

## Explanatory Memorandum

### **Broadcasting – The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004.**

#### Laying Authority and Purpose

1. This explanatory memorandum is laid before Parliament by Command of Her Majesty.
2. The purpose of this Statutory Instrument is to provide for the establishment of new arrangements to contract out the regulation of broadcast advertising; and to add the Medicines (Monitoring of Advertising) Regulations 1994 to the range of 'relevant functions' in the Communications Act 2003 pursuant to which the disclosure of information may be permitted.
3. It is proposed to make the order under the powers in sections 69 and 77(1) of the Deregulation and Contracting Out Act 1994 (read with section 1(7) of the Communications Act 2003) in relation to the new contracting out arrangements; and under section 393(4) of the Communications Act 2003 in relation to the further provision for disclosure of information. A draft of this Order is laid before Parliament for approval in accordance with section 77(2) of the Deregulation and Contracting Out Act 1994 and section 393(11) of the Communications Act 2003.
4. The Department for Culture, Media and Sport is responsible for this Instrument.

#### Description

5. The Deregulation and Contracting Out Act 1994 includes provision in Part 2 of that Act for the contracting out of functions vested in certain office holders. By virtue of section 1 (7) of the Communications Act 2003, OFCOM is one such office holder. This Order identifies those functions in relation to the regulation of broadcast advertising which OFCOM may contract out. They are—
  - (a) functions relating to regulation of advertising standards in the Communications Act 2003, plus certain wider enforcement functions (including functions in the Broadcasting Act 1990 and the Broadcasting Act 1996) which may be exercised in connection with the functions relating to the regulation of advertising standards;
  - (b) functions relating to the regulation of broadcast advertising under the Medicines (Monitoring of Advertising) Regulations 1994; and
  - (c) functions relating to the regulation of broadcast advertising under the Control of Misleading Advertising Regulations 1988.

The Order also makes provision, under the power in section 393 of the Communications Act 2003, to add the Medicines (Monitoring of Advertising) Regulations 1994 to the range of 'relevant functions' in the Communications Act 2003 pursuant to which the disclosure of information may be permitted.

### Legislative Background

6. The Communications Act 2003 provides for OFCOM to have general responsibility for the regulation of the content of broadcasting services including all programmes and advertisements. In addition, both the Control of Misleading Advertisements Regulations 1988 and the Medicines (Monitoring of Advertising) Regulations 1994 make specific provision for complaints about broadcast advertising arising under those Regulations to be referred to OFCOM.
7. The Deregulation and Contracting Out Act 1994 confers powers, among other things, for the contracting out by order of functions vested in certain office holders. By virtue of section 1 (7) of the Communications Act 2003, OFCOM is one such office holder to which these contracting out arrangements can be applied. During the passage of the 2003 Act proposals were brought forward that these powers should be used to contract out the regulation of broadcast advertising; the principle was discussed in debates on the Communications Bill.

### Policy Background

8. Proposals were subsequently developed and formed the basis of a consultation undertaken by OFCOM from October 2003 to February 2004. Subject to obtaining the necessary approval from Parliament for a Deregulation and Contracting Out Order, the intention is for complaints about broadcast advertising to be considered and determined by a new body, the Advertising Standards Authority (Broadcast) (ASA(B)), which would parallel the long-established Advertising Standards Authority (ASA), the self-regulatory body responsible for all non-broadcast advertising, and share its Chairman. Similarly, to parallel the Committee of Advertising Practice (CAP), which sets the advertising code for non-broadcast advertising, a new BCAP would be established to set the broadcast advertising code, a function of OFCOM under Section 319 of the Communications Act.
9. Under this scheme, the ASA would present to the public a single "one-stop shop" for complaints about advertising content. As well as considering complaints, ASA(B) could be authorised by virtue of the order to take any necessary regulatory action short of imposing fines, which would remain the prerogative of OFCOM. Broadcasters would still remain responsible to OFCOM for all broadcast content, through their OFCOM licence conditions.

10. OFCOM would remain responsible for ensuring the new system's effectiveness in meeting its statutory duties. OFCOM are making the contracting out exercise subject to the condition that it would approve the regulatory standards code.
11. The mechanism for establishing these new arrangements is an order made by the Secretary of State under the Deregulation and Contracting Out Act, supplemented by an Authorisation and Memorandum of Understanding between OFCOM and the newly established ASA (B), BCAP and Broadcast Advertising Standards Board of Finance (BASBOF). [An indicative draft of the Authorisation and a copy of the Memorandum of Understanding have been placed in the libraries of both Houses.]
12. The new co-regulatory framework should deliver a number of benefits:-
  - For the public, a single point to which to submit a complaint about an advertisement: at present there is much public confusion about complaints regarding broadcast advertising with many submitted erroneously to the ASA (figures for January to July 2003 show the ASA referred 2,520 complainants to the broadcasting regulators).
  - For the advertisers, a chance to achieve a greater coherence in regulation across all media. Increasingly, with the opportunities provided by the Internet, advertisers are developing multi-media campaigns and it can be costly to deal with two incoherent regulatory systems, in which there is often uncertainty about whether one regulator will adopt the same policy as the other. In recognition of this, advertisers are willing to accept a voluntary levy on broadcast advertising to fund the new ASA(B) function. The voluntary levy will be administered by BASBOF.
13. Teleshopping and other non-spot advertising content - ASA(B)/BCAP will be responsible for all broadcast content which is subject to the Advertising Codes. This content is not limited to traditional spot advertising, but also encompasses:
  - long-form advertising (including teleshopping), either as extended advertising items in programme-based output, or as the entire output of dedicated teleshopping channels;
  - any output involving a transactional element which OFCOM has determined is subject to Advertising Code provisions, having regard to the requirements of the Television Without Frontiers Directive, which may include the entire broadcast content of a channel.
14. There are some notable exceptions to the new co-regulatory body's responsibilities.

- Amount & Scheduling of Advertising - Rules on the amount and scheduling of advertising, which are based on requirements of the Council Directive 89/552/EEC as amended by Directive 97/36/EC (the Television Without Frontiers Directive), would remain OFCOM's direct responsibility.
- Political Advertising - OFCOM is required, under the Communications Act, to ensure that political advertising is not included in the television and radio services regulated by OFCOM. Under the new arrangements for the regulation of broadcast advertising OFCOM will remain responsible for carrying out this function, notwithstanding that it involves the control of advertising content. The rules relating to political advertising will be determined by OFCOM but will remain in the Advertising Codes for reasons of consistency and transparency.
- Sponsorship – Given the strong links between sponsorship and programming and editorial issues, OFCOM will at the outset retain responsibility for regulating broadcast sponsorship under the Communications Act 2003. Any proposal to contract out this responsibility would be the subject of a further Order.

### Consultation

15. OFCOM was consulted by the Department for Culture, Media and Sport during the preparation of this instrument. There has also been extensive consultation on these proposals through OFCOM's public consultation paper published in October 2003.

### Impact

16. This Order enables, but does not require, the contracting out by OFCOM of broadcast advertising regulatory functions: there is therefore no cost arising directly from the Order. However, the Order is being brought forward solely to allow OFCOM to meet its express policy of contracting out these functions to the relevant co-regulatory bodies and OFCOM has undertaken a Partial Regulatory Impact Assessment of that. Under the proposals, OFCOM essentially transfers the cost of regulating broadcast advertising to the advertising industry: this is, in the long term, a transfer of costs rather than incremental costs and therefore broadly cost neutral. As well as the consumer benefits referred to above, it is anticipated that industry will benefit from less regulatory duplication and less consumer confusion. The new arrangements were proposed by the industry, which has accepted funding responsibility by way of a voluntary levy. OFCOM did not receive any negative responses to this impact assessment during its consultation and do not, therefore, intend to undertake a further assessment.

## European Convention on Human Rights

17. In the Secretary of State's view, the provisions of the Contracting Out (Functions relating to Advertising Standards) and Specification of Relevant Functions Order 2004 are compatible with the Convention rights, within the meaning of the Human Rights Act 1998.

## Extent

18. This Order extends to England, Wales, Scotland and Northern Ireland.
19. This Memorandum has been approved by the Secretary of State for Culture, Media and Sport.

DEPARTMENT FOR CULTURE, MEDIA AND SPORT

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