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MISLEADING ADVERTISING

Background

The ASA may take the Consumer Protection from Unfair Trading Regulations 2008 into account when it rules on complaints about marketing communications that are alleged to be misleading. See Appendix 1 for more information about those Regulations.

The ASA will take into account the impression created by marketing communications as well as specific claims. It will rule on the basis of the likely effect on consumers, not the marketer's intentions.

Other sections of the Code contain product-specific or audience-specific rules that are intended to protect consumers from misleading marketing communications. For example, the Children and Medicines sections of the Code contain rules that apply, as well as the general rules, to marketing communications that fall under those sections.

If a marketing communication encourages consumers to buy a product or service through a distance-selling mechanism, marketers should seek legal advice to ensure they comply with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

Rules

General

3.1 Marketing communications must not materially mislead or be likely to do so.

3.2 Obvious exaggerations ("puffery") and claims that the average consumer who sees the marketing communication is unlikely to take literally are allowed provided they do not materially mislead.

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

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

3.4.3 the price of the advertised product, including taxes, or, if the nature of the product 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 (see rule 3.55).

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 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.

3.6 Subjective claims must not mislead the consumer; marketing communications must not imply that expressions of opinion are objective claims.

Substantiation

3.7 Before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove claims that consumers are likely to regard as objective and that are capable of objective substantiation. The ASA may regard claims as misleading in the absence of adequate substantiation.

3.8 Claims for the content of non-fiction publications should not exaggerate the value, accuracy, scientific validity or practical usefulness of the product. Marketers must ensure that claims that have not been independently substantiated but are based merely on the content of a publication do not mislead consumers.

CAP has published a Help Note on the Marketing of Publications.

Qualification

3.9 Marketing communications must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify.

3.10 Qualifications must be presented clearly.

CAP has published Advertising Guidance on Misleading advertising: use of qualifications.

Exaggeration

3.11 Marketing communications must not mislead consumers by exaggerating the capability or performance of a product.

3.12 Marketing communications must not present rights given to consumers in law as a distinctive feature of the marketer's offer.

3.13 Marketing communications must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists.

Prohibited Claims

These rules apply regardless of any substantiation presented in support of the claims:

3.14 Marketing communications must not claim that products can facilitate winning in games of chance.

3.15 Marketing communications must not explicitly claim that the advertiser's job or livelihood is in jeopardy if the consumer does not buy the advertised product.

3.16 No marketing communication may promote a pyramid promotional scheme. Pyramid promotional schemes are those in which consumers pay for the opportunity to receive payments derived primarily from the introduction of other consumers into the scheme, not from the sale or consumption of products.

Prices

Background

Price statements in marketing communications should take into account the Chartered Trading Standards Institute's Guidance for traders on pricing practices.

Definition

Price statements include statements about the manner in which the price will be calculated as well as definite prices.

3.17 Price statements must not mislead by omission, undue emphasis or distortion. They must relate to the product featured in the marketing communication.

3.18 Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers. However, VAT-exclusive prices may be given if all those to whom the price claim is clearly addressed pay no VAT or can recover VAT. Such VAT-exclusive prices must be accompanied by a prominent statement of the amount or rate of VAT payable.

3.19 If a tax, duty, fee or charge cannot be calculated in advance, for example, because it depends on the consumer's circumstances, the marketing communication must make clear that it is excluded from the advertised price and state how it is calculated.

3.20 Marketing communications that state prices must also state applicable delivery, freight or postal charges or, if those cannot reasonably be calculated in advance, state that such charges are payable.

3.21 If the price of one product depends on another, marketing communications must make clear the extent of the commitment the consumer must make to obtain the advertised price.

3.22 Price claims such as "up to" and "from" must not exaggerate the availability or amount of benefits likely to be obtained by the consumer.

Free

Principle

Marketing communications must not describe a product as "free", "gratis", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item.

3.23 Marketing communications must make clear the extent of the commitment the consumer must make to take advantage of a "free" offer.

3.24 Marketing communications must not describe items as "free" if:

3.24.1 the consumer has to pay packing, packaging, handling or administration charges for the "free" product

3.24.2 the cost of response, including the price of a product that the consumer must buy to take advantage of the offer, has been increased, except where the increase results from factors that are unrelated to the cost of the promotion, or

3.24.3 the quality of the product that the consumer must buy has been reduced.

CAP and BCAP have published joint guidance on the use of "free".

3.25 Marketers must not describe an element of a package as "free" if that element is included in the package price unless consumers are likely to regard it as an additional benefit because it has recently been added to the package without increasing its price.

3.26 Marketers must not use the term "free trial" to describe "satisfaction or your money back" offers or offers for which a non-refundable purchase is required.

Availability

3.27 Marketers must make a reasonable estimate of demand for advertised products.

3.28 Marketing communications that quote a price for a featured product must state any reasonable grounds the marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the advertised price within a reasonable period and in reasonable quantities. In particular:

3.28.1 if estimated demand exceeds supply, marketing communications must make clear that stock is limited

3.28.2 if the marketer does not intend to fulfil orders, for example, because the purpose of the marketing communication is to assess potential demand, the marketing communication must make that clear

3.28.3 marketing communications must not mislead consumers by omitting restrictions on the availability of products; for example, geographical restrictions or age limits.

3.29 Marketers must monitor stocks. If a product becomes unavailable, marketers must, whenever possible, withdraw or amend marketing communications that feature that product.

3.30 Marketers must not use the technique of switch selling, in which their sales staff decline to show the advertised product, refuse to take orders for it or to deliver it within a reasonable time or demonstrate a defective sample of it to promote a different product.

3.31 Marketing communications must not falsely claim that the marketer is about to cease trading or move premises. They must not falsely state that a product, or the terms on which it is offered, will be available only for a very limited time to deprive consumers of the time or opportunity to make an informed choice.

3.32 Marketing communications must not mislead the consumer about market conditions or the possibility of finding the product elsewhere to induce consumers to buy the product at conditions less favourable than normal market conditions.

Comparisons

Principle

The ASA will consider unqualified superlative claims as comparative claims against all competing products. Superiority claims must be supported by evidence unless they are obvious puffery (that is, claims that consumers are unlikely to take literally). Objective superiority claims must make clear the aspect of the product or the marketer's performance that is claimed to be superior.

Comparisons with identifiable competitors

3.33 Marketing communications that include a comparison with an identifiable competitor must not mislead, or be likely to mislead, the consumer about either the advertised product or the competing product.

3.34 They must compare products meeting the same need or intended for the same purpose.

3.36 They must not create confusion between the marketer and its competitors or between the marketer's product, trade mark, trade name or other distinguishing mark and that of a competitor.

3.37 Certain EU agricultural products and foods are, because of their unique geographical area and method of production, given special protection by being registered as having a "designation of origin". Products with a designation of origin must be compared only with other products with the same designation.

Other comparisons

3.38 Marketing communications that include a comparison with an unidentifiable competitor must not mislead, or be likely to mislead, the consumer. The elements of the comparison must not be selected to give the marketer an unrepresentative advantage.

Price comparisons

3.39 Marketing communications that include a price comparison must make the basis of the comparison clear.

CAP has published a Help Note on Retailers' Price Comparisons and a Help Note on Lowest Price Claims and Price Promises.

3.40 Price comparisons must not mislead by falsely claiming a price advantage. Comparisons with recommended retail prices (RRPs) are likely to mislead if the RRP differs significantly from the price at which the product or service is generally sold.

Imitation and denigration

3.41 Marketing communications must not mislead the consumer about who manufactures the product.

3.42 Marketing communications must not discredit or denigrate another product, marketer, trade mark, trade name or other distinguishing mark.

3.43 Marketing communications must not take unfair advantage of the reputation of a competitor's trade mark, trade name or other distinguishing mark or of the designation of origin of a competing product.

3.44 Marketing communications must not present a product as an imitation or replica of a product with a protected trade mark or trade name.

Endorsements and testimonials

3.45 Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is obviously fictitious, and hold contact details for the person who, or organisation that, gives it.

3.46 Testimonials must relate to the advertised product.

3.47 Claims that are likely to be interpreted as factual and appear in a testimonial must not mislead or be likely to mislead the consumer.

3.48 Marketing communications must not feature a testimonial without permission; exceptions are normally made for accurate statements taken from a published source, quotations from a publication or references to a test, trial, professional endorsement, research facility or professional journal, which may be acceptable without express permission.

3.49 Marketers must not refer in a marketing communication to advice received from CAP or imply endorsement by the ASA or CAP.

3.50 Marketing communications must not display a trust mark, quality mark or equivalent without the necessary authorisation. Marketing communications must not claim that the marketer (or any other entity referred to), the marketing communication or the advertised product has been approved, endorsed or authorised by any public or other body if it has not or without complying with the terms of the approval, endorsement or authorisation.

3.51 Marketing communications must not falsely claim that the marketer, or other entity referred to in the marketing communication, is a signatory to a code of conduct. They must not falsely claim that a code of conduct has an endorsement from a public or other body.

3.52 Marketing communications must not use the Royal Arms or Emblems without prior permission from the Lord Chamberlain's office. References to a Royal Warrant should be checked with the Royal Warrant Holders' Association.

Guarantees and after-sales service

Definition

In the rules below, "guarantee" includes warranties, after-sales service agreements, care packages and similar products.

3.53 Marketing communications must not use the word "guarantee" in a way that could cause confusion about a consumer's rights.

3.54 Marketing communications must make clear each significant limitation to an advertised guarantee (of the type that has implications for a consumer's rights). Marketers must supply the full terms before the consumer is committed to taking up the guarantee.

3.55 Marketers must promptly refund consumers who make valid claims under an advertised money-back guarantee.

3.56 Marketing communications must not falsely claim or imply that after-sales service is available in an EEA member state in which the advertised product is not sold.

3.57 If a marketing communication in a language other than an official language of the EEA State where the trader is located offers after-sales service but the after-sales service is not available in the language of the marketing communication, the marketer must explain that to the consumer before the contract is concluded