Self– and Co– Regulation: The Advertising Standards Authority

Quick Summary

The advertising industry initiated a system of self-regulation in non-broadcast media in 1962, followed by co-regulation with Ofcom to cover broadcast media in 2004, creating a 'one stop shop' for advertising regulation. This case study covers the ASA's regulatory activities, how compliance and enforcement work in practice, plus practical advice for policymakers.

What was the context?

The Policy Challenge
The content of TV advertisements had been controlled by legislation since commercial broadcasts began in 1955. No such law existed for non-broadcast media so the challenge was how best to extend the discipline of broadcast regulation to non-broadcast media.

Why was taking action required? The Molony Committee, reporting on Consumer Protection in 1962, examined a number of instances of public controversy over alleged consumer detriment concerning non-broadcast media. The Board of Trade had also become aware. The industry had itself recognised that consumer trust in advertisements was key to the future of the industry and that failure to ensure consumer protection may have led to legislation.

Why was statutory regulation not chosen? The industry had been proactive in establishing effective self-regulation.

Why was self-regulation preferred as an alternative? The Molony Committee endorsed the use of voluntary controls in non-broadcast media but only if the voluntary system demonstrated continued quality and maintained its independence.

What was put in place?
Self-regulation for adverts in non-broadcast media. In 1961 the industry came together to form the Committee of Advertising Practice (CAP) and published the first edition of the British Code of Advertising Practice (CAP Code). In 1962, the Advertising Standards Authority (ASA) was established as the independent body to administer the Code and to supervise the work of the new self-regulatory system.

Later developments:
Co-regulation for adverts in broadcast media. By 2000 there were four separate advertising regulators, including the ASA, which was confusing for the public and created complication for businesses affected. The advertising industry responded to the Communications White Paper in 2000 with the aim of tackling media convergence and creating a "one stop shop" for advertising complaints. The resulting Communications Act 2003 placed a legal duty on Ofcom to explore the potential for the use of effective self-regulation. It was empowered to contract out appropriate functions under The Deregulation and Contracting Out Act 1994. The Government subsequently brought forward The Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 which led to a system of co-regulation with the ASA, with Ofcom as the backstop regulator retaining its statutory functions. This is also underpinned by a formal deed between Ofcom and the ASA (Broadcast), BCAP and the Broadcast Advertising Standards Board of Finance (Basbof).

In 2010 the ASA entered into a further co-regulatory partnership with Ofcom to regulate advertisements accompanying video-on-demand (VoD) services, reinforcing the "one stop shop" concept.

What was delivered (mechanism)?

Mandatory Advertising Codes
The mechanism involves the development and enforcement of the mandatory Advertising Codes that are proportionate, evidence-based and targeted.
The Advertising Codes are written, revised and enforced through two industry bodies whose members represent advertisers, agencies, media owners and direct marketers.

- The Committee of Advertising Practice (CAP) for non-broadcast media.
- The Broadcast Committee of Advertising Practice (BCAP) for TV and radio.

The Advertising Codes cover marketing communications across all media— print and press, posters, internet (banners, pop-ups, virals), direct mail, television and radio sales promotions, email and SMS text, tele-shopping, cinema commercials and video-on-demand.

Governance: the ASA
The Advertising Codes are administered by the independent Advertising Standards Authority (ASA).

Regulatory Activities
The regulatory activities the system undertakes include:

- A pre-publication advice service.
- Free complaints and investigation service (around 29,000 complaints a year).
- Monitoring and compliance.
- Advice, training and guidance.
- Pre-clearance of TV and radio ads by Clearcast and the Radio Advertising Clearance Centre (RACC).

Compliance and enforcement
The ASA responds to complaints from members of the public and industry about adverts that may be misleading, harmful or offensive. Since 1970 it has also carried out proactive surveys and monitoring of adverts to check compliance and encourage good practice. Decisions are based on compliance with the code, not the number of complaints.

Independent decision-making: the ASA Council
The ASA Council adjudicates on complaints and is the final arbiter of whether or not the Advertising Codes have been breached.

The Mechanism (continued…)

ASA Council (Continued) comprises 15 people representing a wide cross-section of society. Appointed by the ASA Chairman following public advertisement, two-thirds of the ASA Council are lay members and one-third industry experts. Members serve three-year terms up to a maximum of six years. There is provision for the review of adjudications by the independent reviewer Sir Hayden Phillips.

ASA Sanctions
The ASA has a range of sanctions at its disposal. It is a non-statutory body so cannot impose fines or take advertisers to court. Sanctions include:

- The weekly publication of ASA adjudications which attract media attention.
- Request the removal or amendment of an advertisement.
- Ask CAP to consider the withdrawal or removal of trading privileges
- Pre-vetting, in which persistent offenders must have their materials vetted prior to publication.

The ASA can refer non-broadcast advertisers that refuse to work within self-regulation to the Office of Fair Trading (OFT) for misleading or unfair advertising. Broadcasters must comply with the Code under the terms of their broadcast licence. If a broadcaster persists in running adverts that breach the Code, the ASA can refer them to Ofcom, which may impose fines or withdraw their licence to broadcast.

However, referral to the OFT or Ofcom is rare. In most cases advertisers agree to withdraw the advert concerned. Most are committed to complying with the self-regulatory system and fear the bad publicity and loss of reputation which may result from being seen to break the rules.

Arm's length funding
The ASA is wholly funded by industry through an arm's length arrangement that guarantees the ASA's independence. The Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof) collect a levy on advertising spend (0.1% on airtime and media space, and 0.2% of the Royal Mail's Mailsort contracts).

The levy is the only part of the system that is voluntary. Advertisers can choose to pay the levy, but they cannot choose to comply with the Advertising Codes or the ASA's rulings.

Process

Self-regulation
The process began with industry:

- Resolution to set up the ASA at the 1961 Advertising Association Conference.
- Formulating the code (CAP Code).
- Establishing the machinery to implement the Code.
- Introducing independent funding arrangements.

Co-Regulation This was a challenging process which took time (just under two years). Key issues had to be managed:

- Ensuring industry buy-in.
- Determining the legal process by which functions could be delegated.
- Determining the nature and extent of Ofcom oversight of disputes and the code.
- Conducting a full public consultation.

Issues for the industry included:

- Ensuring wide involvement and support.
- Deciding upon the infrastructure both in legal and logistical terms.
- Ensuring appropriate funding.

Contacts

Contacts

- Simon White—Department for Culture, Media and Sport
- Ian Blair—Ofcom
- Lynsay Taffe—Advertising Standards Authority

Want to know more about alternatives?

- Contact the BRE: alternatives@bis.gsi.gov.uk

Further information

- *Identifying appropriate regulatory solutions: principles for analysing self– and co– regulation* (Ofcom statement)
- *Advertising Regulation and Co-Regulation: The Challenge of Change* by Andrew Brown (Article in Institute of Economic Affairs 'Better Regulation Without the State Volume 26.2, June 2006)

Lessons learnt

On self-regulation:

- Engage the industry early to discover if self-regulation is an option and whether there is willingness to pursue it.
- Provide the industry with a clear brief on what Government expects self-regulation to deliver. The OFT and Ofcom have some useful guides to help with this. Include types of practices to be regulated, end results for consumers, whether certain types of services should be provided.
- Provide industry with a realistic timeframe within which they should come back with their proposal and be clear about the alternative steps that Government might take if self-regulation cannot be pursued or fails.
- There needs to be a mechanism to secure funding which also gives confidence about the independence of regulation.
- Depending on the nature of the regulation, there may need to be a majority (or process and timetable for achieving a majority) of independent members determining complaints and, ideally, an independent appeal system.

On co-regulation:

- It is important to ensure that there are enough areas of common interest between the two organisations to make co-regulation feasible.
- Involve lawyers throughout to ensure that all legal duties can be met by the self-regulatory body.
- It is essential to ensure there is significant high-level engagement with industry early on to ensure the buy-in to proceed **prior to** any detailed drafting of proposals. This is a much simpler process where the self-regulatory body (such as the ASA) already exists.
- Ensure sufficient funds (including for self-promotion) are set aside. The costs of co-regulation can be higher relatively speaking to the smaller organisation than the larger, public body, although it could be more effective.
- When a need for a regulation has been identified, the options should be fully analysed before making formal legislative provision. This involves having a clear understanding of the legal landscape and any emerging legal requirements, particularly from the EU.

General:

- Identify what would drive the industry to pursue self– or co-regulation.
- Do not assume that self- or co- regulation will be cheaper than statutory regulation. The costs of setting up and running a self-regulatory body can exceed those required by an existing public body carrying out the same functions, though it can be more effective. However, industry may consider these costs worthwhile if it has the opportunity to develop regulation that is sensitive to business needs.
- Similarly with co-regulation, the statutory body will retain a number of functions and statutory duties. Ofcom estimates that it retains 10—20% of its functions and related costs so provision must be made for the management of the process and continuation of functions which cannot be taken on by the co-regulatory partner.
- Allow enough time to put arrangements in place; it may be necessary to have a fall-back of statutory regulation (especially if EU provisions have to be implemented by a deadline) but to highlight potential consequences of this to industry to encourage their buy-in.
- Seek lessons from colleagues and others with relevant experience outside Government.
- There is always consumer suspicion of industry involvement in its own regulation which can be countered by having eg transparent processes and a majority of independent persons adjudicating, as well as systems, including sanctions, which achieve outcomes the public are likely to view as fair. A simple appeal mechanism is valuable.
- The mix of approaches of self– co– or statutory regulation will determine the legal and funding mechanisms required. In all cases there is a need for clear relationships between the parties involved.

ASA

"We build that trust by enforcing the Advertising Codes written by the Committee of Advertising Practice and acting swiftly when marketing communications break the rules"