

Committee of Advertising Practice: Distance Selling Consultation

Consultation on whether to remove the distance selling rules from the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing

Issue date:

05/11/2014

Closing date:

13/01/2015



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1. Executive Summary

The Committee of Advertising Practice (CAP) is the regulatory body responsible for maintaining the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code). CAP strives to ensure that its rules are transparent, accountable, proportionate, consistent and targeted where action is needed.

The CAP Code reflects the law where appropriate and, in the case of distance selling, seeks to reflect the requirements of The Consumer Protection (Distance Selling) Regulations 2000, which give certain rights to consumers in respect of distance contracts.

On 13 June 2014, The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into force, replacing The Consumer Protection (Distance Selling) Regulations 2000. Perhaps most significantly for CAP, the new Regulations implement a maximum harmonisation measure, whereas the old Regulations implemented a minimum harmonisation measure. Consequently, CAP is obliged to consider what might be the legal implications of continuing to maintain distance selling provisions under the new regime. Since 13 June, where the use of any Code rule would be inconsistent with any provision of the new Regulations, the rule has been interpreted by the Advertising Standards Authority (ASA) and CAP in the light of the new Regulations.

The obligation on CAP to consider the compatibility of its rules with the new legislation has provided CAP with an opportunity to consider more generally the extent, if at all, to which it wishes to reflect distance selling legislation in its Code. The current CAP distance selling rules fall into two broad categories:

1. pre-contractual information requirements; and
2. post-contractual matters.

CAP is consulting on proposals to remove both categories of rule from its Code (the rationale for these proposals is set out in detail in **section 4** below).

2. Introduction to CAP and the ASA

2.1 The Committee of Advertising Practice

CAP is the self-regulatory body that creates, revises and enforces the [CAP Code](#). The CAP Code covers non-broadcast marketing communications, which include advertisements placed in traditional and new media, sales promotions, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from adjudication by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those businesses agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained.

By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including on misleading advertising (Directive 2005/29/EC). Self-regulation is accepted by the Department for Business, Innovation and Skills and the courts as a first line of control in protecting consumers and the industry.

Further information about CAP is available at www.cap.org.uk.

2.2 The Advertising Standards Authority

The ASA is the independent body responsible for administering the CAP Code and ensuring that the self-regulatory system works in the public interest. The Codes require that all marketing communications are legal, decent, honest and truthful.

The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's adjudications are published on the ASA's website, www.asa.org.uk, and made available to the media. An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case.

If the ASA Council upholds a complaint, the advertisement must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions.

Information about the ASA is available at: www.asa.org.uk

3. Legal Framework

[Section 9](#) of the CAP Code reflects some of the requirements of [The Consumer Protection \(Distance Selling\) Regulations 2000](#) (the 2000 Regulations); it does so in a ‘best practice’ fashion, sometimes providing a higher standard of consumer protection than that provided for in law. Until 13 June 2014, this was a permissible approach, owing to the minimum harmonisation nature of [Directive 97/7/EC](#) which the 2000 Regulations implemented. From 13 June 2014, the 2000 Regulations have been replaced by [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the 2013 Regulations). The 2013 Regulations provide significant changes to the old regime; perhaps most significantly for CAP, they implement a maximum harmonisation measure ([Directive 2011/83/EU](#)) and, consequently, where CAP seeks to regulate in the harmonised field, it can be no more restrictive or permissive than maximum harmonisation allows.

It should be noted that from 13 June 2014, CAP has issued the following notice in relation to its distance selling rules:

CAP and BCAP are reviewing the distance selling sections of their Codes in light of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which come into force on 13 June 2014. From 13 June, where any Code rule is inconsistent with any provision of the new Regulations, the rule will be interpreted in the light of the new Regulations.

The notice is to prevent any unlawful use of the CAP rules whilst this consultation is being carried out.

4. Proposals for change

4.1 Introduction

CAP’s current rules reflect the requirements of the 2000 Regulations which implemented a minimum harmonisation directive. This is especially important because some of the rights given to consumers (in both the old and new legislation) depend on the trader’s behaviour: for example, if a trader fails to comply with the information requirements, the consumer has enhanced cancellation rights.

The current rules reflect a “best practice” scenario and do not set out all the different rights and obligations that apply in different circumstances. This approach is not possible under the new legislative regime, because the Code would then be imposing greater restrictions than are permitted under the maximum harmonisation principle. Because of this, CAP has had to examine the compatibility of its rules with the new legislation. CAP has also taken the opportunity to consider to what extent, if at all, it wishes to reflect distance selling legislation in its rules, and this consultation is the result of that process.

The current CAP distance selling rules fall into two broad categories:

1. pre-contractual information requirements; and
2. post-contractual matters.

CAP is consulting on proposals to remove both categories of rule from its Code (the rationale for these proposals is set out in [4.2](#) and [4.3](#) below). It is important to note two important contextual points in relation to the proposals:

1. Under [Regulation 44](#) of the 2013 Regulations, every local weights and measures authority in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland are under a duty to consider any complaints made to them about a contravention of the Regulations; this duty would not be affected by any removal / retention of CAP's distance selling rules.
2. Consumers do complain to the ASA about advertisers failing to deliver products, failing to process cancellations or failing to provide refunds when reasonably requested; however from 2011-2013, the ASA resolved only 600 non-broadcast cases under the distance selling rules. These concerned post-contractual matters, mainly fulfilment problems (non-receipt of goods/refunds etc.). Half of these concerned non-receipt of prizes in competition or gifts in other sales promotions; these cases would continue to be considered under CAP's "Sales promotions" rules.

4.2 Proposal to remove rules relating to pre-contractual information

Currently, CAP's rules relating to pre-contractual information requirements are the following:

- 9.1** *Distance selling marketing communications must make clear the marketer's identity and geographic address; that information must be given in a form that can be retained by consumers.*
- 9.2** *Distance selling marketing communications must include:*
 - 9.2.1** *the main characteristics of the product*
 - 9.2.2** *the price, including any VAT or other taxes payable (see "Prices" in Section 3: Misleading Advertising, and payment arrangements*
 - 9.2.3** *the amount of any delivery charge*
 - 9.2.4** *the estimated delivery or performance time (see rule 9.4) and arrangements*
 - 9.2.5** *a statement that, unless inapplicable (see rule 9.6), consumers have the right to cancel orders for products. Marketers of services must explain how the right to cancel may be affected if the consumer agrees to services beginning less than 7 working days after the contract was concluded. They must, however, make it clear when the services will begin*
 - 9.2.6** *any telephone, postal or other communication charge calculated at higher than the standard rate (for example, if a premium-rate call is required)*
 - 9.2.7** *any other limitation on the offer (for example, period of availability) and any other condition that affects its validity*
 - 9.2.8** *a statement on whether the marketer intends to provide substitute products (of equivalent quality and price) if those ordered are*

unavailable and one that it will meet the cost of returning substitute products on cancellation

9.2.9 *if goods are supplied or services performed permanently or recurrently, the minimum duration of open-ended contracts.*

9.3 *At the latest by the time that goods are delivered or services begin, marketers must give consumers written information on:*

9.3.1 *how to exercise their right to cancel, unless inapplicable (see rule 9.6). Marketers must allow at least seven clear working days after delivery (or after the conclusion of service contracts unless the consumer agrees to an earlier start date) for consumers to cancel*

9.3.2 *for goods, whether the consumer has to return the goods to the suppliers on cancellation and, if so, who is to bear the cost of return or recovery of the goods (though see rule 9.5.3 for substitute goods)*

9.3.3 *any other guarantees and after-sales services*

9.3.4 *the full geographical address of the suppliers for any consumer complaints*

9.3.5 *the conditions that apply to the cancellation of any open-ended contract.*

9.10 *This rule must be read in conjunction with Directive (EC) No 2010/30/EU and the Energy Information Regulations 2011 on labelling and standard product information of the consumption of energy and other resources by energy-related products and its subsequent delegated regulations. The Directive introduces an information and labelling framework whereby delegated regulations will detail which products need to contain an energy efficiency rating or fiche. The rule only applies to products which are subject to a delegated regulation.*

For more information on delegated regulations, go to <http://ec.europa.eu/energy>.

Marketers must make product fiche information about products that fall under delegated regulations available to consumers before commitment.

CAP considers it is proportionate to remove rules which do not mandate the content of advertising. The 2013 Regulations require certain information to be provided by traders to consumers before a consumer is bound by a distance contract. CAP considers that it could only require advertisers to include this information in their advertising where the advertising constituted the first and last stage of communication from the marketer before a distance contract is concluded. To require it in all ads would exceed the requirements of the 2013 Regulations, given that they allow the information to be provided *before a consumer is bound by a distance contract*. Some ads (for example, those appearing in newspapers) do not constitute the first and last stage of communication, and consumers often have to use a website or a telephone line to place orders; the Regulations allow for pre-contractual information to be given at this later stage.

CAP's regulation of information that must appear in business-to-consumer advertisements is also governed by [The Consumer Protection from Unfair Trading Regulations 2008](#) (the CPRs) which implement [Directive 2005/29/EC](#) concerning unfair business-to-consumer commercial practices (UCPD). The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques. They impose a general prohibition on unfair, misleading or aggressive practices, which are defined in the Regulations, and specific prohibitions on certain practices that are deemed to be unfair in all circumstances.

[Regulation 6\(4\)](#) of the CPRs sets out the following categories of material information the omission of which must not mislead the average consumer:

- (a) *the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;*
- (b) *the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;*
- (c) *the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;*
- (d) *either—*
 - (i) *the price, including any taxes; or*
 - (ii) *where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;*
- (e) *where appropriate, either—*
 - (i) *all additional freight, delivery or postal charges; or*
 - (ii) *where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;*
- (f) *the following matters where they depart from the requirements of professional diligence—*
 - (i) *arrangements for payment,*
 - (ii) *arrangements for delivery,*
 - (iii) *arrangements for performance,*
 - (iv) *complaint handling policy;*
- (g) *for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.*

These categories of material information are reflected, both expressly and through falling under the general category of 'material information', in rules 3.1, 3.3, 3.4 and 3.5 of the CAP Code in the following terms:

3.1 *Advertisements must not materially mislead or be likely to do so.*

3.3 *Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.*

Material information is information that the consumer needs to make informed decisions in relation to a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.

3.4 *For marketing communications that quote prices for advertised products, material information [for the purposes of rule 3.3] includes:*

3.4.1 *the main characteristics of the product or service*

3.4.2 *the identity (for example, a trading name) and geographical address of the marketer and any other trader on whose behalf the advertiser is acting*

3.4.3 *the price of the advertised product or service, including taxes, or, if the nature of the product or service is such that the price cannot be calculated in advance, the manner in which the price is calculated*

3.4.4 *delivery charges*

3.4.5 *the arrangements for payment, delivery, performance or complaint handling, if those differ from the arrangements that consumers are likely to reasonably expect*

3.4.6 *that consumers have the right to withdraw or cancel, if they have that right. If the advertisement encourages consumers to buy a product or service through a distance-selling mechanism, please refer to Section 8: Distance Selling.*

3.5 *Marketing communications must not materially mislead by omitting the identity of the marketer.*

Some marketing communications must include the marketer's identity and contact details. Marketing communications that fall under the Distance Selling, Database Practice or Employment sections of the Code must comply with the more detailed rules in those sections.

Marketers should note the law requires marketers to identify themselves in some marketing communications. Marketers should take legal advice.

CAP considers that the requirements of the CPRs, as reflected in section 3 of the CAP Code (as set out above), already effectively mandate the type of information that should be included in ads.

In 2011, CAP and BCAP consulted on how the Codes should reflect two advertising-related provisions contained in The Energy Information Regulations 2011 which transposed Directive 2010/30/EU. As a result of the consultation, rule 9.10 was added to the distance selling section because it addresses information that must be provided before a consumer enters into a contract but which may be provided separately from a given marketing communication, for example in follow-up literature.

For the avoidance of doubt, CAP and BCAP do not propose to reopen the question put in their 2011 consultation and rules relating to energy labelling are unaffected by the outcome of the current consultation. If CAP and BCAP ultimately adopt the present consultation proposal, rule 9.10 will be relocated to [section 11](#).

In considering the questions and proposals below, CAP would ask respondents to consider the wider consumer protection context (as set out in paragraph 4.1 of this document) in which they are made, and would welcome any comments from respondents on this.

Question 1: Do you agree with CAP's proposal to remove its distance selling rules which relate to pre-contractual information? If you do not, please indicate why not.

4.3 Proposal to remove rules relating to post-contractual matters

Currently, CAP's rules relating to post-contractual information requirements are the following:

9.4 *Marketers must fulfil orders within 30 days from the day consumers send their order unless:*

9.4.1 *the nature of the product or service makes it reasonable to specify a longer period in the marketing communications: for example, marketing communications for made-to-measure products, plants that are out of season, or products or services that are supplied on an instalment basis may reasonably specify a longer period, or*

9.4.2 *a longer performance period has been agreed with the consumer.*

9.5 *Marketers must refund money promptly (and at the latest within 30 days of notice of cancellation being given) if:*

9.5.1 *consumers have not received products within the specified period. If they prefer to wait, consumers must be given a firm dispatch date or fortnightly progress reports. Alternatively marketers may, if asked or if stated before purchase, provide a substitute of equivalent quality and price*

9.5.2 *products are returned because they are damaged when received, are faulty or are not as described; if so, the marketer must bear the cost of transit in both directions*

9.5.3 *consumers cancel within seven clear working days after delivery, unless the product is listed in rule 9.6. Consumers should assume they may try out products, except for audio or video recordings or computer software, but should take reasonable care of them before they are returned. Consumers must return the product and, unless the product*

is a substitute product sent instead of the ordered product, the marketer may require the consumer to pay the costs of doing so providing the marketer made that clear at the latest at the time the product was delivered.

- 9.5.4** *an unconditional money-back guarantee is given and the products are returned within a reasonable period*
- 9.5.5** *products that have been returned are not received back, provided consumers can produce proof of posting.*
- 9.6** *If all contractual obligations to consumers are met, marketers do not have to provide a refund on:*
 - 9.6.1** *services that have already begun with the consumer's agreement, if rule 9.2.5 has been complied with*
 - 9.6.2** *products the price of which depends on financial market fluctuations that are outside the control of the supplier*
 - 9.6.3** *perishable, personalised or made-to-measure products*
 - 9.6.4** *audio or video recordings or computer software if unsealed by the consumer*
 - 9.6.5** *newspapers, periodicals or magazines*
 - 9.6.6** *betting, gaming or lottery services.*
- 9.7** *Marketers should take particular care when packaging products that might fall into the hands of children.*
- 9.8** *Marketers must not falsely imply that consumers have already ordered the marketed product by including in marketing material an invoice or similar document that seeks payment.*
- 9.9** *Marketers should not ask consumers to pay for or return unsolicited products, except for substitute products supplied in conformity with rules 8.12 and 9.5.1.*

CAP considers rules relating to post-contractual matters do not generally relate to advertising but rather to the trader's behaviour after a contract has been concluded; a notable exception to this is where statements relating to post-contractual behaviour are made in advertising. In such cases, the ASA would look at these under its "Misleading advertising" rules (this is elaborated on in 4.2 above), even in the absence of the above distance selling rules. CAP's current view is that post-contractual matters are sufficiently regulated by other authorities and under legislation. On this basis, it proposes to remove these matters from its Code.

Question 2: Do you agree with CAP's proposal to remove its distance selling rules which relate to post-contractual matters? If you do not, please indicate why not.

5. Responding to this Consultation

5.1 How to respond

CAP invites written comments, including supporting evidence on the proposals contained in this document, by **5pm on 13 January 2015**.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

Responses via email with attachments in Microsoft Word format are preferred to assist in the processing of responses.

Please send your response to jamesc@cap.org.uk.

If you are unable to reply by email, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

CAP Distance Selling Consultation
Regulatory Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

5.2 Confidentiality

CAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

Contact us

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