1st October 2021

ASA system submission to the Department for Business, Energy & Industrial Strategy consultation on Reforming Competition and Consumer policy

1. Background and Introduction

1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'

1.2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 59 years and the broadcast Advertising Code (written and maintained by BCAP) for 17, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.

1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.

1.4. As the UK's frontline advertising regulator of legitimate businesses, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system of collective-regulation involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.

1.5. We use our convening powers to bring together the ad industry and media owners to set, maintain and police high standards. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.

1.6. The UK Advertising Codes are drafted and maintained by CAP and BCAP, supported by experts in our Regulatory Policy team. This authorship of the rules by the ad industry is an important part of our system. It means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. Many of the rules derive directly from legislation, of course. For example, the rules requiring ads not to mislead or be likely to mislead originate from UK consumer law. However, many do not, particularly those seeking to prevent harm, offence and social irresponsibility. Whichever the case, in setting the rules which govern UK advertising, CAP and BCAP have multiple checks and balances in place to ensure the process is transparent, open to scrutiny and follows the principles of good regulation. From calls for evidence and public consultations on rule changes, having an independent consumer panel advising CAP and BCAP, Ofcom signing off on BCAP rule changes and, ultimately, the ASA System's processes being open to judicial review. All to ensure the system is wholly accountable to everyone with a stake in advertising, particularly the public.

1.7. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided 722,523 pieces of advice and training in 2020.

1.8. The ASA system is providing this written submission in response to the Department for Business, Energy & Industrial Strategy's consultation on Reforming Competition and Consumer policy.

2. Regulatory context

2.1. The ASA regulates the content, placement, scheduling and targeting of UK advertising across media. We take action where ads break the rules whether that's by being misleading, harmful, offensive or irresponsible. The ASA is not, however, an economic or market regulator and we do not have a specific role in promoting competition, innovation or growth.

2.2. The Government's consultation on Reforming Competition and Consumer policy envisages increased enforcement powers for statutory enforcers and it also considers some specific aspects of the creative content of online advertising where there is likely to be an overlap with our regulation. These include the proposals on subscription traps and fake online reviews. The consultation also considers certain online behavioural techniques such as drip pricing and the proper labelling of paid search results, again these are areas where the ASA system has undertaken significant regulatory activity.

2.3. We think it important, therefore, to set out clearly that there is an effective online advertising regulatory framework in place in the UK to protect people and businesses from misleading advertising by legitimate businesses, and to appropriately limit under 18s' and other vulnerable groups' exposure to advertisements for products that may not be suitable for them. It is one that creates a level-playing field for competitors, ensuring businesses respect the principles of fair competition generally accepted in business, and which allows responsible advertising to flourish.

2.4. Our submission explains how that system works and the additional measures we're taking, including closer working with online platforms and other regulators, to bolster protections for UK consumers, business and society from irresponsible or inappropriate advertising online.

3. ASA remit for online regulation

3.1. With almost 60 years' experience regulating advertising, the ASA provides a one-stop shop for consumers and for the industry across all media and platforms. We regulate almost all advertising online, including paid ads on platforms and the open internet, influencer ads, and companies' own website and social media advertising claims. (The exceptions are political advertising and misleading-related issues in non-broadcast financial advertising, which falls to the FCA.)

3.2. Our role is to ensure that the content of ads seen by UK consumers, including those appearing online and in social media, follow the Advertising Code. The enduring principles of the advertising rules are that ads must not mislead, harm or offend and should be prepared in a socially responsible way. We also require that ads are targeted responsibly and are appropriate for the audience that sees, hears and engages with them.

3.3. Moreover, under our More Impact Online strategy we're using proactive, tech-assisted, collective regulation to be more effective and to tackle irresponsible ads online at scale and speed.

3.4. We know people are spending more time online, businesses are increasingly advertising online and the pace of technological change online is contributing to societal concerns. That's why our strategy focuses on improving the effectiveness of our online advertising regulation. We're proud of the technological initiatives we've undertaken as a part of that.

3.5. The strategy prioritises:

- Delivering high quality, proactive regulatory projects on ads that cause the most detriment to people, particularly children and other vulnerable people.

- Working more closely both with the large online platforms and with the government and Ofcom, both on Video Sharing Platform advertising regulation and to address any gaps in online advertising regulation.

- Using machine learning to improve our regulation, act more nimbly, simplify and make more efficient our regulation where we can.

3.6. As mentioned in 1.4 and 1.5 the ASA operates a system of collective regulation. That includes working openly and effectively with the Competition and Markets Authority. We also have a long established and strong co-regulatory partnership Ofcom and stand ready to build on that relationship in relation to any advertising issues that might emerge from its new role as the Online Safety regulator. Collective regulation encompasses a range of expertise and enforcement mechanisms that would be impractical if not impossible for any new regulator to replicate.

4. Our relationship with the online platforms

4.1. Under the UK Advertising Code, parties involved in preparing or publishing marketing communications accept an obligation to abide by the rules. For non-broadcast media, this means taking steps to ensure third party ads comply with the Code and, where they don't and the advertiser refuses to cooperate with the ASA, the medium/platform/agency works with the ASA to remove the ad.

4.2. Online, the ASA has and continues to work effectively with social media platforms and other online ad networks in this way, developing informal compliance procedures and partnerships with the larger platforms and other advertising networks.

4.3. Social media platforms and online advertising networks help the ASA secure advertising standards by removing non-compliant ads (those appearing in paid-for space online and those appearing in 'non-paid-for' space on social media platforms) we bring to their attention, and raising awareness of our regulation.

4.4. As an example of our work with platforms, in 2020, we issued an enforcement notice to 130,000 wide-ranging businesses across the beauty and cosmetic services industry about 'non-paid-for' ads for Botox. Botox is a prescription-only medicine, and so is prohibited from being advertised to the public. We identified a trend of these ads appearing on social media, particularly in organic Instagram posts, and took action to ensure advertisers reviewed their advertising. We used monitoring technology to identify where these ads were appearing on

Instagram, and flagged them with the platform to have them quickly removed. We made it clear that any advertisers that continue to break the rules risked being referred to the MHRA and/or their professional regulatory body.

4.5. These industry partners, which includes Google and Facebook, helped set-up and also participate in our Scam Ad Alert system, which has successfully led to the disruption of fraudulent activity online, by identifying and removing paid-for scam ads across multiple platforms.

4.6. In the context of a changing online regulatory landscape, we and the platforms we engage with are determined to adapt and play our part in delivering a more inclusive and accountable form of advertising regulation for everyone's benefit. As part of that, we want to see greater transparency and accountability from online platforms and ad networks for the role they play in upholding the advertising rules. We are engaging with them and government in exploring how we achieve this, including reporting publicly on how they perform.

5. Consultation question 47: Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?

5.1. As mentioned, the ASA system has undertaken significant regulatory activity in both of these areas, particularly drip pricing. For example we undertook extensive joint action with the CMA on secondary ticketing platforms, where we successfully secured assurances from the key platforms' that they would change their pricing structures to make them clearer and fairer for consumers.

5.2. This type of joined-up systemic action is beneficial to all parties and achieves better enforcement outcomes. However, given that these practices are such important aspects of online consumer journeys and, when not undertaken properly and in a transparent way, clearly problematic, we consider there are reasonable grounds for 'doing more' to strengthen consumer protection around these practices. 'Doing more' could entail making it easier for consumer protection enforcers to take action against particularly exploitative website pricing designs that employ these practices.

6. Consultation question 55: Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

6.1. As stated, we work closely with the CMA on regulatory issues of common interest and operate a memorandum of understanding that sets out our working arrangements in relation to our specific roles in the consumer protection landscape, including how we co-operate and liaise and this type of systemic action helps to drive good outcomes.

6.2. We acknowledge the grounds on which government proposes to empower the CMA to enforce consumer protection law directly. We consider the proposal would likely allow the CMA, where appropriate and proportionate to do so, to conclude cases faster and bring infringements to an end more promptly, strengthening the consumer protection landscape more generally to the benefit of all.

7. Consultation question 74: How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?

7.1. The ASA operates an effective online advertising regulatory framework: our established authority and recourse to UK media-backed sanctions allows us to tackle non-compliance quickly and robustly. In a very small minority of cases, however, we need to have recourse to a legal backstop where we can refer the handful of recalcitrant businesses (almost always in relation to misleading claims on their own websites) to be dealt with through the legal framework.

7.2. This backstop is provided for and funded by National Trading Standards (NTS), who contract out the work to Buckinghamshire and Surrey Trading Standards (B&STS), an arrangement that delivers multiple compliance successes and provides excellent support to the ASA's regulation of advertising where it is, very rarely, needed. For example in 2020 we made just nine backstop referrals to B&STS, from a total of over 30,000 complaints.

7.3. From our perspective the current model for NTS is working well and we see no need to change it at this time. However, we do have concerns about the current issues with backlogs in the courts and the inability to prosecute cases in a timely fashion, something that has had a bearing on some cases that we have referred across. But this also strengthens the potential case for the CMA (and other relevant enforcers) to enforce consumer law directly.

7.4. We also acknowledge the difficulties of prosecuting criminal cases, particularly in relation to some health-related therapists making misleading claims and the high evidential thresholds needed to be satisfied in order to prosecute them successfully. [redacted]

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