

Ofcom's Decision on the Future Regulation of Broadcast Advertising by

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After a pregnant pause, Ofcom finally delivered its decision concerning the future regulation of broadcast advertising on 17th May 2004. The consultation period had already been extended as a result of complaints by consumer organisations about the original proposal, including an allegation that the reforms were being rushed into place. So what has changed as a result of the consultation process?

Ofcom has always envisaged contracting out the regulation of broadcast advertising to a self-regulatory body. The seductive simplicity of the proposal was that it effectively mirrored the existing structures for the regulation of non-broadcast advertising, which have been tried and tested for over 40 years. The Broadcast Committee of Advertising Practice ("BCAP") would be responsible for drafting and reviewing the appropriate codes, the Advertising Standards Authority (Broadcasting) for enforcing them, and the Broadcast Advertising Standards Board of Finance responsible for raising the levy of 0.1% on media airtime to finance it all. Ofcom, meanwhile, would retain responsibility for monitoring their effectiveness, with "backstop powers" enabling it to bring regulation back in house if the new system failed.

The original proposal was well received by industry commentators, attracted by the logical symmetry with the existing ASA model. The creation of a single ASA portal as the 'post-box' for consumer complaints about advertising in any medium was welcomed as an improvement on the old system, with its plethora of different regulators.

Unfortunately, this satisfaction with the original proposal was not universal. Some objections come from people who simply do not accept that self-regulation offers sufficient protection to consumers, especially in the most powerful medium of broadcast advertising. They are troubled by its perceived lack of independence from the advertising industry and alleged inability to reflect public policy concerns effectively. The existing ASA model was also accused of being too slow and of lacking transparency and accountability. One specific criticism of the new proposals concerned the paucity of lay involvement in drafting the applicable codes.

Ofcom has tried to address these concerns in several ways. The timetable for implementation of the new system has been delayed until November 2004, always assuming that both Houses of Parliament give their approval to the "contracting out" under the De-regulation and Contracting Out Act 1994.

The distinction between the functions retained by Ofcom and those to be contracted out has also been clarified. The new bodies will regulate spot advertising, Tele-shopping and

interactive services, while Ofcom will regulate the amount and scheduling of advertising, as well as television and radio sponsorship. This may not satisfy the concerns of some objectors, particularly advocates of further restrictions on food advertising to children, who want stricter limits on both the content and scheduling of such advertising. It is not clear, however, why Ofcom and BCAP could not work together to implement any agreed programme of changes. Ofcom has also reiterated its right to insist on code changes and to veto changes proposed by BCAP.

Perhaps the most interesting development is the introduction of the Advertising Advisory Committee, intended to make the self-regulatory system more accountable and transparent by providing for input by between four and six lay individuals, tasked with the responsibility of representing the interests of consumers.

So will the advertising industry's warm welcome for the proposals be sustained in the long term? Confidence is high, but there is a danger that in their anxiety to achieve a self-regulatory system, rather than a statutory one, advertisers and agencies might have overlooked some of the less congenial aspects of the new arrangements.

The process for appeals of BCAP decisions is to be modelled on the procedures for independent review adopted by the ASA, which requires advertisers to demonstrate new evidence or a substantial procedural flaw before a review will be considered. Although the old ITC appeal processes have been criticised as opaque, an advertiser could ask the ITC to re-examine a decision simply because they seemed to have got it wrong. Advertisers will also still face the structural double jeopardy of a commercial cleared by the BACC being pulled by BCAP due to different interpretations of highly subjective issues of taste and decency.

The drive for consistency across media to reflect the single ASA portal may also result in stricter application of the rules, particularly as both Ofcom and the ASA acknowledge the greater power of broadcast media relative to print and press media. Historically, the ASA has sometimes appeared to interpret equivalent rules more strictly than their opposite numbers at the ITC and BACC, so perhaps we should expect an overall raising of the requirements for substantiation and accuracy.

And now, there also is the impact of the AAC to consider. Will it counteract the vested interests of advertisers? Will it operate as the consumers' voice of reason? Or will it be the advance party of lunatics, come to take over the asylum?