

21 June 2017

**Memorandum of Understanding between the Competition and Markets Authority and ASA on working arrangements in relation to their specific roles in the consumer protection landscape**

This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and the Advertising Standards Authority (“ASA”) in relation to their specific roles in the consumer protection landscape as regards advertising for which ASA is responsible.

The purpose of this MoU is to establish an understanding between the CMA and ASA as to how these working arrangements will work in practice. It records our commitment to the lawful sharing of expertise, information, ideas and experience, and to doing this efficiently and with a mutual regard for each other’s regulatory position and strategic objectives.

We believe that this MoU offers a valuable basis for co-operation in the interests of the CMA, ASA, and consumers.

This MoU and the practices which it provides for will be reviewed from time to time by the CMA and ASA as the need arises or at the request of the CMA, ASA or members of the UK Consumer Concurrence Group. This MoU may be revised by agreement between the CMA and ASA.

This MoU is not legally binding.

Signed:

**Roland Green**  
Deputy General Counsel  
CMA

**Guy Parker**  
Chief Executive  
ASA

## **Purpose of this MoU**

1. This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and the Advertising Standards Authority (“ASA”) in relation to their specific roles in the consumer protection landscape as regards advertising for which ASA is responsible.

## **Role of the CMA**

2. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013 (ERRA), and works to promote competition for the benefit of consumers, both within and outside the UK, and to make markets work well for consumers, businesses and the economy.
3. The CMA’s statutory functions include:
  - 3.1. conducting market studies and market investigations in markets where there may be competition and consumer problems; and
  - 3.2. enforcing consumer law to tackle practices and market conditions that make it difficult for consumers to exercise choice.
4. In undertaking its functions the CMA will:
  - 4.1. use its full range of powers to tackle market wide consumer problems or issues which affect consumers’ ability to make choices;
  - 4.2. make the best use of the CMA’s resources to produce outcomes for UK consumers, having regard to its Prioritisation Principles;<sup>1</sup> and
  - 4.3. co-operate with sectoral regulators and encourage sectoral regulators to use their powers to apply relevant consumer legislation in the interests of consumers.

## **Role of the ASA**

5. The ASA is the UK’s independent regulator of advertising. Its work includes acting on complaints and proactively checking media, to take action against misleading, harmful or offensive advertising, promotional and direct marketing. The ASA administers two Codes, the UK Code of Non-broadcast and Advertising Direct & Promotional Marketing written and maintained by the Committee of Advertising Practice (CAP) and the UK Code of Broadcast Advertising written and maintained by the Broadcast Committee of Advertising Practice (BCAP), through the Advertising Standards Authority Limited (ASA

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299784/CMA16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf)

Ltd) and Advertising Standards Authority (Broadcast) Limited (ASAB Ltd) respectively.

6. The rules in the Codes cover the content and placement of advertising and are intended to ensure all advertising is legal, decent, honest and truthful. The rules are mandatory and advertisers cannot opt out of the system. Compliance with these codes is enforced by the ASA across all forms of media.
7. The ASA is regarded as the “established means” for the investigation and resolution of complaints about unfair business to consumer commercial practices in marketing contrary to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), and impermissible comparative advertising and misleading business to business marketing contrary to the Business Protection from Misleading Marketing Regulations 2008 (BPRs), and in respect of broadcast advertising it exercises (as ASAB Ltd) powers contracted out to it by Ofcom to resolve complaints about breaches of the BCAP Code.

### **General co-operation**

8. The CMA and ASA will work together with the aim of ensuring that a consistent and co-ordinated approach is generally taken in relation to advertising issues potentially falling within the area of responsibility of both bodies to discuss which body is best placed to lead in each case.
9. The CMA and ASA are committed to the following general principles and practices for co-operation between themselves in respect of the sectors for which ASA has responsibility.
10. Officials of the CMA and ASA will meet and communicate regularly, at appropriate levels of seniority, to discuss matters of mutual interest, including through the Consumer Protection Partnership, the Consumer Concurrency Group and bilaterally.
11. Where either the CMA or ASA exercises their concurrent powers, the CMA and ASA will, to the extent permitted by law, engage with each other and share relevant information as appropriate, while recognising the independence of the decision taking processes of each body and consulting where necessary to secure these are respected.
12. The CMA and ASA will consult each other at an early stage on any issues that might have significant implications for the other.
13. The CMA and ASA agree that in deciding upon any enforcement action in respect of a potential breach of consumer protection legislation, causing potential consumer harm, they will have regard to the principles that

regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted. The CMA will enforce consumer protection legislation with regard to published statements of enforcement and prioritisation principles.<sup>2</sup> ASA will take action having regard to its Commitment to Good Regulation.<sup>3</sup> The aim of these arrangements is to avoid, as far as is reasonably practicable, duplication of enforcement or other action

## **Notifications**

14. Where the CMA has an obligation to publish information regarding taking and/or the outcome of enforcement action it will do so by publishing it on [www.gov.uk/cma](http://www.gov.uk/cma)

## **Liaison between CMA and the ASA**

15. Where CMA identifies a consumer law issue relating to advertising falling within ASA's remit which it considers merits regulatory attention by the ASA it will contact the ASA. This is likely to be where the matter is appropriate for the ASA to consider under its consumer protection role, having regard to matters such as its role as the "established means" under the CPRs, its sectoral expertise and any administrative prioritisation framework.
16. Where ASA identifies potential breaches of consumer protection legislation falling within the CMA's remit, which may lead to enforcement action, and which are likely to cause harm to the collective interests of consumers, it will contact the CMA. This is likely to be where:
  - 16.1. there are systemic failures in a market;
  - 16.2. changing the behaviour of one business would set a precedent or have other market-wide implications;
  - 16.3. there is an opportunity to set an important legal precedent; or
  - 16.4. there is a strong need for deterrence or to secure compensation for consumers.

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243711/4-guidance-on-cma-approach-to-use-of-its-consumer-powers-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243711/4-guidance-on-cma-approach-to-use-of-its-consumer-powers-consultation.pdf)  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274462/CMA16con\\_Prioritisation\\_Principles\\_consultation\\_document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274462/CMA16con_Prioritisation_Principles_consultation_document.pdf)

<sup>3</sup> <https://www.asa.org.uk/asset/33BFE0A8-41A1-4657-BE2A57C3CB35D1FE/>

## Sharing information – legal aspects

17. The CMA will, insofar as it is able within the constraints imposed by Part 9 of the Enterprise Act 2002 (EA02) (governing the disclosure of specified information), promptly share such information as is permitted and necessary to enable efficient and effective handling of consumer law issues. Where appropriate, this includes sharing complaint data, together with relevant correspondence regarding those complaints.
18. Under Part 9, information that comes to the CMA in connection with the exercise of its functions (as defined) is “specified information” (see section 238(1) of EA02). Where specified information relates to the affairs of an individual or any business of an undertaking (see section 237(1) of EA 02) the CMA can only disclose it, during the lifetime of the individual or while the undertaking continues in existence, under permitted gateways (see section 237 (2) of EA 02). Disclosure outside those gateways is a criminal offence.
19. Unless the information is already properly and lawfully in the public domain (see section 237(3) of EA02), or a power or duty to disclose it exists outside Part 9 of EA02 (see section 237(6) of EA02), the CMA may only disclose it where one or more of the following gateways exists:
  - 19.1. where the CMA obtains consent from both those providing the information and those to whom it relates (section 239 of EA02);
  - 19.2. disclosure is required to meet an obligation under EC law (section 240 of EA02);
  - 19.3. disclosure facilitates the exercise of the CMA’s statutory functions (section 241 of EA02);
  - 19.4. disclosure facilitates the exercise of any function another body has under certain specified statutes (section 241 of EA02);
  - 19.5. disclosure is for the purposes of, or in connection with, prescribed civil proceedings or prospective proceedings in the UK or elsewhere, or for the purposes of taking legal advice in relation to them, or for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings;
  - 19.6. the disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 of EA02); or
  - 19.7. the disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 of EA02).

20. When sharing specified information with the ASA, the CMA will usually do so in reliance on the gateway set out in paragraph 19.3 above, that is on the basis that any such disclosure facilitates exercise of the CMA's functions. The CMA has broad consumer protection functions enabling disclosure using this gateway.
21. Even where a gateway exists, the CMA is also required to consider excluding from disclosure (so far as practicable):
  - 21.1. information whose disclosure the CMA thinks is against the public interest (see section 244(2) of EA02);
  - 21.2. information relating to the private affairs of an individual, or any commercial information relating to a business, whose disclosure might, in the CMA's opinion, significantly harm the individual's interests or the legitimate business interests of the undertaking to which it relates (see section 244(3) of EA02); and
  - 21.3. The CMA must also consider the extent to which any disclosure under sections 239-243 of EA02 is necessary to fulfil the purpose for which it is made (see section 244(4) of EA02).
22. As far as disclosure by the ASA to the CMA is concerned:
  - 22.1. ASAB Ltd, to the extent it obtains information with respect to a particular business pursuant to exercise of a power (contracted out by Ofcom) under the Communications Act 2003 or Broadcasting Acts 1990 and 1996, is permitted under Section 393 of the Communications Act to disclose such information only under one of the gateways in Section 393, which include for the purpose of facilitating the carrying out by any relevant person (which includes the CMA) of any relevant function (which includes any function conferred by or under CPRs or BPRs).
  - 22.2. To the extent that ASAB Ltd holds other information, and to the extent that ASA Ltd holds any information, disclosure will be subject to the usual restrictions on disclosure to the extent that the information constitutes personal data or information which is held pursuant to an obligation of confidentiality (whether express or implied – e.g. confidential substantiation evidence furnished to the ASA by an advertiser under the CAP or BCAP Codes); and the usual gateways/exemptions will apply.
  - 22.3. Where the ASA volunteers such information to the CMA it will aim to rely on one of those gateways.

22.4. Where the CMA seeks information from the ASA in relation to specific traders, the CMA will specify the information which it requires by issuing an information notice requiring the production of such information pursuant to Part 3 of Schedule 5 to the Consumer Rights Act 2015.

### **Transfer of personal data**

23. In receiving any “personal data” through the gateways set out above or otherwise the CMA and the ASA will comply at all times with the Data Protection Act 1998.

### **Process for sharing information**

24. The CMA and ASA will each designate in its organisation a relationship manager at official level to take responsibility for relations between the two authorities. In each authority, the relationship manager’s responsibilities will include (but not be limited to):

24.1. maintaining an overview of joint projects between the two authorities and matters of mutual interest;

24.2. maintaining an overview of the authority's contacts from all areas of joint working and mutual interest; and

24.3. holding meetings with the relationship manager in the other authority from time to time to identify potential new issues with a view to circulating information to appropriate individuals within each organisation.

25. The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and ASA.