programmes included in television and radio services is prevented;

(e) the objective set out at paragraph (k) of section 319(2), namely that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and

(f) so much of the objective set out at paragraph (i) of section 319(2), namely that the international obligations of the United Kingdom with respect to advertising included in television and radio services are

complied with, as relates to the obligations set out in Articles 11, 17, 18 and 18a of Directive 89/552/EEC as amended by Directive 97/36/EC.

3. Without prejudice to the generality of Article 8 of the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, BCAP shall only exercise a standards function where such exercise is in accordance with, in particular, the following sections of the 2003 Act as appropriate as if references in the following sections to OFCOM were references to BCAP:

(a) section 319(3), paragraphs (a) to (e) of section 319(4), 319(5) and 319(6) (as modified from time to time by any order of the Secretary of State under section 323);

(b) section 321(1), although only insofar as that section relates to advertising; and

(c) section 324.

4. Before and in exercising any standards function, BCAP shall:

(a) consult OFCOM; and

(b) secure OFCOM's written agreement with BCAP's proposals for the exercise of such function.

5. BCAP shall, by no later than the end of April each year, provide OFCOM with a written report detailing BCAP's exercise of the standards functions in the preceding calendar year. This report may be combined with the report referred to in paragraph 15 below at the discretion of BCAP and ASA(B).

6. BCAP shall forthwith provide such information and assistance to OFCOM as OFCOM shall from time to time reasonably require for purposes connected with the exercise by OFCOM of their functions under sections 26, 321(5) and/or 325(3) of the 2003 Act, and generally to assist OFCOM to review how effectively BCAP has exercised, or is exercising, any standards function.

Code complaints functions to be exercised by ASA(B)

7. ASA(B) are authorised to exercise any function of OFCOM conferred by the following provisions of the 2003 Act (a 'code complaints function'):

(a) section 325(2);

(b) section 325(4) in so far as it provides for a direction to be given to a licence holder with respect to any of the matters mentioned in paragraphs (a) and (b) of section 325(5), subject to paragraph 12 below; and

(c) section 14(1) of Schedule 12 in so far as it provides for a direction to be given to the Welsh Authority with respect to any of the matters mentioned in paragraphs (a) and (b) of section 14(2) of that Schedule.

8. ASA(B) shall only exercise a code complaints function for the purpose of handling and resolving complaints about the observance of such standards as BCAP may set, review or revise in accordance with paragraphs 1 to 6 above.

9. ASA(B) are authorised to exercise any function of OFCOM conferred by regulations 8, 9, 10 and 11 of the 1988 Regulations (a 'misleading advertisements function'), in accordance with the 1988 Regulations, as if references in those regulations to OFCOM were references to ASA(B).

10. ASA(B) are authorised to exercise any function of OFCOM conferred by regulations 9(1), 11(1) and 11(4) of the 1994 Regulations (a 'medicinal advertisements function'), in accordance with the 1994 Regulations, as if references in those regulations to OFCOM were references to ASA(B).

11. ASA(B) shall not exercise either a misleading advertisements function or a medicinal advertisements function for the purposes of or in connection with the prevention of unsuitable sponsorship of programmes included in television and radio services.

12. ASA(B) shall only exercise a function conferred by subsection (b) of section 325(4) of the 2003 Act in connection with the exercise of a misleading advertisements functions or a medicinal advertisements function.

13. ASA(B) are authorised to exercise any function of OFCOM relating to advertising conferred by or in connection with a provision listed in Part 2 of the Schedule to the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 only so far as to determine that no such direction as is mentioned in that provision should be made.

14. ASA(B) are authorised to exercise any function of OFCOM relating to advertising conferred by or in connection with a provision listed in Part 3 of the Schedule to the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 only so far as to determine that no such notice as is mentioned in that provision should be served on the holder of a Broadcasting Act licence or the Welsh Authority.

15. ASA(B) shall, by no later than the end of April each year, provide OFCOM with a written report detailing ASA(B)'s exercise of the code complaints functions

in the preceding calendar year. The report shall include quantitative and qualitative information regarding complaints received and handled and the monitoring of such standards set under section 319 of the 2003 Act as relate to advertising. This report may be combined with the report referred to in paragraph 5 above at the discretion of ASA(B) and BCAP.

16. ASA(B) shall forthwith provide such information and assistance to OFCOM as OFCOM shall from time to time reasonably require for purposes connected with the exercise by OFCOM of their functions under sections 26, 321(5) and/or 325(3) of the 2003 Act, and generally to assist OFCOM to review how effectively ASA(B) has exercised, or is exercising, any code complaints function.

Information disclosure between BCAP and ASA(B)

17. For the purposes of Schedule 15 to the 1994 Act, OFCOM certify that:

(a) a standards function appears to OFCOM to be a function related to a code complaints function, a misleading advertisements function, and a medicinal advertisements function;

(b) a code complaints function, a misleading advertisements function, and a medicinal advertisements function all appear to OFCOM to be functions related to a standards function; and

(c) the following descriptions of disclosure between BCAP and ASA(B) are capable of being necessary or expedient for the purpose of each of them exercising their relevant functions or related functions:

(i) any disclosure by BCAP to ASA(B) of information relating to the exercise by BCAP of a standards function or the exercise by ASA(B) of a related function;

(ii) any disclosure by ASA(B) to BCAP of information relating to the exercise by ASA(B) of a code complaints function, a misleading advertisements function or a medicinal advertisements function, or the exercise by BCAP of a related function.

Interpretation

18. In this Authorisation references to BCAP and ASA(B) include references to their respective employees, as defined by section 79 of the 1994 Act.

19. Except where otherwise defined or in so far as the context otherwise requires, any word or expression shall have the same meaning as it has in the 2003 Act and any reference to sections or subsections of legislation is to the 2003 Act.

20. The Interpretation Act 1978 (except section 11 of that Act) shall apply as if this Authorisation were an Act of Parliament.

21. Any references in this Authorisation to any provisions of the 2003 Act, the Broadcasting Act 1990 and the Broadcasting Act 1996 are to include, as appropriate, references to those provisions as modified from time to time for the purposes of community radio by any order of the Secretary of State under section 262 of the 2003 Act.

22. Headings and titles shall be disregarded in the interpretation of this Authorisation.

23. This Authorisation shall take effect from 1 November 2004, and shall continue for a period of 10 years, unless revoked at any time by OFCOM, or unless the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 is previously revoked.

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DAVID CURRIE
Chairman, Ofcom

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STEPHEN CARTER
CEO, Ofcom

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

Date: