

ITV plc, Channel 4, Sky and ViacomCBS - written evidence (DAD0090)

We have been watching with interest the hearings that the Select Committee on Democracy and Digital has been carrying out in recent months, most recently taking evidence from the ASA. In this context we thought it might help to share our attached position paper on the need for statutory backed regulation for advertising on online platforms.

The issues around the regulation of online platforms clearly deserve deep and careful examination. This is critical given the scale of the content online and the impact this has on our society and democracy, and particularly true for younger generations who spend more time viewing content online than on broadcast television. In our minds, there is no question that legislation is required to ensure the platforms take far greater responsibility for the content on their platforms than they do currently.

This responsibility and scrutiny should include advertising online (including political advertising) which has had far less attention than other online content. Online platforms have control over the advertising content that they surface and have sales teams that are interacting directly with the advertisers and their agents, selling advertising at scale and hosting it/offering it to their users on their proprietary platforms.

The ASA deserves credit for the way in which it has worked proactively to bring some regulation to the online advertising space through the introduction of self-regulation in the form of the CAP code. But this regulation stops short of applying directly to global online platforms – it essentially puts the compliance obligation onto the advertiser rather than the platform. By contrast, broadcasters are absolutely responsible for the compliance of the adverts that they carry. There needs to be substantial statutory intervention to ensure that these players take responsibility for the advertising they carry and hence to enable the ASA to most effectively police those platforms, raising standards further through a regime similar to that for TV. Such an approach will also help to ensure the continuation of fair and effective competition between TV and global online platforms as they increasingly compete for the same revenues.

We would be delighted to come in and talk though in more detail, if that would be helpful.

WHAT NEEDS TO CHANGE TO CREATE AN EFFECTIVE REGULATORY REGIME FOR REGULATING ADVERTISING ON ONLINE PLATFORMS

The following briefing paper examines the core aspects of an effective regulatory framework for advertising and makes suggestions for how the current framework needs to change to capture online platforms.

The analysis is broken out into two areas:

- A. Responsibility, compliance and sanctions
- B. Transparency and visibility

A statutory framework is required to give effect to these requirements and to provide the necessary oversight and to create meaningful sanctions for non-compliance; however, as for the current framework for broadcast advertising, under BCAP and the ASA, a co-regulatory arrangement could deliver the balance between consumer protection, flexibility and industry expertise.

A. RESPONSIBILITY, COMPLIANCE AND SANCTIONS: WHAT NEEDS TO CHANGE ONLINE

The regime for TV advertising regulation is effective in part because it is very clear who is ultimately responsible for compliance with binding legal obligations and serious sanctions for non-compliance.

In TV, ultimately it is the broadcaster (i.e. the distributor/publisher) who has both control of where advertising is placed (i.e. alongside which programme content it appears within a linear schedule) and responsibility for ensuring the adverts it carries comply with the rules.

There is a thorough process of compliance, pre-transmission, carried out by Clearcast, the dedicated advertising compliance organisation. The advertiser and advertising agency has some incentive to comply given the possibility of lost cost of creative/production (and negative PR) if an advert is non-compliant. However, in practice this incentive is often not strong given that campaigns are often over by the time regulatory decisions are reached. What matters is the filter of the regulated broadcaster.

Broadcasters have binding legal (licence) obligations to comply with the BCAP advertising code and face the possibility of fines, shortened licence duration or even revocation of licences in the event of serious non-compliance. The result is careful pre-scrutiny and a high level of compliance.

Against the backdrop of TV, if the ambition is to have an effective regime for regulating online advertising, creating a level playing field with TV, there are five things in the area of responsibility, compliance and sanctions that must change:

1. Online platforms must be legally obliged to ensure compliance with rules online

The online platform (i.e. the aggregator/publisher – YouTube, Facebook etc) controls where advertising is placed (i.e. alongside which online content, even if this control is fully or semi-automated). In other words, the platform

is unequivocally the publisher of the advertising from which it profits; however, the platform is not responsible for ensuring compliance – this rests primarily with the advertiser. In a recent decision, the ASA recorded YouTube as saying *"YouTube stated that they required that advertisers complied with all relevant legal and regulatory requirements, including their obligations under the CAP code, and that YouTube did not review ads on behalf of advertisers for compliance with the CAP code"*¹.

2. Advertising should be complied before it is published via online platforms

The open nature of online platforms means that video content tends to go live the instant it is uploaded. But advertising is completely different – it flows through and is monetised by the platform – it isn't or need not be outside of the control of the platform. There is no reason, therefore, why all advertising on the platform ought not to be pre-vetted to ensure the highest possible standards of compliance, as Clearcast do for broadcasters. This is something the online platform should do as the publisher of the advertising with (in future) the legal obligation for compliance. Although pre-scrutiny is not technically required by the regulatory regime for TV, it is hard to see how sufficient compliance could be achieved otherwise.

3. There must be clear legal/regulatory incentives for compliance

There is no licensing regime for online distributors/publishers and few legal sanctions if they accept and run infringing advertising compared to broadcasters (in principle and in extremis the ASA can refer the matter to Trading Standards for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. Trading Standards can seek undertakings to comply but in practice this avenue is rarely used).

4. Non-compliance must be risky and unattractive

The lack of any pre-clearance and minimal repercussions in the event of a breach mean that non-compliant advertising campaigns are more likely to run online and potentially able to run for an extended period of time before complaints are made and action taken. This, coupled with the scale of what is offered online and a reliance mainly on complaints to make the ASA aware of potential issues, results in a high risk of serious consumer harm and a far from level playing field with TV.

5. There needs to be an effective and well-resourced regulator.

There are currently two regulators with responsibility for TV advertising – Ofcom as the statutory backstop with ultimate responsibility and effective powers of enforcement and the ASA as the front line regulator, operating under authority from Ofcom. Ultimately the regime overseen by the ASA for TV is rooted in statute and the ASA's authority in relation to TV depends on that regime. By contrast, Whilst the ASA acts as the front line regulator for online advertising, it has no statutory authority in relation to online advertising or formal enforcement powers -- its only backstop is to refer cases to trading standards.

¹ See ASA ruling on Columbia Pictures Corporation Ltd, T/A as Sony Pictures Releasing UK, 13 June 2018.

B. TRANSPARENCY AND VISIBILITY: WHAT NEEDS TO CHANGE ONLINE

The TV advertising regulatory regime also appears to be effective in part because there is transparency in the market.

There is a standard industry currency (BARB) for measuring who is watching what and when. This allows for easy measurement of actual consumption, delivered by a trusted and impartial pan-industry agency. Data can be interrogated in a range of ways (from whole market to programme-specific demographic breaks). This allows precise definition of audience segments that might be subject to regulatory restrictions and accurate measurement of actual consumption among these groups.

There is clear separation of advertising content from programme content. Both advertising and programmes are available in advance of broadcast, allowing broadcasters and advertisers the ability to assess its appeal in advance of broadcast, and to put in place relevant restrictions. The benefit of pre-clearance applies across the market as a whole as the programmes and adverts are finite in nature, deployed in easily identifiable moments in time, channel by channel, and so of a scale that allows pre-clearance.

After the event, there is clear visibility about what has actually been broadcast and when. TV adverts are delivered on a one-to-many basis, in public. In addition, broadcasters have obligations to keep copies of all their broadcast channels for 90 days to ensure that if there are regulatory issues they can be easily investigated.

Given this TV backdrop, there are three things in the area of transparency and visibility that need to change:

1. There must be an effective common approach to determining who is seeing adverts online

There is no BARB-equivalent online, most firms use unaudited proprietary data and different definitions of consumption. The inaccuracy of these measures is becoming the topic of debate in industry². Furthermore, there continues to be a myth that the online platforms voluntarily protect children from harmful content and advertising because they offer precise targeting and have systems for screening out children that are far more sophisticated than those on television. This is not the case. The ASA has for some years expressed concern that many younger users of social media and other sites misreport their age to appear older than they are (in one study as far back as 2013 they found that 42% of children in the study (aged between 11 and 15) had falsely registered themselves as aged 18 or over and hence saw age inappropriate advertising)³.

This is an area which creates some challenges for all providers of free online services though of course the online services offered by broadcasters consist

² <http://adcontrarian.blogspot.com/2017/09/will-facebook-ever-stop-bullshitting.html>

³ See: Children and advertising on social media websites, ASA Compliance Survey, July 2013 (<https://www.asa.org.uk/asset/FA34B8D3-2E1B-4A14-892FCECFD09938EB/>)

of content that they control and which is made and complied to Ofcom standards at the outset and is included in services that are themselves regulated by Ofcom.

2. There must be clear visibility about what advertising is provided online

Adverts online are often delivered one-to-one and in private rather than one-to-many in public, making it hard to have visibility not just about who is seeing adverts but what advertising is being delivered. That is plain to see in broadcasting (and reinforced by license obligations to retain copies of broadcast signals for a period post broadcast) but entirely hidden online.

3. There must be clear separation of advertising content from programme content

The line between advertising and content is currently blurred, making it harder to define precisely what it is that is to be restricted, something that is of particular concern if it is impossible to establish reliably if the recipient of advertising is under 16/18 or not. The issues around online "influencers" is the tip of the iceberg. As in TV there needs to be a single set of bright red lines to define what is content and what is advertising that apply in the same way to all online platforms.