

To Mr Martin Harland
Principal Officer
Regulatory Services, Camden TS

FOI sent 6th March 2017

Dear Mr Harland,

Advertising Standards Authority (ASA) Ltd. and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

A number of us wrote to you in November of last year to express concerns about ASA Ltd. in relation to the above legislation. You are on record of stating in reply: 'With regards to your specific allegation under the Consumer Protect from Unfair Trading Regulations 2008 against the ASA, we can advise that the ASA are not directly promoting, selling or supplying products to consumers and therefore this legislation is not applicable.'

However, the government's website^[i] states (para 4.2): 'The CPRs apply to commercial practices that can be described as 'business to consumer'. These are acts or omissions by a trader, directly connected with the promotion, sale or supply of a product to or from consumers. **Products include** goods and **services, rights and obligations** (*my emphasis*).

ASA Ltd performs a (self-) regulatory function: it is though not a statutory regulator, but a private, limited company. It may indeed not supply goods, but it certainly supplies services: -

- 1) ASA Ltd states: 'We apply the Advertising Codes, which are written by the Committees of Advertising Practice. Our work includes acting on complaints and proactively checking the media to take action against misleading, harmful or offensive advertisements'. ASA Ltd. receives payment for this service through a levy on advertisers (0.1%).
- 2) ASA Ltd further states: 'We regularly participate as speakers or judges at relevant events, conferences or seminars.....we charge a speaker fee of £600'^[ii]. Also: 'We can provide tailored training sessions..... In these three-hour seminars, we personalise the presentation to meet the specific needs of your staff..... there is a fee of £900'^[iii]

Might you wish therefore, and further in the light of the below, to reconsider your previous position not to enquire into ASA Ltd. under the CPRs?

Further concerns about ASA Ltd., have been raised by, inter alia, Baroness Deech, Lord Palmer of Childs Hill and Lord Stevenson of Balmacara in the House of Lords, and by barrister Richard Eaton^[iv].

ASA Ltd claims that 'The ASA's authority is recognized by the government, the courts, by other regulators such as the office of Fair Trading (OFT) and the Office of Communications (Ofcom) and is the established means for consumer protection from misleading advertising'^[v].

If ASA Ltd is to be the ‘established means’ for regulating adverts, it is obliged to comply with Directive 2006/114/EC “The Business Protection from Misleading Marketing Regulations 2008 (BPRs). In the House of Lords debate^[vi], Baroness Deech observed:

‘European Union directive 114 of 2006 requires recourse to a court or administrative tribunal as a remedy’.

Lord Palmer of Childs Hill said: ...*(the) EU Directive requires the UK to provide effective means... to combat misleading advertising...with recourse to the courts...the ASA is not a court... ”.*

And Lord Stevenson of Balmacara also said in respect of ASA Ltd.: *I am particularly struck by the points made about access to the courts should there be a problem in resolving disputes. Of course there is an independent adjudicator and judicial review, but I do not think that that is what the EU directive meant... ”*

ASA’s claim to be ‘the established means’ would thus appear to be unlawful, and the Competitions and Markets Authority (CMA) have confirmed that ‘TSS’ [Trading Standards services] and DETINI [in Northern Ireland] have a duty to enforce the BPRs.

As barrister Richard Eaton writes^[vii]:

‘The CMA considers established means as a body which can meet the principles listed in paragraphs 4.28 to 4.38 in *Consumer Protection: Guidance on the CMAs approach to use of its Consumer Powers (CMA7)*...’ (the Guidance).

Paragraphs 4.34 and 4.35 of the Guidance require the ASA (as ‘established means’) to “*demonstrate*” (amongst other things) the following ‘*Essential Qualities/Systems*’:

- i. “...*(that) it has regard for the principles of better regulation and the Human Rights Act with regard to the rights of consumers and traders/businesses... ”*
- ii. “...*it is law abiding in its own operation... ”*
- iii. “...*there is an appropriate degree of independence in governance.*’

Baroness Deech continued:

- ‘The ASA is not a government agency, not elected, and not overseen’.
- ‘The ASA is not subject to freedom of information requests’.
- ‘It is not accountable to anyone outside the industry - indeed, it is hermetically sealed’.
- ‘Successful judicial review is very difficult, as it is directed only to the lawfulness of the ultimate review by the independent reviewer—one person—and in general cannot look at the reasonableness of the ASA decision itself’.

I turn now to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

Included in ‘Outright Prohibitions: Section 6.1 (4)’ is:

‘Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation’. [my underlining]

So especially in the apparent absence of compliance with this final clause, can you please supply to me a legal basis for ASA's claim that 'If we judge an ad to be in breach of the UK Advertising Codes, it must be withdrawn or amended'?

Without transparent legal backing of the law, the status of ASA Ltd. returns to one of a private limited company operating a system of voluntary self-regulation, seemingly what it was always supposed to be. As John Glen MP observed in the House of Commons^[viii]: 'the advertising codes [ASA Ltd.] enforces are not enshrined in law '.

Are you satisfied that ASA Ltd. meets the legal requirements to be termed as 'established means'? Or will you alternatively take steps to ensure ASA and all others must cease to claim it to be 'established means'?

Yours sincerely,

Paul Burnett.

PS In the light of the content of my letter, would you please send me the details of your agreement to act as ASA Ltd's 'legal backstop', to include explanation of this agreement pertaining to traders all over the country, rather than only to those operating in the area of Camden. This is a Freedom of Information request. Thank you.

[i]

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf

[ii] <https://www.asa.org.uk/advice-and-resources/training-and-events/speakers-and-judges.html>

[iii] <https://www.asa.org.uk/advice-and-resources/training-and-events/bespoke-training.html>

[iv] <http://www.positivehealth.com/article/complementary-medicine/your-cam-practice-and-the-advertising-standards-authority-ltd-time-to-take-action>

[v]

<https://www.asa.org.uk/General/Transparency/~//media/Files/CAP/Transperancy/CAP%2011%20and%2014%20Memorandum%20of%20Understanding%20between%20ASA%20and%20DEFRA.ashx>

[vi] The House of Lords, 29th October 2015

[vii] Article available online at <http://www.positivehealth.com/article/complementary-medicine/your-cam-practice-and-the-advertising-standards-authority-ltd-time-to-take-action>

[viii] <https://hansard.parliament.uk/commons/2016-05-23/debates/1605232500002/AdvertisingStandardsAuthority>