

The Future Regulation of Broadcast Advertising

Consultation document

Public consultation on a proposal by Ofcom to contract out the regulation of broadcast advertising to an industry co-regulator

The deadline for comments is **Friday 9 January 2004**.

Contents

Section		Page
1	Introduction	1
2	Summary – key issues and questions	1
3	The Consultation in detail	
	Background	4
	Introduction	4
	History of the current system	4
	The rationale for moving to self-regulation	6
	Proposed changes to regulation of broadcast advertising	9
	The current ASA system	9
	The proposed new approach to broadcast advertising regulation	10
	Ofcom’s continuing involvement in advertising regulation	15
	Powers of enforcement and the application of sanctions	17
	Monitoring the success of the scheme	17
	Process for auditing the co-regulator’s performance	17
	Options for Ofcom if the system appears to be failing	19
4	Regulatory impact assessment	20
5	How to respond to the consultation and Next Steps	20
Annex 1	Summary list of questions	22
Annex 2	Glossary of terms	24
Annex 3	Regulatory impact assessment	27
Annex 4	Ofcom consultation guidelines	29
Annex 5	The structure of the new system	30

Section 1

Introduction

1. This consultation document contains a proposal by the Office of Communications (Ofcom) to change the way broadcast advertising is regulated and to establish a co-regulatory partnership between Ofcom and a new self-regulatory system for advertising standards, to be set up by the advertising industry (and referred to in this consultation as the 'co-regulatory system'). The consultation covers all aspects of broadcast advertising, including spot advertising*, teleshopping*, sponsorship*¹ and interactive advertising.
2. Ofcom, the new converged regulator for the communications industry, officially assumes its duties on 29th December 2003. The Ofcom Board expects to make the decision on whether to proceed to a co-regulatory system by February 2004. In parallel with this process, Ofcom will seek parliamentary approval to contract out some of its duties in relation to advertising, under the terms of the Deregulation and Contracting Out Act 1994.
3. Ofcom seeks the views of consumers, consumer organisations, industry and others on the proposals contained in this consultation document by **Friday 9 January 2004**.

Where possible comments should be made in writing and sent by email to ian.blair@ofcom.org.uk. However, copies may be posted or faxed to the address below.

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If you have any queries about this consultation or need guidance on the appropriate form of response or have any other query, please call our consultation helpdesk on 020 7981 3003 in working hours. Ofcom is keen to make responding to consultations easy and we will endeavour to give appropriate support and advice.

4. The proposals put forward in this consultation document are in line with National Consumer Council (NCC) guidelines and with Ofcom's proposed principles of co-regulation. The proposals have been developed in conjunction with advertising and broadcast industry representatives, and discussions have been held with other key stakeholders including bodies representing consumer interests.

¹ Please note: terms marked with an asterisk are explained in the glossary at Annex 2

Section 2

Summary – key issues and questions

How broadcast advertising is currently regulated

5. The statutory regulators, the Independent Television Commission (ITC) and the Radio Authority (RAu), currently control broadcast advertising regulation. They are required by the Broadcasting Act 1990 to draw up Codes² setting standards for broadcast advertising. The broadcasters must ensure that the advertisements they carry comply with these Codes through pre-vetting. For television, a central body (BACC*) clears around 90% of all advertisements. An equivalent body for radio (RACC*) clears certain sensitive categories of advertising and most national campaigns.
6. If the ITC or the RAu believe that a commercial may have breached its Code, a range of sanctions can be imposed on the licensee*. These include publishing details of the complaint, applying a scheduling restriction, requiring the advertisement to be withdrawn/amended, fining the broadcaster and, in the “extreme case”, revoking the broadcaster’s licence.
7. In December 2003, the ITC and the RAu become part of the new statutory communications regulator, Ofcom. Ofcom derives its powers from the Communications Act 2003. The Act places upon Ofcom certain duties in relation to the regulation of broadcast advertising. It also has a duty to explore opportunities for effective self-regulation* where appropriate as an alternative to statutory regulation.

Proposal for change

8. **In this context, Ofcom proposes to address the regulatory issues raised by the increasing convergence of the broadcast, electronic and printed media by contracting out its advertising regulation duties to an external self-regulatory system. This would involve the transfer of most of Ofcom’s advertising regulatory functions to a new self-regulatory system operating under the banner of the Advertising Standards Authority (ASA), the existing self-regulatory organisation for non-broadcast advertising. The new system would operate in a co-regulatory relationship with Ofcom.**
9. The ASA would become a ‘one-stop-shop’ for the consumer for all advertising content regulation across all conventional media. Behind its single portal, and alongside its independent responsibilities for non-broadcast advertising (which would continue), the ASA would establish a separate legal entity for broadcast advertising, tailored to recognise the different approaches required for broadcast media. This model – a single organisation to complain to, but different processes for handling broadcast and print and other media complaints - should make it easier for the public to complain about advertising. Under the proposals, the Codes defining what is acceptable for broadcast advertising would also transfer to the new co-regulatory system. While this would be separate from the non-broadcast advertising Code, the opportunity to achieve a coherent approach between the Codes would be maximised.

² The current advertising Codes can be found at www.itc.org.uk and www.radioauthority.org.uk

10. Under the proposals, Ofcom would retain its statutory responsibilities for regulating broadcast advertising. It would therefore be delegating functions to the co-regulatory partnership but would retain backstop regulatory powers over the new system. Broadcasters would still be responsible to Ofcom for broadcast content through their Ofcom licence conditions.
11. Ofcom would be responsible for the new system's effectiveness. It would monitor the co-regulator's performance, but would not interfere in individual adjudications. A recovery plan would be developed and agreed between the parties if intractable problems emerged with the new system.

Ofcom's continuing involvement in advertising regulation

12. Some non-content-related elements of advertising regulation would remain within Ofcom's direct remit, including the absolute amount of TV advertising, some aspects of TV and radio sponsorship policy and a number of other related issues. Also, while the co-regulator would have responsibility for maintaining and enforcing the advertising standards Codes, Ofcom would approve them.

Powers of enforcement and the application of sanctions

13. The co-regulator must have appropriate measures in place to enforce its decisions, including powers to withdraw or amend an advertisement or impose a timing restriction. Ofcom's licence conditions would mandate that broadcasters comply with directions from the broadcasting arm of the ASA. In response to persistent and/or serious Code breaches, the co-regulator could ask Ofcom to impose on a licensee a formal sanction, including a financial penalty or licence revocation.

Summary of key issues

14. The key issues to address, all of which are discussed later in the paper, are:
 - What are the benefits, or otherwise, to audiences and to the advertising and broadcasting industries of moving towards a self-regulatory system?
 - Are there sufficient safeguards in these proposals to ensure that Ofcom can discharge its statutory duty?
 - Would the new system be sufficiently independent from the advertising industry to earn and retain public confidence?
 - Are there proper mechanisms to ensure that the co-regulator has sufficient teeth to enforce its adjudications? Are there effective appeals procedures to ensure fair play for advertisers, broadcasters and complainants?
 - Are the proposed Ofcom responses to the potential failure of the contracted-out body sensible?

More detailed questions are included in the main text of the document and repeated in full in [Annex 1](#).

Section 3

The consultation in detail

Background

Introduction

15. Ofcom wishes to consult publicly on its proposal to contract out its duties in relation to the regulation of broadcast advertising content to a new self-regulatory system with which it would have a co-regulatory partnership. This would involve the transfer of the broadcast advertising codes and complaints handling to the new system, with Ofcom as the backstop regulator. The public face of the new system would be the Advertising Standards Authority (ASA), the self-regulatory body with 40 years' history of regulating non-broadcast advertising. The ASA would become a 'one-stop-shop' for all advertising complaints, thus simplifying the current fragmented regulation of advertising across media. Within this 'one-stop-shop' framework, broadcast advertising would be handled by separate legal entities. The existing self-regulatory advertising standards regime for non-broadcast advertisements – for example, in newspapers and magazines – would continue to be administered by the ASA, independent of Ofcom.
16. If the results of this consultation are positive, the proposals could be implemented during the first half of 2004.
17. The body of the consultation is divided into the following headings:
 - The rationale for moving to self-regulation
 - History and the current system of regulating broadcast advertisements
 - How the ASA system works for the self-regulation of non-broadcast advertisements
 - The proposal for a new co-regulatory system for broadcast advertisements
 - Questions arising from the proposal
 - Ofcom's continuing involvement in advertising regulation
 - Powers of enforcement and the application of sanctions
 - Process for auditing the co-regulator's performance
 - Key performance indicators
 - Options for Ofcom if the new system appears to be failing

History and the current system for regulating broadcast advertisements

18. When commercial broadcasting began in the UK with ITV's launch in 1955, government was concerned about the possible detrimental impact of television advertising arriving unbidden into private living rooms - they were not encouraged by the example of American television, which had run commercials for some years. It was therefore decided that the public interest would be best served if television advertisements were subject to the same statutory regulation as programmes. This principle was extended to commercial radio when it began in the UK in 1973. The regulation of broadcast advertising has remained on a statutory basis, and since 1991 has been administered by the ITC and the RAu. Ofcom will assume these responsibilities when it becomes fully operational on the 29th December 2003.

19. The Broadcasting Act 1990 required the ITC and the RAu to draw up, review, and enforce Codes which set standards for advertising and sponsorship. Within this framework, television and radio are regulated somewhat differently.

Television

20. Broadcasters do not generally produce commercials themselves. They transmit commercials made by third parties (advertisers and their agencies) but have no prior knowledge of their content until they are supplied for transmission. Broadcasters thus assure themselves that advertisements comply with the ITC Advertising Code by pre-vetting them before airing. Major broadcasters, as well as many cable and satellite channels, subscribe to the BACC*, which pre-vets advertisements on their behalf. All channels that do not use BACC (for example most ethnic channels, teleshopping services and non-UK channels) are required to make their own compliance arrangements. ITC licences require broadcasters, not the advertisers, to comply with the Code.
21. If, through complaints or direct monitoring, the ITC believes that a commercial may have breached its Code, it will take the matter up with the BACC or directly with the broadcaster in the case of cable and satellite channels which do not use the BACC. The ITC can impose a range of sanctions on the broadcaster including:
- publishing the upheld complaint in the ITC Complaints Bulletin;
 - requiring later transmission times;
 - withdrawing the advertisement from broadcast pending amendment;
 - banning the advertisement;
 - fining the broadcaster for repeat or particularly serious offences;
 - in the extreme case, revoking the licence to broadcast.
22. The ITC receives and deals with some 8,000 complaints about 2,500 television advertisements each year (there are about 30,000 new television advertisements shown annually), and upholds complaints in around 120 cases. It uses the information gleaned from complainants to inform its own policy and code-making and conducts extensive research to ensure that standards of advertising regulation are in tune with public expectations.

Radio

23. Radio Authority licensees both produce advertising (including sponsor credits and promotions) and also take national, regional, local or specialist campaigns which feature on a number of stations. Pre-vetting of advertisers and scripts, including sponsorships, credits and advertiser promotions, is a condition in radio licences. Advertisers and scripts are cleared either by station staff or centrally by the RACC*, but stations also need to double-check, for example, that “RACC cleared” scripts are suitable for their audience and the proposed time of broadcast.
24. The RAu does not generally intervene against broadcasters but regulates by complaint. Where there is doubt about rule interpretations, the RACC and individual stations may seek guidance from the RAu, but the authority does not normally advise advertisers or agencies. If the RAu believes that advertising or sponsorship has breached its Code, it will take matters up with RACC and/or the radio broadcaster. The RAu can act immediately to ensure that advertising is withdrawn or amended or transmitted at a more suitable

time, and has available the same range of sanctions against licensees as the ITC.

25. The RAu receives and deals with about 250 complaints about 175 radio scripts each year, and upholds complaints in around 40 cases. About 12,000 radio scripts are cleared by RACC each year, with many more cleared locally. The RAu uses complaints information to inform its own policy and Codes.

The rationale for moving to self-regulation

26. The following paragraphs lay out the arguments for changing the existing approach.

Public policy and Ofcom's duty

27. In recent years government policy has increasingly encouraged co-regulation and self-regulation where these will best achieve regulatory objectives. Consistent with this approach, the White Paper "A New Future for Communications" published in 2000, raised the question whether a more self-regulatory approach to broadcast advertising might be appropriate.
28. The Secretary of State for Culture, Media and Sport, Tessa Jowell, summed up the Government's view in a speech on 13th November 2002:

"Ofcom will be able to stand back from regulation or reduce regulatory burden where it can see there is effective self-regulation....Any liberalisation of regulation must go hand-in-hand with an acknowledgement by industry of the responsibility it carries. Self-regulation means taking seriously our responsibilities to consumers and citizens....Ofcom will have the principal responsibility for regulating advertising in the broadcast media. However, we recognise that, in the future context of increasing convergence, it may be that a self-regulatory system can better deliver consistent, comprehensible regulation across the media. We can draw on the example set by the ASA. A system which is respected and works well... Any move towards greater self-regulation has to work. The new system must command trust and respect...Ofcom's role will be to ensure it is effective."

29. Accordingly, the Communications Act 2003 stipulates that Ofcom should:

"...have regard to...the desirability of promoting and facilitating the development and use of effective forms of self regulation." (Section 3(4))

"...have regard to the extent to which [its General Duties]....are likely to be furthered or secured by effective self-regulation....and to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by Ofcom."(Section 6(2))

Section 1.7 of the Act empowers Ofcom to contract out appropriate functions under the Deregulation and Contracting Out Act 1994.

Section 6.3 of the Act requires Ofcom, when determining whether the model of self-regulation is effective, to have regard to:

- whether the procedures are administered sufficiently independently of the industry being regulated, and
- whether adequate arrangements are in force for funding the system.

As the statutory regulator and licensing body, Ofcom retains final responsibility for the effectiveness of any self-regulatory regime to which it contracts out any of its functions. Thus self-regulation would operate in a co-regulatory relationship with Ofcom in respect of broadcast advertising.

The full text of the Act, which includes Ofcom's duties with regard to self-regulation and the regulation of advertising, can be found at:

<http://www.legislation.hms.gov.uk/acts/acts2003/20030021.htm>

Handling convergence

30. The establishment of a single advertising regulator would help to address the issues of convergence across media used for advertising. This media landscape has become increasingly complex, not only because of the number of different media in which advertising appears, but also because of the inter-relationships between them. Advertising campaigns today are often designed to run across several platforms simultaneously (press, radio, television, internet, mobile telephony), aided by digital technology and with sophisticated links between them. An integrated approach to regulation would reflect the converged approach to commercial communication taken by the industry - an integration that has not, up to now, been provided by the current regulatory environment, comprised as it is of four sectoral advertising regulators³ and a raft of laws, both domestic and European.

Avoiding confusion

31. There is evidence that the public are confused about who to approach when they have a complaint about broadcast advertising. For example, the 2002 edition of the ITC's independent survey of public opinion "Television - The Public's View" indicated that more than twice as many people believe that the ASA rather than the ITC is responsible for regulating advertising on the three commercial analogue terrestrial channels (23% compared to 9%). This research is borne out by experience. For instance, between January and July 2003 the ASA referred 1,898 television complainants to the ITC. It has also transferred 622 radio complainants to the Radio Authority. Furthermore, of the 283 complaints made to the Radio Authority in 2002, 55 had initially been made to the ASA.

32. Confusion about which complaint bodies to contact for conventional media advertising is exacerbated by the growth in advertising on new and innovative media. For instance, a moving poster in a railway station, a video screen on a garage forecourt or advertising reaching television screens via a telephone line may appear to the public to be similar to a television advertisement and thus subject to the same regulatory regime. In fact, all are likely to be non-broadcast media and therefore within the remit of the ASA. Even more problematic, from both a regulator and consumer perspective, is some advertising received by digital means. Image-based and text advertisements on digital radio receivers for example fall between the current scope of the ASA, and the remits of the ITC and the RAU. In these cases, consumers are protected only by relatively blunt provisions of general consumer law. A broadcast arm of the ASA could be expected, with industry agreement, to extend its scope to cover these regulatory gaps.

³ Advertising Standards Authority (non-broadcast advertising); Independent Television Commission; Radio Authority; Broadcasting Standards Commission (taste, decency and fairness across all broadcast media)

33. Both sources of confusion would be avoided if one body handled all complaints about advertising, whatever the medium.

Avoiding regulatory uncertainty

34. A common regulatory approach which addresses advertising issues across all media would help address some of the uncertainty for both broadcasters, advertisers and consumers which can arise as a result of the current distinct regulatory regimes. For example adjudications made by the ITC or the RAU for broadcast advertisements may differ from both each others adjudications and from ASA adjudications on the same advertising campaign in relation to press, poster or cinema. Whilst divergent decisions in relation to the same campaign in different media and with different executions may in some cases be justified, in others it may point up subjective inconsistencies which would leave advertisers running a risk of double jeopardy.

Concentration of Ofcom's resources

35. A key benefit for Ofcom in contracting out regulatory functions where appropriate is that it will allow the regulator to concentrate its resources in those areas where co- or self-regulation is not a practical proposition. This should result in more cost-effective regulation for all Ofcom's stakeholders.

Other benefits

36. The advertising and broadcasting industries, meeting in a joint Task Force representative of all sectors of the business, have indicated their commitment to the co-regulatory partnership (see the industry website www.adconsult.info for further details). The Task Force argues that this new approach is required to maintain consumer and competitor confidence in marketing communications. Advertising funds independent broadcasting. Advertisements must be 'legal, decent, honest and truthful' in whatever medium they appear, if advertising is to be effective and welcomed. Changing media require different regulatory arrangements that can keep pace with change. While current arrangements have worked well in the analogue age, there is now a requirement for greater clarity and simplicity for consumers wishing to make representations about advertising in converging media. There is also a requirement for more transparent and accountable processes, with opportunities to challenge adjudications.
37. For the reasons stated in paragraphs 26-36, Ofcom proposes moving to a co-regulatory system. However, the views of stakeholders, consumers, consumer groups and others affected by this potential change are important, both with respect to the decision on whether to pursue co-regulation and to more detailed issues about the form of co-regulation. Below, we summarise the main arguments for and against the main policy options: **maintaining statutory regulation as now** or **introducing co-regulation**.

The main arguments in favour of the change are:

- As new and hybrid electronic media emerge, all broadcast and non-broadcast advertising (including on the internet and on phone services) would be subject to a common self-regulatory approach, under a single established body, thus providing greater clarity for consumers;
- There is a greater likelihood of consistency of adjudications and policy across broadcast and non-broadcast media;

- The advertising industry will assume responsibility for its own behaviour;
- The proposals are in line with the Communications Act which encourages appropriate co-regulation;
- Contracting out this function would allow Ofcom to minimise duplication of resources.

The arguments against change are:

- Broadcasters would be responsible to two regulators, one for programming and licensing (Ofcom) and one for advertising;
- Some elements of advertising and sponsorship regulation would have to remain with Ofcom, diluting the broadcasters' focus;
- More difficult to maintain an integrated approach to programme and advertising policy (for example, on watershed issues).

Question 1: Please give your views on the benefits and disbenefits of a move to co-regulation with respect to:

- Viewers and listeners
- Broadcasters
- Advertisers

Ofcom's proposed changes to the regulation of broadcast advertising

The ASA system for the self-regulation of non-broadcast advertisements

38. The ASA currently administers a system for non-broadcast advertising. This is trusted by government and well-known to consumers (see the industry website at www.adconsult.info). The existing non-broadcast system is based on four essential principles.

- (1) The industry writes and enforces the code (the British Code of Advertising, Sales Promotion and Direct Marketing)⁴.
 - Effected through the Committee of Advertising Practice (CAP),
 - CAP includes the 17 representative bodies and trade associations involved in the various parts of the non-broadcast sector – advertisers; advertising, direct marketing and sales promotion agencies; the non-broadcast media,
 - Periodically CAP reviews the code and engages in public consultation on it.
- (2) The Advertising Standards Authority (ASA) is the independent body that administers the code, manages consumer (and industry) complaints and makes adjudications.
 - Effected through the ASA Council (12 members and a Chairman who must be independent of the industry),
 - The former Director General of Fair Trading, Lord Borrie QC, is the current Chairman. He appoints the members of Council.
 - Two-thirds of the Council are lay members, drawn, via public advertisement, from a wide cross-section of society.
 - The one-third minority on the Council are drawn from experienced practitioners within the business. They do not

⁴ The CAP Code can be found at www.cap.org.uk

‘represent’ the business or the sector from which they are recruited but are there as capable individuals who add helpful expertise in difficult cases.

- There is an independent review process built into the system to consider appeals from any parties critical of an individual adjudication. This is independent of both the ASA and the business.

(3) The whole system is financed by a levy on advertising spend in non-broadcast media and on direct mail.

- An arms-length body, the Advertising Standards Board of Finance (asbof) collects and distributes the money; this has proved to be a reliable and efficient form of funding for the self-regulatory system since 1975,
- Asbof, through its Chairman, appoints the Chairman of CAP and the Chairman of the ASA,
- The DTI and OFT are currently consulted with regard to the appointment of the Chairman of the ASA, but have no right of appointment or veto (the same would apply to Ofcom if broadcast advertising were brought within the remit of the ASA),
- The separation of the funding mechanism from other parts of the self-regulatory system allows the ASA to operate independently from industry and to adjudicate complaints impartially.

(4) A system of sanctions, including:

- The media will not publish advertisements against which ASA adjudications have been made,
- Bad publicity (a serious deterrent for advertisers),
- Compulsory pre-vetting in the poster medium for repeat offenders,
- In the case of misleading claims (the major cause of complaints) referral can be made to the Office of Fair Trading (OFT), which has legal powers, including those of injunction,
- Acceptance of ASA adjudications is mandatory.

39. Although the ASA is the public face of the system, it is in reality an ASA/CAP/asbof system with three inter-dependent bodies having linked but quite separate roles.

The proposed new approach to broadcast advertising regulation

40. The following paragraphs explain how the ASA model could be modified to meet the particular issues faced by broadcast advertising.

Ofcom as the backstop regulator

41. The status of the Codes covering broadcast advertising content is different to the Code covering non-broadcast media. Both are similarly bound by the law in areas such as misleading claims, but compliance with the Codes is a condition of broadcasters’ licences and Ofcom would therefore retain legal powers. No such condition applies to other media and therefore the parts of

the system that dealt with advertising in non-broadcast media would have no relationship with Ofcom on matters of advertising content⁵. While from the public's point-of-view, there would be one visible, outward-facing organisation for handling complaints (the ASA), internally, the self-regulatory system would recognise the differences between licensed and non-licensed services by setting up separate decision-making structures to deal with broadcast and non-broadcast advertising. Complaints would be handled in the relevant division.

Separation of different functions

42. The current statutory bodies, the ITC and Radio Authority, write the Codes, and also assess complaints, make adjudications and apply sanctions. In a self-regulatory system, these functions would be separated, in the interests of greater transparency.
43. The broadcast parts of the system would have their own legal entities which would each sign the contract with Ofcom. There would however be close liaison between the legal entities of ASA (Broadcast) and the existing non-broadcast ASA. This would enable a more coherent approach to be taken on advertising regulation across all media than is currently possible.
44. The new separate legal entities would fulfil similar roles to those performed by ASA/CAP/asbof – for the sake of simplicity, these bodies are referred to as ASA(Broadcast), BCAP and basbof – i.e. the broadcasting equivalents of the existing self-regulatory system (see [Annex 5](#) for explanatory graphic). Ofcom has the statutory duty to satisfy itself that the adjudicatory body is appropriately independent of the industry. The arm's length character of these arrangements would be essential.
45. There would also be an independent review process to manage appeals against adjudications, based on the existing ASA model (see paragraph 49 below).

ASA Council

46. To meet the adjudicatory needs of the two very different types of Code, while securing consistency in decision-making, consideration is being given to:
 - increasing the Council of the ASA from 12 to 15 (plus the independent Chairman),
 - sub-dividing it into 2 councils of 10 (i.e. for non-broadcast and broadcast advertisements) with an overlap of 5 members serving on both councils. The independent Chairman would preside over Council consideration of both non-broadcast and broadcast advertisements.
47. Like the existing ASA Council, the proportion of lay to non-lay members would be 2:1 and the lay members would be appointed by the Chairman, following public advertisement. The non-lay members would be selected by the Chairman for their industry experience, but would not represent specific industry sectors, and would act independently of the business.

⁵ In this proposal “non broadcast” advertising means advertising in any paid-for media that does not require content to be licensed by the ITC, the Radio Authority or, after December 2003, Ofcom

48. This should ensure the existence of one public-facing brand (ASA), comprising two legal entities – ASA and ASA (Broadcast), speaking with a single credible voice – i.e. the ASA becomes a single portal with the broadcast and non-broadcast sub-divisions applying the relevant Code.

Appeals

49. A robust independent review procedure would be established for appeals by complainants, broadcasters or advertisers against broadcast advertising adjudications, similar to the format currently available for non-broadcast advertising. An independent reviewer would be appointed (the existing reviewer of ASA adjudications is a retired senior civil servant) who could ask the ASA Council to reconsider its decision, although the Council's final decision would be paramount. There would still be the possibility of Judicial Review.

Effective funding mechanism

50. Subject to Ofcom's approval of the co-regulatory proposal, the industry is committed to setting up basbof to manage a levy system for broadcast advertising which would initially only be collected by advertising agencies, and would be collected only on advertising campaigns in the UK (see the industry website www.adconsult.info for further details). At current levy rates (one tenth of 1% of advertising media spend), it is anticipated that this would ensure adequate funding for the new system of around £3.5 - 4 million per annum. Ofcom has a statutory duty to satisfy itself that adequate resources are available.
51. The levy should also provide additional resource for consumer research, monitoring and training.
52. The value of basing the new model (basbof) on the existing asbof model is that it is known to function well. The funding body operates at arm's length from the complaints adjudication body, thus ensuring the latter can operate independently.

Retention of existing pre-clearance bodies

53. The pre-clearance bodies (the BACC and RACC) would continue to be funded at their current level by broadcasters that use their services. Television broadcasters that do not currently use the BACC will not be required to do so in the future, but will continue to be obliged to ensure the advertising broadcast on their services complies with the codes. The wider industry, in recognition of their key role in vetting broadcast advertising prior to transmission, has acknowledged that there may be a case for enhanced funding for the pre-clearance bodies. Over time, the levy could generate sufficient funds to enhance the resources available, as considered necessary.

Industry Codes

54. Code ownership would be transferred to BCAP. Thus the broadcast advertising codes would become industry Codes.
55. The industry would be responsible for making changes as appropriate and on the basis of evidence, as well as research and ongoing monitoring of the public's views. This has worked successfully in the non-broadcast sector,

where CAP has revised its Codes on a number of occasions, the most recent being in 2003 when the separate advertising and sales promotion Codes were amalgamated into a single updated Code – the 11th edition.

56. There would be wide public consultation with stakeholders (including the industry and representatives of viewers, listeners and consumers) which might include public events, seminars etc., where concerns about particular issues could be aired and the system's effectiveness demonstrated and debated.
57. There would be regular liaison between Ofcom and the co-regulatory system through BCAP working groups which would provide the opportunity to evaluate issues of concern and to discuss areas of social responsibility, or changes in Government policy. The ITC's Advertising Advisory Committee (AAC) would be used as a model for ongoing Code discussions.
58. While modifications to the Codes might be required at any time on public policy grounds or in response to changes in legislation or EU directives, it is otherwise proposed that the existing Codes should be retained for an initial period (perhaps two years) in order to provide stability and certainty while the new system is being established.

Code Compliance

59. ASA (Broadcast) would consider all complaints about broadcast advertisements which might be generated by the public and by industry and would intervene when code breaches are judged to have occurred. It is envisaged that compliance monitoring and initiation of any consequent interventions would be carried out by BCAP, the body responsible for the Codes. The separation of responsibilities would enable fair treatment and transparency.

Sanctions

60. ASA (Broadcast) would adjudicate on **all** complaints relating to licensed broadcast advertisement content, and the whole industry would have to agree to abide by its decisions. It is intended to create a self-regulatory system which would have teeth, but in accordance with the Communications Act, Ofcom would remain the backstop regulator with powers to intervene in the last resort.
61. Broadcasters would remain responsible, as a condition of licence, for ensuring the advertisements they broadcast comply with the Codes. Failure to abide by ASA (Broadcast) decisions would result in referral to Ofcom. The possibility of fines imposed by Ofcom, or licence withdrawal, would remain an ultimate, though last-resort, sanction.
62. However, broadcasters' everyday working relationship on broadcast advertising content issues would be with ASA (Broadcast), BCAP and their respective pre-clearance bodies, not with Ofcom. This would minimise the risk of double regulatory jeopardy.
63. These proposals clearly derive from the existing ASA procedures and are therefore, tried and tested in the non-broadcast environment. They also deliver, at least in theory, the benefits identified in paragraph 36. However, views are sought on whether these proposals will deliver in practice. The questions below address the relevant issues.

Promoting the system

64. It is important that regulatory arrangements, in particular complaints procedures, are widely understood by the public and industry. This forms part of the rationale for contracting out broadcast advertising regulation to a long-established and well-known brand - the ASA.
65. Broadcast advertising self-regulation will be launched with maximum PR and publicity, which will generate considerable media coverage and immediate public awareness.
66. On an ongoing basis, awareness of the ASA is generated by use of free media space and in particular through the publicity generated by the weekly publication of its complaints adjudications. This would continue if the ASA's remit is extended to broadcast advertising. Broadcasters have agreed to continue the practice, required by licence, to give airtime to promote the self-regulatory complaints procedure, as they do under the existing system.

Question 2: *Are you confident that these proposals can deliver a regulatory system which is at least as effective, timely and respected as the current statutory system? What aspects give you cause for confidence or concern? In what way might the proposals be an improvement on current arrangements?*

Question 3: *Can you suggest any changes to the proposals which would either improve on current standards of regulation or remedy any detriments you perceive compared to the current system?*

Question 4: *In order to safeguard the co-regulator's effectiveness and to avoid possible double jeopardy, it is proposed that Ofcom would not be entitled to intervene in individual cases, though it would remain responsible for the overall effectiveness of the system. Does this seem a sensible approach?*

Question 5: *Do you believe there would be additional costs, or cost savings, for the broadcast and advertising industries as a result of the proposed changes? Please specify. If you anticipate higher costs in any area, do the benefits of the proposed new system justify these?*

Question 6: *Does the proposed system appear capable of regulating fairly and effectively the advertising which appears on all those services which Ofcom will license, including small or specialist audience channels, foreign language stations, and very local or community broadcasters? If not, where might the problems arise?*

Question 7: *Are the safeguards proposed sufficient to ensure that the co-regulatory system remains independent of the commercial interests and pressures of advertisers and broadcasters?*

Question 8: *Are the appeals arrangements adequate and sufficiently independent, and do they provide adequate recourse for advertisers, broadcasters and complainants? Are they better or worse than current arrangements?*

Question 9: *If you wished to complain about broadcast advertising would you feel more confident or less confident complaining to the ASA (the proposed co-regulator) operating under the proposed system?*

Question 10: *Ofcom proposes that the broadcasters should continue, as now, to be responsible for the advertising that they carry, and that they, rather than just the advertisers, would apply the co-regulator's decisions. Do you regard this as the right approach? If not, how would you see the system working?*

Question 11: *We would welcome your views on the degree to which, from your reading of the proposal, the new co-regulatory body would be either more or less transparent and accountable than are current arrangements. Would such transparency and accountability be sufficient?*

Ofcom's continuing involvement in advertising regulation

67. The co-regulation proposals are concerned with advertising content. Non-content-related elements of advertising regulation would remain within Ofcom's direct remit. The following paragraphs clarify our view of which body should be responsible.

Ownership and enforcement of the advertising Codes

68. As explained above, responsibility for the content and enforcement of the Codes would rest with the co-regulator. However, Ofcom would have to approve any changes to the Codes. It would also be able to suggest, but not insist upon, Code amendments, subject to the exception at paragraph 80.

Complaints about content of advertising

69. Ofcom would have no involvement in individual complaints handling, a key function for the co-regulator both in enforcing Codes and in informing future policy (but see paragraph 84 about performance indicators). As is now the policy at the ITC and the RAU, the co-regulator would also be able to intervene on the basis of its own monitoring, even if complaints have not been received.

Research

70. Ofcom would measure the effectiveness of co-regulation, and in pursuit of this may require specific subjects to be researched. Research, however, would also be an essential function of the co-regulator. Its research objectives would be to keep abreast of public opinion and specialist views, including public policy issues that may attract few complaints and in relation to audiences who are traditionally not minded to complain.

Scheduling of spot advertising

71. Ofcom will need to retain broad input into scheduling policy, such as the applicability and relevance of the watershed to advertising. However, the co-regulator would determine whether an advertisement had been appropriately scheduled. The co-regulator would also judge whether timing restrictions imposed on specific advertisements by the broadcasters were appropriate.

Clear distinction between advertising and programmes

72. Ofcom would retain responsibility for ensuring separation of commercial content from editorial content, required by European television law*, as well as by current television and radio Codes. Issues may include: ensuring

audiences know when they are exposed to advertising material, product placement, virtual advertising⁶ and “artist separation”⁷.

Scheduling of advertising breaks (television only)

73. Policy on when advertising breaks may occur (including what programmes may not carry advertising) and with what frequency (e.g. number of breaks per hour) would be matters for Ofcom to determine and monitor, having regard to relevant programme regulation issues. European television law* lays down minimum requirements (there is no such requirement for commercial radio).

Control of advertising minutage (television only)

74. Ofcom would be responsible for determining how many advertising minutes television broadcasters may carry per day⁸. This requires a balance between the broadcasters’ need to maintain revenue to fund programme making and the viewers’ preference against too many interruptions to programmes. European television law* states minimum requirements (again, no such requirement for commercial radio).

Programme sponsorship

75. It is proposed that where sponsorship of television or radio programming involves (or potentially involves) influencing editorial policy it should remain Ofcom’s responsibility. Where however it simply affects presentational issues (such as credits), these non-editorial elements should transfer to ASA (Broadcast). This will require detailed procedural work by both Ofcom and ASA (Broadcast) to ensure that complaints are handled seamlessly between the two bodies.

Teleshopping channels (television only)

76. The output of teleshopping channels is all advertising content (they show no non-commercial programming). We therefore propose that all teleshopping content would be in the co-regulator’s remit, as would teleshopping slots on normal channels. As teleshopping is an area where there continues to be a large number of issues, this transfer will be particularly challenging for the new system.

Television channels’ and radio stations’ own programme trailers and promotions

77. Trailers and promotions, appearing mainly in non-paid-for programme time, are nearly always programme/or channel/linked, are subject to the Programme Codes, and should remain in Ofcom’s remit as part of programme regulation.

Cross-promotion

⁶ Where advertising is electronically superimposed over existing television images, e.g. in sports fixtures.

⁷ There are rules to prevent television advertisements being scheduled around a programme if both feature the same actor(s).

⁸ For details of how this area of activity is currently regulated, see the ITC’s Rules on the Amount and Scheduling of Advertising.

78. Cross-promotion is the promotion of a channel or station by a broadcast licence holder on another service owned or run by the same licence holder. The promotions appear in programme time or in non-paid-for advertising slots. Issues are usually competition-related and as such should be part of Ofcom's remit, though they can contain misleadingness issues which may require liaison with the co-regulator. Where a channel takes a paid-for advertisement on another channel, regulatory responsibility will lie with the co-regulator.

Non-paid-for advertising

79. Public service announcements placed by Government departments are independent of broadcasters and should be regulated by the co-regulator like other spot advertising.

Other statutory and public policy requirements

80. It would fall to the co-regulatory code body to implement public policy requirements such as statutory bans on political advertising and tobacco products, and restrictions on the advertising of gambling and lotteries. This would also cover areas where no statutory requirements exist, but where there are strong governmental/public policy considerations. However, Section 321(6) of the Act gives the Secretary of State the power to direct Ofcom in relation to categories and methods of advertising. Ofcom consequently would need to reassure itself that the co-regulator's rules and practices adequately encompass current public policy.

Question 12: *Do you have any comments on any of these allocations of responsibility, or on the functions themselves, or on any of the issues discussed? In particular, do you think the proposal to transfer teleshopping and the non-editorial elements of sponsorship to the ASA (Broadcast) is appropriate?*

Powers of enforcement and the application of sanctions

81. As a result of complaints or staff monitoring, code breaches are currently registered in around 160 cases a year between the ITC and the RAU. Where adjudications are made, the broadcaster may be required to amend advertising, to restrict its broadcast to certain times of day, or to remove it permanently from air.

82. The co-regulator would be expected to have appropriate measures in place to enforce its decisions in a similar manner. Ofcom would make it a broadcasting licence condition that radio and television licensees must comply with directions from the co-regulator. This would ensure that the co-regulator had the teeth to take effective and rapid action against advertising that breaches the Codes.

83. If a licensee's failure to comply with the requirements of the Code was sufficiently serious (e.g. a major breach, repeated Code breaches, ignoring the co-regulator's directions etc.), the co-regulator could ask Ofcom to impose a formal sanction. Ofcom has the power to fine broadcasters who either persistently or seriously breach the Codes or, in extreme cases, to revoke their licences to broadcast.

Question 13: *Do you consider that the enforcement and sanctioning process would provide effective protection for viewers and listeners from harmful, offensive or misleading advertising material?*

Monitoring the success of the new scheme

Process for auditing the co-regulator's performance

84. Research shows⁹ 86% of viewers feel the amount of television advertising regulation is about right or that there is too little, indicating a high level of satisfaction with advertising content. Any shift in responsibility should not result in any diminution in this level of satisfaction. There is a need to check that this level of satisfaction is maintained. Ofcom's statutory duties also require it to establish systems which allow Ofcom both to monitor the performance of the co-regulator, and to intervene if that performance fails to meet Ofcom's or the public's expectations. Conversely, performance auditing procedures should not impose excessive burdens on the co-regulator or on Ofcom's licensees. We propose the following measures:

- The co-regulator should publish an annual statement which encompasses its performance for the past period and its objectives and targets for the forthcoming period. By this method, the co-regulator would set and assess its own performance indicators, which would be agreed by Ofcom and which would probably include:

Quantitative

- complaint response times
- trend data on complaints received and handled
- trend data on upheld complaints
- trend data on complaints leading to sanctions

Qualitative

- policy initiatives and activity (including in those socially important areas where few complaints may be received)
- assessment of compliance in particularly contentious areas (for example advertising to children and alcohol advertising)
- research undertaken (including public attitude surveys to determine the public's satisfaction with the degree and effectiveness of regulation)
- evidence of stakeholder satisfaction and clarity about the way in which decisions are reached, implemented and communicated
- code changes and rule reviews
- assessment of internal performance (e.g. adequate funding)
- reports to Ofcom on significant external criticisms of the regulatory regime

Ofcom would have the right to query any of the co-regulator's targets if it believed they were inadequate, and to specify additional targets:

⁹ The Independent Television Commission's "Television, the Public's View" survey is published annually and the 2002 edition can be found on the ITC's website at www.itc.org.uk

- Ofcom could request sight of current trend information and statistics at any time if it had reason to believe there might be a problem or was required to account to Parliament for operation of the system.
- Ofcom would retain the right to intervene and require changes to systems and procedures if it judged that the co-regulator was failing to perform satisfactorily (see next section).

85. Ofcom will need a set of standards by which it can judge performance and, importantly, pick up on signs that the system may be failing or falling behind acceptable standards. It also needs to be determined what action Ofcom could take if the system does appear to be failing.

86. In addition, during the detailed design work that will precede the setting up of the self-regulatory system, Ofcom will work closely with those involved to ensure it is satisfied that the system will be both efficient and effective. Once in operation systems will need to exist to ensure identification of possible problems at an early stage and that Ofcom retains an understanding of current issues. Ofcom regards as essential that this be done in a way that neither undermines the authority nor the operational independence of the self-regulatory system despite its ultimate accountability to Ofcom. The Chairman of the ASA and the Chairman of the Content Board have agreed that, if and when such a system is established, the Chairman of the ASA would attend the Content Board for a discussion of the Annual Report and any other relevant discussion issues as appropriate.

Key performance indicators

87. We consider the four main key performance indicators to be:

- **Compliance:** the percentage of advertisements broadcast on radio and television against which the co-regulator has intervened, either as a result of complaints or of staff monitoring. An unacceptable increase in this percentage would imply that the co-regulator was failing to convince the broadcasters and advertisers of the need to comply with the Codes. Success for the new system will be in preventing inappropriate advertisements from being broadcast in the first place.
- **Customer satisfaction:** Research amongst complainants can identify what proportion is satisfied with the handling of their complaint, irrespective of whether the complaint was upheld. This should indicate the degree to which the public feel served/protected by the co-regulator.
- **Industry satisfaction:** It will be important for the co-regulator to establish by research whether industry stakeholders believe the co-regulator to be acting in a fair, transparent and accountable manner.
- **Appeals:** The primary measure would be the extent to which adjudications were reversed or amended as a result of Requests for Review. Similarly, the number of appeals by advertisers or broadcasters against the co-regulator's decisions might indicate how successful the co-regulator has been in justifying its case for intervention.

Options for Ofcom if the system appears to be failing

88. If the co-regulator fails to meet the agreed standards, Ofcom and the co-regulator would open discussion about appropriate corrective measures. These might include:

- A review by Ofcom of “case handling” procedures and outcomes
- Ofcom entering into discussion with broadcasters and advertisers, with the co-operation of the co-regulator, to determine where and why the system is failing
- If necessary, proposing that an Ofcom trouble-shooting team works with co-regulator staff to iron out problem areas
- As a last resort, suspending the co-regulatory system and taking advertising regulation back into Ofcom.

Question 14: *Do you consider that these audit and recovery measures are adequate to enable Ofcom to fulfil its statutory duties?*

Question 15: *In the event of serious failure of the co-regulatory system, Ofcom would retain the right to revert to full statutory regulation. The industry has proposed that to give the system time to establish itself Ofcom should refrain from taking this action for an agreed period, perhaps two years. Is this reasonable, and does two years seem appropriate?*

Section 4

Regulatory Impact Assessment

89. Ofcom is committed to carrying out a regulatory impact assessment on all changes upon which it consults. A discussion of the overall regulatory impact of the proposal is included at [Annex 3](#). This annex does not attempt to quantify the value of the proposal, but suggest that it should deliver benefits without in the long term altering costs. It therefore recommends the proposal.
90. Some of the Consultation Questions are designed to inform this assessment but we welcome your comments on areas which are not covered by questions and where you feel that there are points to be made about regulatory impact.

Question 16: *Does the approach to the Regulatory Impact Assessment described in Annex 3 seem practical and fit for purpose? Do its conclusions make sense?*

Section 5

How to respond to the consultation and Next Steps

How to respond to the consultation

91. Ofcom seeks the views of consumers, consumer organisations, industry and others on the proposals contained in this consultation document by **Friday 9 January 2004**.

Where possible comments should be made in writing and sent by email to ian.blair@ofcom.org.uk. However, copies may be posted or faxed to the address below.

Ian Blair
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3000
Fax: 020 7981 3333

If you have any queries about this consultation or need guidance on the appropriate form of response or have any other query, please call our consultation helpdesk on 020 7981 3003 in working hours. Ofcom is keen to make responding to consultations easy and we will endeavour to give appropriate support and advice.

92. Ofcom has designated Philip Rutnam, Partner Competition and Strategic Resources, as its consultation champion. If you have any concerns or comments about the consultation process in general or this consultation in particular, please contact:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
Email: philip.rutnam@ofcom.org.uk

Confidentiality

93. We aim to publish the outcome of this consultation and all responses to it. Unless you make a specific request to keep all or part of your response confidential (please give reasons), all submissions will be published as soon as practicable after they have been received by Ofcom.

Consultees

94. We are sending this document to a range of organisations (listed on our website, www.ofcom.org.uk). Please tell us if you know of organisations who would be interested. Further paper copies are available from the address

above.

95. Further information on these proposals and on advertising self-regulation is available at www.ofcom.org.uk and from the industry at www.adconsult.info and from the ASA at www.asa.org.uk.

Consultation principles

96. Ofcom has committed to meeting a series of criteria for consultations, which can be found at [Annex 4](#).

Next Steps

97. Following analysis of the consultation responses, Ofcom hopes to announce a decision on the future regulation of broadcast advertising by the end of February 2004.

Annex 1

Summary list of Questions

We welcome any relevant comments, even if the issue you raise is not covered by this list of questions:

Question 1: *Please give your views on the benefits and disbenefits of a move to co-regulation with respect to:*

- Viewers and listeners
- Broadcasters
- Advertisers

Question 2: *Are you confident that these proposals can deliver a regulatory system which is at least as effective, timely and respected as the current statutory system? What aspects give you cause for confidence or concern? In what way might the proposals be an improvement on current arrangements?*

Question 3: *Can you suggest any changes to the proposals which would either improve on current standards of regulation or remedy any detriments you perceive compared to the current system?*

Question 4: *In order to safeguard the co-regulator's effectiveness and to avoid possible double jeopardy, it is proposed that Ofcom would not be entitled to intervene in individual cases, though it would remain responsible for the overall effectiveness of the system. Does this seem a sensible approach?*

Question 5: *Do you believe there would be additional costs, or cost savings, for the broadcast and advertising industries as a result of the proposed changes? Please specify. If you anticipate higher costs in any area, do the benefits of the proposed new system justify these?*

Question 6: *Does the proposed system appear capable of regulating fairly and effectively the advertising which appears on all those services which Ofcom will license, including small or specialist audience channels, foreign language stations, and very local or community broadcasters? If not, where might the problems arise?*

Question 7: *Are the safeguards proposed sufficient to ensure that the co-regulatory system remains independent of the commercial interests and pressures of advertisers and broadcasters?*

Question 8: *Are the appeals arrangements adequate and sufficiently independent, and do they provide adequate recourse for advertisers, broadcasters and complainants? Are they better or worse than current arrangements?*

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Question 11: *We would welcome your views on the degree to which, from your reading of the proposal, the new co-regulatory body would be either more or less*

transparent and accountable than are current arrangements. Would such transparency and accountability be sufficient?

Question 12: *Do you have any comments on any of these allocations of responsibility, or on the functions themselves, or on any of the issues discussed? In particular, do you think the proposal to transfer teleshopping and the non-editorial elements of sponsorship to the ASA (Broadcast) is appropriate?*

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Question 14: *Do you consider that these audit and recovery measures are adequate to enable Ofcom to fulfil its statutory duties?*

Question 15: *In the event of serious failure of the co-regulatory system, Ofcom would retain the right to revert to full statutory regulation. The industry has proposed that in order to give the system time to establish itself should Ofcom refrain from taking this action for an agreed period, perhaps up to two years? Is this reasonable, and does two years seem appropriate?*

Question 16: *Does the approach to the Regulatory Impact Assessment described in Annex 3 seem practical and fit for purpose? Do its conclusions make sense?*

For further information see:

www.ofcom.org.uk (Ofcom website)

www.asa.org.uk (Advertising Standards Authority website)

www.adconsult.info (industry website)

Annex 2

Glossary

Advertising Standards Authority (ASA)

The ASA is the independent body, self-regulatory body for non-broadcast advertisements, sales promotions and direct marketing in the UK. The ASA administers the British Code of Advertising, Sales Promotion and Direct Marketing (The CAP Code) to ensure that advertisements are legal, decent, honest and truthful. The ASA was founded in 1962 and is independent of both the Government and the advertising industry. For more information, see www.asa.org.uk

Advertising Standards Board of Finance (Asbof)

Asbof sets the framework for industry policy making and is responsible for the Committee of Advertising Practice and for funding the self-regulatory system for advertising standards in non-broadcast media. Asbof's members are advertisers, promoters and direct marketers, their agencies, the media and the trade and professional organisations of the advertising, sales promotion and direct marketing businesses. Asbof ensures that the self-regulatory system is adequately funded, principally by a levy on advertising and direct marketing expenditure. This arms-length funding arrangement helps to ensure that the independent judgement of the ASA is not compromised.

BACC:

The only practical method for licensees to assure themselves that the advertisements comply with the ITC Advertising Code is by pre-vetting them before transmission. To this end, the major broadcasters, as well as a number of cable and satellite channels, subscribe to a self-regulatory body called the Broadcast Advertising Clearance Centre (BACC), that pre-vets advertisements on behalf of the broadcasters prior to screening. Around 90% of all television advertisements are cleared by the BACC, although individual licensees may clear local advertising themselves. All channels that do not use the BACC (for example most ethnic channels, teleshopping services and non-UK channels) are required, as a licence condition, to make their own compliance arrangements. The BACC is not a regulator and exists in an advisory capacity to the licensees who use its services.

Committee of Advertising Practice (CAP) :

CAP is the industry body that creates, reviews and amends the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code) which requires all non-broadcast advertisements to be 'legal, decent, honest and truthful', to be prepared with a sense of responsibility to consumers and to society, and to respect the principles of fair competition generally accepted in business. CAP comprises 19 trade associations representing advertisers, agencies and non-broadcast media. CAP oversees the sanctions operated by its members in support of adjudications by the Advertising Standards Authority. For more information, see www.cap.org.uk.

European Television Law:

The framework for the regulation of television across the European Community is contained in the Television Broadcasting Directive (ref: 89/552/EC) (3rd October 1989), known as the Television Without Frontiers Directive (TVWF). The revised Directive was published on 30th June 1997 (ref: 97/36/EC). The Directive lays down minimum standards for television content, production and advertisement scheduling which must be incorporated into Member States' local rules. In the

UK, the requirements for advertising scheduling are contained in the ITC's Rules on the Amount and Scheduling of Advertising (RASA).

Licensee:

All UK television and radio broadcasters (other than the BBC) currently require a licence from the ITC or the Radio Authority to broadcast, and will require an Ofcom licence when Ofcom begins to operate in December 2003. A requirement of broadcast licences is that licensees must comply with the relevant Codes of practice, e.g. Advertising or Programme Codes.

RACC:

A self-regulatory organisation exists for the clearance of radio advertising. Advertisers and scripts are cleared either by local station staff or centrally by the Radio Advertising Clearance Centre (RACC), but stations need to double-check for themselves that RACC cleared scripts are also suitable for their audience and the time of day etc. The RAu Code sets out certain 'special category' advertisements (relating to sensitive or complex categories of advertising, such as Finance, Health, Alcohol and Religion, which require mandated advance central clearance by the RACC. The RACC is more than an advisor and has, in effect, delegated regulatory powers. RAu licences require licence holders to comply with the code and RACC clearance decisions. If a radio broadcaster ignores RACC directions, it is likely to have complaints against it upheld.

Self-regulation and co-regulation:

There are distinctions between "self-regulation" and "co-regulation". The proposals laid here concern themselves with degrees of co-regulation and a partnership with self-regulatory structures, and not with pure self-regulation. Strictly speaking, self-regulation is where an industry polices its own operations without reference to any external controlling back-stop entity. In a co-regulatory system, a body with statutory regulatory authority delegates to the relevant industry the responsibility for maintaining and applying a Code of practice that the statutory regulator has approved. The statutory regulator has final responsibility and would expect to oversee effectiveness and retain powers to intervene where necessary. The Advertising Standards Authority (ASA) is recognised by the Office of Fair Trading (OFT) as the 'established means' for implementing the Control of Misleading Advertisements Regulations. Thus the self-regulatory ASA is in a co-regulatory relationship with the OFT. The media that would carry the co-regulated advertising, namely radio and television, will themselves be statutorily regulated by Ofcom. In this environment, therefore, pure self-regulation would not be possible.

Co-regulator

A non-statutory body working with a statutory regulator to deliver agreed objectives through effective self-regulation. See 'self-regulation' and 'co-regulation' above. For the purposes of this consultation, the term 'co-regulator' is used to describe the constituent parts of the self-regulatory regime as appropriate – ASA (Broadcast), BCAP or basbof - or the operation of the self-regulatory system as a whole. The backstop powers of Ofcom are understood.

Sponsorship:

A paid-for on-air association between an advertiser and a programme or TV/Radio channel.

Spot advertising:

Short advertisements on television and radio, most often of 30/20/10 second duration. The most common/traditional form of advertising.

Statutory regulation:

The function of any regulator whose powers are provided by Act of Parliament. Ofcom is therefore a statutory regulator, whose existence depends of the Communication Act 2003. Ofcom has a duty under the Act to ensure that appropriate standards of broadcast programming and advertising are maintained.

Teleshopping:

A form of advertising enabling viewers to buy goods directly from home. Usually consists of longer advertisements or advertising features. Some television channels are dedicated exclusively to teleshopping.

Annex 3

Regulatory Impact Assessment

Section 1 of the Communications Act suggests that when considering proposals relevant to Ofcom's carrying out its functions, it should either carry out and publish a regulatory impact assessment (RIA) or publish the reasons why it is not doing so. In this instance, Ofcom is proposing to produce an RIA but one which stops short of a quantified assessment of the benefits and costs of transferring the responsibility for regulation of broadcast advertising to the ASA (B). The reasons for adopting this limited form of RIA are explained in the following paragraphs, but can be summarised as follows – the potential benefits, while being easy to identify, are difficult to value and, if they were valued, the valuation would be speculative; and the costs involved are negligible, as the proposal involves (largely) transferring resources, rather than any incremental expenditure or investment. What follows therefore identifies the benefits and costs, without ascribing monetary values to them.

Aim of the proposal

The aims of the proposal are as follows

- to benefit consumers
- to benefit the industry
- to conform with Ofcom's statutory duty to promote the development and use of forms of effective self-regulation

Each of these are explained and amplified in the section below.

Regulatory options including costs and benefits of each

The relevant regulatory options in this instance are the status quo i.e. regulation of broadcast advertising by the industry regulator (i.e. the ITC and RAU or, at a later date, Ofcom) and co-regulation involving the advertising industry and Ofcom. What follows is a conceptual identification of the benefits and costs of the latter, relative to the former.

Consumer benefit

Consumers benefit in the following ways

- less confusion about who to complain to (single point to complain to for broadcast and print complaints)
- over the long term, a better complaint process, as the advertising industry will be better able to develop codes, apply sanctions etc, as it will be able to have an unintermediated dialogue with consumers, viewers and listeners; this benefit is entirely conditional however on the form of co-regulation proposed being effective and appropriate incentives being in place

Industry benefit

- the advertising industry will benefit from the same process, once again conditional on the effectiveness of the proposed form of co-regulation.

Congruence with Ofcom's statutory duties

- Section 1 of the Communications Act 2003 stipulates that Ofcom pursue self-regulation (often through co-regulatory initiatives) where appropriate; this proposal is consistent with this duty. The underlying rationale for the duty being included within the Act depends on the consumer benefit and industry benefit arguments enumerated above.

All these benefits are extremely difficult to quantify. For example, what is the value of consumer benefit of knowing who to call with an advertising complaint? Is it the time saved? Is it a broader sense that consumer concerns are being properly dealt with, delivering a more encompassing sense of consumer welfare? Ofcom takes the view that attempting to value this and other forms of benefit would be an overly theoretical exercise and the results would be rightly regarded as irreducibly speculative.

Costs

Under the proposals, Ofcom essentially transfers the costs of regulating broadcast advertising to the advertising industry. There is no proposed diminution of Ofcom tariffs levied on the communications industry, nor a compensating new source of revenue for the advertising industry – crudely Ofcom will have more money to spend in other areas, the advertising industry less. The trade-off is clearly attractive from Ofcom's perspective (assuming the regulatory regime is effective) and, less directly and more contentiously, to its other regulatees. From the industry's perspective, the additional costs it bears will only be worth it, if it is able to harness the benefits to the industry in practice as well as in theory.

Other potential costs exist in addition – if the new system fails, consumer detriment will recur and ultimately Ofcom would have to re-assert control, incurring transaction costs. However, although these risks have to be considered, it is not appropriate to do so in this context – in an RIA, it is appropriate to take into account the benefits and costs of the scheme, not of its putative failure.

Summary and recommendation

Consequently, the proposal to shift responsibility for broadcast advertising to a new co-regulatory system has various consumer and industry benefits whose scale is difficult to assess. The proposal in the long term involves a transfer of costs rather than incremental costs and, in cost terms, is therefore neutral. Overall, therefore there are benefits to the proposal and negligible costs and the proposal should proceed. In addition the proposal is congruent with Ofcom's statutory obligations.

Annex 4

Ofcom's consultation principles

Ofcom has committed to meeting the seven tests for consultations set out below:

1. Hold discussions with stakeholders before issuing a major consultation document – so that Ofcom's thinking is subject to an early sense-test. If this is not possible, an open meeting to explain the proposals will be held soon after publication.
2. Be clear about who is being consulted, why, on what questions and for how long.
3. Make the document as simple and concise as possible – with a summary of no more than 2 pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.
4. Allow 10 weeks for responses, other than on dispute resolution.
5. Analyse responses with care and an open mind. This involves giving reasons for subsequent decisions, and an account of the views expressed.
6. Monitor and evaluate consultations, and designate a consultation champion – an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process.
7. Explain why Ofcom is departing from any of these tests if it has to – for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.

Annex 5

The structure of the new system

