



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to consultation on the proposed CAPS and BCAPS Code

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Consultation on the proposed CAPS and BCAPS Code

The face of advertising is changing radically and this review is timely and critical. Our comments are included below and make specific reference to the CAPS code but many have application to the equivalent sections in the BCAPS code.

Many of the comments focus on the need to be future-facing in amending the code to ensure its continuing relevance. There will also be a need for more regular reviews given the pace of change in the area, and a commitment to genuine consultation. We would suggest an annual review on fast developing areas or areas of concern with a total review at least every five years.

The Scope of the Code

A code of practice should:

- deliver a higher level of consumer protection than the basics set down in law
- build on best practices within a sector
- react quickly to changes in market practices
- deliver commercial benefits to business¹

The complaints mechanism and remedies should be included in the code and we submit that the provision of conciliation procedures and for independent arbitration would strengthen the code in line with the standard required for approval by OFT.

We are particularly concerned by the statement that 'Consumer Protection regulation goes far wider and deeper than could be reflected in a self-regulatory code of practice but compliance with the Code **goes a long way** to ensuring compliance with law in subjects covered by the Code'² (our emphasis). The code needs to incorporate the law at a minimum and give guidance on compliance, not cherry-pick aspects of the law (eg, at para 2.10 where the code is said to 'approximate the law' or para 9.23 where it is stated that the code 'incorporates many of the DSRs' requirements). To do so is misleading of itself and leads to confusion for the industry and the consumer as to what applies. There is still room for the Code to provide administrative remedies for specific breaches while clearly sign-posting the principles and the legal requirements in one consistent document.

¹ The Office of Fair Trading guide to consumer codes of practice
http://www.offt.gov.uk/oft_at_work/consumer_initiatives/codes/quick-guide

² p6

Application of code

We welcome the extended definition of advertisements in non-broadcast electronic media as this picks up significant growth areas of online advertising that were not previously covered. We encourage the extension of the code to advertiser's claims that appear on the advertiser's website to ensure that advertisers and consumers understand that these claims are subject to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

In 1.1(d) it is unclear whether the code applies to advertisements in space that is not paid for, and whether it applies to commercial websites such as www.rupertbear.com and www.inthenightgarden.co.uk, which have a clear marketing and influencing focus.³ Given the developments in online advertising these are areas for particular concern and need mention as specific inclusions to remove doubt.

The issue of non-UK-registered websites needs to be subject to specific work by the ASA to seek co-operation from other advertising regulatory organisations to the principles of the code and as to how cross-border issues are dealt with.

Misleading

There have been some amendments to the code made in the light of the CPRs but arguably the most significant change introduced by the CPRs is the prohibition against misleading by omission. This is an important change that needs to be reflected in the code.

The proposed rule 2.3 attempts to combine two different legislative provisions and in doing so appears to water down the provision that 'any commercial communication provided by him (sic) ...shall be clearly identifiable as a commercial communication'.⁴ The provisions should be reflected separately and reproduce the legislation.

A new rule 3.10 is proposed, that 'Qualifications must be clear to consumers who see or hear the marketing communication only once.' This is especially true of mobile phone marketing, where restrictions on time and space are likely to be greatest and therefore to have the most impact. The rule should also include ads seen only briefly to include something to reflect that it covers ads that may be seen on a small mobile screen.

Proposed rule 3.24.1, 'Marketing communications must not describe items as "free" if the consumer has to pay for packing, packaging, handling or administration' should add 'or through the provision of personal information', as many free services are now provided in exchange for this information that is subsequently traded on or used for profiling.

Rule 32.5 in the present code states any consumer 'liability for costs should be made clear in all material featuring "free" offers. An offer should be described as free only if consumers pay no more than:

- a) the minimum, unavoidable cost of responding to the promotion, eg the current public rates of postage, the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending an e-mail or SMS text message"

We believe that the definition of unavoidable cost of responding is helpful and that it should be retained in the new rule.

³ See also the recommendations of the Office of Fair Trading, 'Internet shopping', OFT 2007, para 9.47p. 132.

⁴ Electronic Commerce (EC Directive) Regulations 2002, 7.

A new rule 3.28.3 states 'marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.' It may be necessary to state specifically that marketing related to mobiles or goods and services provided to mobile users by third parties should state where geographical restrictions apply due to a lack of network coverage (especially 3G services).

Harm and offence

We support the proposed changes in relation to flashing images and believe that the general accessibility guidelines issued by the Equality and Human Rights Commission should form basic standards for marketing under the code.

Children

The Trans Atlantic Consumer Dialogue (TACD) has recently revised its resolution on marketing to children online.⁵ The adoption of the resolution's recommendations would provide an appropriate framework for online marketing to these vulnerable consumers.

Our recommendation regarding specific coverage of websites by the code applies specifically to marketing to children because of the popularity of these websites with children. Previous research carried out by the National Consumer Council which assessed commercial activity on children's favourite websites⁶ recommended that the existing codes take action to monitor internet advertising practices and be pro-active in enforcing codes and regulations. This would assist in closing existing loopholes which allow companies to promote products that are unsuitable for children within editorial spaces or by other hidden forms, for example, advertisers taking over whole home pages or within profiles on social networking sites.

Consumer Focus wants to see greater consistency in the protection of children aged up to 16 years old with regard to the restrictions for advertising to children in both CAP and BCAP codes.

We would want to see a tightening up of the proposed principle that 'the way in which children perceive and react to marketing communications is influenced by their age, experience and the context in which the message is delivered. Marketing communications that are acceptable for young teenagers will not necessarily be acceptable for younger children. The ASA will take those factors into account when assessing whether a marketing communication complies with the code.'

We are concerned about arbitrary distinctions being made. Recent neuroscience research conducted both in the EU and the US suggests that, contrary to previous beliefs, children over 12 do not have adult-like understanding and critical judgement of marketing⁷. Compliance is easier if there is a consistent age limit of application and the minimum should be 16, with consideration of 18 being the minimum in relation to areas such as financial services and explicit material.

⁵ TACD, Resolution to Marketing to Children online, March 2009, www.tacd.org

⁶ Anna Fielder, Will Gardner, Agnes Nairn, Jillian Pitt *Fair Game? Assessing commercial activity on children's favourite websites and online advertisements*, National Consumer Council, December 2007.

⁷ Cornelia Pechman, Linda Levine, Sandra Loughlin and Francis Leslie. *Impulsive and Self-conscious: Adolescents' vulnerability to advertising and promotion*. Journal of Public Policy marketing. Vol 24.

Food and Soft drink advertisements and children

Although the advertising of High Fat Sugar Salt food and drinks are regulated by Ofcom's rule (using nutrient profiling) and the EU Nutrition and Health Claims regulation, the code should reflect and enhance on the principles contained there and also set minimum standards that apply consistently throughout the codes. Age protection should consistently be set at up to a minimum of 16 years and this standard is applied to some parts of the codes but not others.

For example at 13.13 in the BCAP code:

'Promotional offers to children must be used with a due sense of responsibility. They may not be used in food or soft drink product advertisements targeted directly at pre-school or primary school children.'

And under 15.14 and 15.15 (CAP) – 'Marketing communications featuring a promotional offer must be prepared with a due sense of responsibility. Except for those for fresh fruit and vegetables, marketing communications for food advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer.'

Licensed equity characters should be included in restrictions on the involvement of licensed characters and celebrities popular with children in advertising of less healthy food, eg the Dairy Lea cow, (47.9 CAP, 7.2 BCAP) as these characters are also used to market a diet that conflicts with expert recommendations.

Restrictions need to be expanded in the CAP code on food marketing and advertising based on restricting less healthy foods utilising the Food Standards Agency nutrient profiling model.⁸ This will ensure a level playing field with the BCAP codes and enable the marketing of healthier foods.

Infant formula and follow-on formula restrictions should include restrictions for foods that the consumer is reasonably led to believe will fulfil these functions even if not labelled as such (15.11 CAP 13.8 BCAP).

Gambling

We note that under section 16 of the CAP code children are defined as people of 15 and under and young persons are people of 16 or 17, yet the legal age for gambling in a betting shop or football pools is 16 years. Point 16.1 proposes that 'marketing communications for gambling must be socially responsible, with the particular need to protect children.' We want to see a tightening up of children's potential exposure to gambling advertisements online with monitoring and a more pro-active stance taken by the ASA. Research by the National Consumer Council⁹ has found that out of a total of 70 online advertisements surveyed, nine per cent were for online gambling and children as young as 12 were being exposed to these advertisements.

⁸ <http://www.food.gov.uk/healthierating/advertisingtochildren/nutlab/ef>

⁹ Anna Fielder, Will Gardner, Agnes Nairn, Jillian Pitt (December 2007). *Fair Game? Assessing commercial activity on children's favourite websites and online advertisements.*

Privacy

The code has not been altered in relation to privacy and therefore fails to respond to the developments of online behavioural advertising. Consumers are concerned about privacy issues but not necessarily equipped to protect their own privacy. The profile/tracking process is not transparent and because of lack of transparency, marketing methods may be unfair and deceptive. Information is passed on to third parties with whom consumers have no direct relationship and therefore have no control over the transactions.

Profiling also collects sensitive information, such as health or medical issues and potentially targets the vulnerability of certain users in a way that is not known in traditional commercial arrangements. For example, almost every website used by young people is commercial. The content is funded by three methods: selling advertising space to third parties who want to target children; selling merchandise direct from the site; and/or collecting children's data to sell to other organisations.

The Internet Advertising Bureau has recently revised their Good Practice Principles for Online Behavioural Advertising¹⁰ to safeguard individual privacy. They have reflected basic protections such as notice, choice through an opt-out mechanism and user education. Our preferred model and industry best practice, would require affirmative express consent (by way of an opt in model) for use of information, however the CAP code should at the least reflect the IAB principles to enable some consistent dealing with online advertising across the industry.

Data should only be collected, processed and used with the express and voluntary permission of consumers to the form, collection and processing of data held and the code needs to make provision for this. We suggest a form of amendment to 10.15 below.

Distance selling

Data protection law requires marketers to tell consumers how they intend to use the personal data supplied by the consumer. These provisions need to be better reflected in the code, as the use of personal data is not just for the purpose of sending a representative to visit,¹¹ but is now increasingly used for profiling by the advertiser themselves or to sell on to ad networks. As such there needs to be transparency about how information is collected, if the information is stored and the details about this, if it may subsequently be used by the advertiser or if it is passed on to a third party and what are the advertiser's security arrangements in relation to this data.

Almost 58 per cent of advertising online classifies as search advertising where traders pay for listing and prominent positions on the search engines and search comparison sites¹². There is a lack of transparency in disclosing information about this form of advertising to consumers and consumers are unaware that the prominent position of a trader on a search engine list may not equate with the best quality offer or best match of product searched for. We would recommend that the Code require publishers such as search engines and search comparison sites to include a declaration that results lists and advertising displays are prioritised according to commercial arrangements and do not, therefore, carry any ranking according to whether the advertisement may be appropriate to a consumer's needs.

Separate attention in the Code should be given to online auctions where large proportions of complaints recorded by Consumer Direct refer to misleading claims and

¹⁰ <http://www.iabuk.net/en/1/behaviouraladvertisinggoodpractice.html>

¹¹ 9.28

¹² Office of Fair Trading, 'Internet shopping', OFT 2007

omissions.¹³ Yet consumers face problems with redress because the auction platforms do not accept liability for sellers or buyers loss, or quality, safety or legality of the products on sale.

With the convergence of operating platforms and increasing number of mobile phone users, mobile advertising is becoming a growing lucrative market, which can benefit both consumers and business. However the exploratory TACD survey on mobile commerce¹⁴ and the OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce¹⁵ highlighted problems in relation to mobile advertising which impact on consumers. Areas of particular concern are: limited information disclosure due to a small mobile screen and low memory capacity, unauthorised use of personal information and protection of minors. The Code does not address the problems and only makes references to the issues, for example, in rule 3.3.

We would recommend that ASA deal with consumer concerns over mobile advertising in the review of the Code and specifically address the recommendations highlighted by the TACD Resolution on Mobile Commerce 2005 such as:

- Require clear and full disclosure about the products and services offered, the cost, and the terms and conditions in any commercial communication as well as immediately before any individual transaction
- Prohibit fraud and deceptive and misleading solicitations and provide especially strong sanctions against such solicitations targeting vulnerable consumers
- Protect consumer privacy in mobile commerce and prohibit use of any personal data (including purchase and location information) for purposes that consumers have not explicitly agreed to or that unfairly disadvantage them
- Give special protection to children and restrict marketing practices targeting children¹⁶

Database practice

The collection of data generally needs to comply with the data protection principles, ie:

- Fairly and lawfully processed
- Processed for limited purposes
- Adequate, relevant and not excessive
- Accurate and up to date
- Not kept for longer than is necessary
- Processed in line with your rights
- Secure
- Not transferred to other countries without adequate protection.¹⁷

¹³ Internet Shopping, OFT 2007, p 147.

¹⁴ TACD Mobile Commerce Survey, 2006.

¹⁵ OECD Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce, Korea 2008.

¹⁶ www.tacd.org

¹⁷ http://www.ico.gov.uk/Home/what_we_cover/data_protection/the_basics.aspx

If information is collected then it must be done fairly (ie transparently), it must be relevant and processed for limited purposes (ie it should not be done without informed consent as to the exact uses of the information because there is no need for an advertiser to collect this information), it is to be kept securely and not for longer than is necessary (and this again underlines the need for the consumer to understand and consent to the purpose). The US Federal Trade Commission has recognised in a recent report that information need not on its own be personally identifiable information (PII) in order to potentially or reasonably be associated with a consumer or device.

In order to properly reflect the principles above and ensure compliance in a changing environment we submit that 10.15 needs to be amended to read:

‘Marketers must not collect information for marketing or other purposes that could potentially or reasonably be associated with a consumer or device without first obtaining affirmative express consent to the collection and specific uses of that information from the consumer.’

At 10.26, the CAP code consultation paper says:

‘CAP considers that consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the ‘explicit consent requirements’ of the Privacy and Electronic Communications (EC Directive) Regulations to Bluetooth marketers.’

This seems reasonable – mobile users tend to leave Bluetooth deactivated because of the high battery consumption it uses, as well as for privacy reasons. However, it will be important for the ASA to monitor developing technology in this area; successors to Bluetooth technology could potentially have wider application while being more power efficient, which could lead to them being targeted as a medium by marketers.

Sales Promotion

We believe that the issues in relation to advertising on mobiles and PDAs, ie small screen devices would be better dealt with through the following amendment to rule 8.18

‘Marketing communications that include a promotion and are significantly limited by time or space must include information about significant conditions and must direct consumers clearly to an easily-accessible alternative source where all the significant conditions of the promotion are prominently stated. Participants should be able to retain those conditions or easily access them throughout the promotion.’

Environmental claims

Consumer Focus has done extensive research^[1] with consumers on green claims in advertising, offering insights into what gives consumers confidence in these claims. It showed that, despite the credit crunch, consumers still want to buy products that are better for the environment – 53 per cent of consumers say they are buying more environmentally friendly products than two years ago. However, two thirds of consumers say they are not sure how to tell if claims made by companies advertising green products – from household cleaners to cars and energy – are true. Only one in five people think it is not possible for companies to make false claims about their products’ environmental credentials.

[1] Lucy Yates ‘Green expectations: consumers’ understanding of green claims in advertising’, Consumer Focus, June 2009.

Consumers are now confronted with an increasing number of green claims – some in relation to specific products or product ranges, others in relation to a company brand or even an industry sector as a whole. Green claims in advertising have the potential to play a part in encouraging consumers to make sustainable consumption choices, as well as rewarding progressive companies for their efforts. This can, in turn, encourage business to make further environmental innovations, completing a virtuous circle. However, green claims also have the possibility, intentionally or otherwise, to mislead consumers and, in doing so, erode trust in the premise of environmentally responsible purchases. Alongside this, consumers can find green claims confusing – the complexity of information required to make a judgement on the greenness of a product can leave even the most dedicated green consumer confused and disempowered.

Our research shows that, in order for consumers to have confidence and trust in the green claims, companies need to follow the 3Cs:

Clarity – consumers are looking for, as a minimum, claims that are clear and easy to understand. There is demand for information on green issues that is direct and ‘to the point’. Ambiguous and overly technical terms are not widely understood or liked by consumers.

Credibility – consumers want realistic, accessible and verifiable claims. They deploy a series of ‘perceptual filters’ to make rapid judgements, based on intuitive and in-built rules of thumb. They can be grouped into four categories:

- **Ad specific elements** – There is widespread dislike of small text, asterisks and footnotes (all of which are considered to represent ‘the catch’), whereas third-party endorsements from well known and respected organisations are highly valued by consumers. Consumers were confused by imagery that was unclear or not obviously connected to the product.
- **Perceptions of brand & brand ‘fit’ with the environment** – Consumers were more likely to accept and believe claims that ‘made sense’ (ie, a brand with which they have positive associations and/or believe is consistent with environmental responsibility) but were more suspicious of other brands. This ‘brand baggage’ affected their assessment of the specific green claim.
- **Ingrained habits and beliefs** – Consumers draw upon their own experiences of green products to judge the credibility of a claim and – where they have no experience – expectations of performance are used as a proxy.
- **The wider market and social context** – Consumers have varying levels of confidence in how strictly green claims are regulated and this impacts on how credible they perceive claims to be.

Comparability – these emerge as one of consumers’ most important demands. Consumers want simple, meaningful and ‘like-for-like’ comparisons. The absence of meaningful comparisons, the general proliferation of labelling schemes and comparisons that are not well understood (eg, grams of CO₂/km on car ads) offer little or even undermine the relevance and usefulness of a green claim. In addition, as the number of products and claims expands, the sheer amount of information may drown out the ability of consumers to make like-for-like comparisons and ceases to provide them with any useful means of differentiation.

In light of these findings, we recommend that both Codes currently have insufficient focus in relation to the following issues:

The use of imagery: The code should include a rule that states ‘Marketing communications must not use green imagery that implies broader environmental impacts than the product offers: for example, by using a general green image such as a wind turbine to advertise a product that’s only claim of greenness is a longer battery life.’

Comparisons: Rules that cover absolute claims and comparative claims state ‘absolute claims must be supported by a high level of substantiation. Comparative claims such as ‘greener’ or ‘friendlier’ can be justified, for example, if the advertised product provides a total environmental benefit over that of the marketer’s previous product or competitor products and the basis of the comparison is clear.’

However, this deals insufficiently with the issue of comparisons for consumers. Our research demonstrates that valid and useful comparisons are in strong demand among consumers because they help them navigate their way through the multiple claims and offers that are presented to them on a daily basis. Consumers highlighted the following aspects of what makes a useful comparison for them (quotes provided are from our June 2009 research ‘Green expectations: consumers understanding of green claims in advertising): Relative and absolute comparisons were demanded to help to understand if a claim offers something that is above and beyond ‘business as usual’:

‘But then I don’t know even how long other products take to biodegrade so for me there’s no comparison at all. That doesn’t tell me if it’s any better than anything else’

‘So if it’s the best of the seven seaters, where does it rate overall? Way down’

Meaningful comparisons - All groups struggled with measures of grams of CO₂/km used in car ads. Some of those classified as high-green receptivity did understand this term but it was a definite minority. Instead – in relation to cars – consumers used road tax bands as a proxy for environmental performance. Many were keen on this way of deciding whether a car advert with a green claim was valid or not because it provided them with clarity in comparing one car with another:

‘Well it’s just a random figure [g CO₂/km]. Unless they compare it with something it’s just a random figure’

‘I mean it’s stating CO₂ but unless you’ve looked into what’s good and what’s bad you just see the number you don’t know where on the scale that is’

‘The road tax is £35 a year which is very cheap. So that is saying something about the emissions straight away because if it were higher then the road tax would be a lot higher’

Standardisation and the consolidation of standards – this emerged as a priority area, with several participants highlighting the amount of different labelling schemes – echoing the findings of our previous research^[2] – while others pointed

^[2] *Bamboozled, Baffled and Bombarded: consumers’ views on voluntary food labelling*, NCC (2004)

to both the A-G ratings on white goods and the healthy eating traffic light as good practice examples to follow:

'Different stores have their own labels and there's no consistency between them so it can be confusing'

'I think we went through a phase where it was all about your calories and fat and everything like that in your food and that's quite well indicated now, but how recyclable a product is, or how environmentally friendly it is, that's not clear'.

The danger for green products and claims, as the number of products and claims expands, is that the sheer amount of information drowns out the ability of consumers to make like-for-like comparisons and ceases to provide them with any useful means of differentiation. This point was neatly made in the discussions, as follows:

'When you've got so many cars pitching against each other you just kind of lose any interest, they're all making these claims so none of them stand out'

The CAP and BCAP Codes need to reflect these findings. There is a fine line between consumer scepticism and cynicism – without confidence in the truth of advertising, consumers could become reluctant to exercise their green purchasing power, as they no longer know who or what to believe. This can put the whole market for the 'green pound' in danger. Getting this right is clearly in businesses self-interest and the Codes must provide clear guidance of how to do this.

We are pleased to see that the Codes will include a principle that states that 'marketers should take account of Government guidance including the Green Claims Code published by Defra'. This helps to ensure that any new Government guidance on emerging issues and definitions in the green claims area will be taken into account by the ASA when investigating complaints about environmental claims. However, we would like the Code to include this as a rule, ensuring stronger coordination between the Government Green Claims Code and the CAP and BCAP Codes.

Digital products and services

The OFT study recognises that 'poor information may include omitting important details on for instance, restrictions on usage' and refers to particular examples such as music downloads which are often limited by Digital Rights Management Software or by the terms of a subscription service.¹⁸ These limitations need to be clearly stated in advertising material as the consumer assumption is that products will be interoperable and not subject to controls.

Other comments

The Consultation document was long and rather unwieldy, and would discourage even the hardiest of consumers. A more public-facing consultation would assist in reinforcing the principles and their credibility and making them relevant.

¹⁸ Internet Shopping, OFT 2007, p 129.

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