

**ASA System response to the Digital, Culture, Media and Sport Committee's report on influencer culture**

**Background and Introduction:**

1. This response to the recommendations in the Digital, Culture, Media and Sport Committee's report on influencer culture is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'
2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.
3. We are responsible for ensuring that advertising is legal, decent, honest, and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.
4. As the UK's frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.
5. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.
6. We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees' development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System's processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.
7. The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't

mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

8. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 850,000 pieces of advice and training in 2021.

#### Committee Recommendation 4:

- **“We recommend that the Advertising Standards Authority introduce a requirement to the UK Code of Non-broadcast Advertising (CAP Code) for virtual influencers to be watermarked.” (paragraph 32)**

ASA System response:

1. We understand ‘virtual influencers’ are fictional, sometimes computer-generated people who typically have realistic characteristics, features and personalities of humans. The content they deliver is created by individuals, brands, agencies etc, who remain anonymous and faceless to the web-user.
2. The ASA has not received any complaints relating to virtual influencers. We are not aware of research that suggests that virtual influencers are causing advertising-related harm.
3. We understand the recommendation is for the ASA system to require the account of virtual influencers to be watermarked when the account is being used to advertise to web users. A recommendation to watermark the account of virtual influencers for purposes other than advertising would fall outside the advertising remit of the ASA system.
4. We understand two theoretical concerns are raised: i) the anonymous controller of the virtual influencer account is less likely to be deterred from non-compliance by ASA name-and-shame sanctions or other self-regulatory and statutory sanctions; and ii) a web user has the right to know the controller of the virtual influencer account.
5. On i) an advantage of the ASA system is that it can tackle non-compliance via the influencer and/or the brand being marketed and/or the platform; it is not reliant on remedying non-compliance via the influencer only or, in this case, via the controller of the virtual influencer account. If it considers it necessary to do so, the ASA system can work with third parties, including platforms, to seek to identify the contact details for the controller of the influencer account.
6. On ii) The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) requires ads, including influencer ads, to be obviously identifiable as such. This helps to ensure the consumer knows when they are being marketed to. If the presentation of an ad meets this test, for example, by use of an upfront and prominent ‘#ad’ label, it is not clear whether and, if so, how a consumer could be misled *in all circumstances* by the fact that the ad was communicated in a post by a virtual influencer; our rules allow us to assess whether it would be misleading in individual cases, however. The ASA system undertakes to consider any evidence presented to it of advertising-related harm arising from virtual influencers against the criteria set out in its Evidence-based Policy Making guidance (<https://www.asa.org.uk/static/uploaded/cb20c00f-b559-40a2-8b5677188511b45b.pdf>). In the absence of such evidence, we do not have the basis to consider further, at this stage, the recommendation that virtual influencers should be watermarked when the account is being used to advertise to online users.
7. On ii) we also understand the Online Safety Bill may give Ofcom powers to consider the circumstances in which the use of virtual social media accounts (used by people,

organisations etc. which conceal their identities) may lead to harm and, in such circumstances, the duty of care that may apply to the platform in scope of the Bill.

**Committee Recommendation 8:**

- **“We recommend that the remit of the CAP code be extended by removing the requirement for editorial ‘control’ to determine whether content constitutes an advertisement.” (paragraph 69)**

ASA System response:

1. The ASA system ‘payment’ and ‘control’ tests have, for approximately 60 years, determined advertorial/native advertising that falls within the remit of the ASA system, and they help to ensure we – the advertising regulator – do not inappropriately extend our regulation to editorial or sponsorship matters.
2. The ASA adopts a broad interpretation of the payment and control tests, which means that, in practice, most influencer posts that involve the endorsement of a product or service fall within the remit of the ASA. For example, regarding the interpretation of brand ‘control’, as a rule of thumb, if influencers are not completely free to do and say whatever they want, whenever they want, about a product for which they have received payment or payment in kind, the ASA is likely to consider the brand exercises a critical level of control over the marketing communication and the remit test has been met. In practice, this means there are very few cases of influencer advertising that we reject or refer to other bodies because the control test has not been met.
3. In line with consumer protection law and to ensure consistency with the CMA, the ASA system takes every opportunity to confirm that ‘payment’ alone necessitates disclosure requirements (see p.3: <https://www.asa.org.uk/static/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf>) irrespective of whether the post is ‘controlled’ by the brand.
4. We will commit to exploring how we can clarify further that payment alone invokes advertising disclosure requirements and we will explore whether there is a case for reconsidering the ASA system payment and control tests as they apply to certain categories of native advertising, including influencer advertising, whilst ensuring our regulation does not restrict freedom of speech by extending unduly to areas it should not, for example, editorial and sponsorship matters.

**Committee Recommendation 10:**

- **“We recommend that the ASA be given statutory powers to enforce the CAP Code. These powers should be considered as part of the Government’s upcoming Online Advertising Programme. Appropriate funding arrangements should also be considered to ensure that the ASA is able to act effectively on these enforcement powers.” (paragraph 89)**

ASA System response:

1. We acknowledge this recommendation is directed at the Government Online Advertising Programme.
2. We welcome the Committee’s support for the CMA to receive greater powers to enforce consumer protection law. We would highlight also that Ofcom has new powers applying to UK established video-sharing platforms, which place requirements on these platforms to provide their users with the means to help them disclose the advertising nature of their uploaded content.

3. We consider the combination of enhanced statutory and self-regulatory enforcement powers (the latter including ASA Online Platform Targeted Ad sanctions, which bring to the attention of 'followers' the fact of the influencers non-compliance), combined with new and impactful use of data science to monitor influencer ads at pace and scale, will prove effective in improving compliance outcomes in this aspect of regulation. To date, the ASA system has not had the need to refer an influencer or a brand to a legal backstop for repeated non-compliance, but we will work with the appropriate statutory regulatory where we consider it is necessary to do so.
4. The ASA system has submitted a response to the Government Online Advertising Programme, to which this Committee recommendation is directed. The response clarifies that the ASA system is committed to significantly enlarging its budget to respond to the capacity, technology and expertise challenges that all digital regulators are facing. Through an enhanced financial plan (2022-2025), the ASA system is committed to above-inflation investment to expand our workforce and deliver the expertise and technology to maximise our data science capability, in particular.

**Committee Recommendation 11:**

- **“The influencer marketing ecosystem is rapidly changing and presents unique problems in monitoring compliance with UK advertising regulations. We have heard that new sanctions and undertakings are an important and positive step but have not seen evidence to this effect. We therefore recommend that ASA conducts yearly monitoring exercises to better understand how compliance rates change over time and in response to policy and technological developments.” (paragraph 90)**

ASA System response:

1. The ASA system is committed to its strategic objective to have More Impact Online. This strategic focus has propelled our regulation of influencer advertising and led us to develop machine-learning monitoring tools; new sanctions; and develop partnership working with CMA, Ofcom and industry representative organisations.
2. Targeted monitoring will continue to remain an invaluable tool in securing transparency and accountability in our regulation of influencer advertising, and we remain committed to its use in areas of greatest detriment to consumers, particularly children and other vulnerable groups. This targeted monitoring currently happens on a continuous, ongoing basis and we plan to scale it up to cover more influencers and communicate our work accordingly, in line with the Committee recommendation. Examples of communications on our monitoring and enforcement work can be found [here](#), [here](#), and [here](#).
3. Whilst the scale and heterogeneity of the influencer marketing ecosystem make it impractical to determine a reliable overall compliance rate, we agree that it is important to use quantitative and qualitative measures to indicate the changing rates of compliance in relation to the influencer sectors targeted for monitoring. We are always striving to improve the communication of the impact of our regulation.
4. The ASA system considers it is meeting and, in certain aspects, exceeding this recommendation.

**Committee Recommendation 12:**

- **“There are risks as well as benefits in the use of machine learning technology. We recommend that the ASA and CMA report yearly to Government outlining the scope, capabilities, and risk management protocol for their monitoring technology as it develops.” (paragraph 93)**

ASA System response:

1. The ASA is committed to ethical development of AI, which includes how we responsibly design and implement AI systems in the public sector in line with guidance produced by the Alan Turing Institute (<https://www.turing.ac.uk/research/publications/understanding-artificial-intelligence-ethics-and-safety>), for example.
2. The CMA is a full member, and the ASA system is an associate member, of the Digital Regulation Cooperation Forum, which is driving regulatory best practice in the use of AI and machine learning. (<https://www.gov.uk/government/publications/findings-from-the-drcf-algorithmic-processing-workstream-spring-2022>)
3. As regulators that are necessarily independent of government, the ASA, CMA, Ofcom and ICO will develop the scope, capabilities and risk management protocol of their AI and monitoring technology subject to appropriate transparency and accountability constraints. The ASA is committed to using opportunities, both proactive and reactive, to share our work with government in this important and developing area of our regulation.

**Committee Recommendation 15:**

- **“We strongly recommend that the Advertising Standards Authority update the CAP Code to include mandatory enhanced disclosure standards for advertisements targeted to children or an audience composed predominantly of children. Any updates should be supported by robust research into children’s particular information processing requirements and ensure that children are able to critically evaluate, as well as identify, advertisements.” (paragraph 116)**

ASA System response:

1. We will explore to what extent the advice we already provide to advertisers in relation to enhanced disclosure for ads targeted at younger children can be more effectively communicated to influencers and their agencies that target a child audience. We will also consider whether and, if so, how we might monitor a selection of influencers, who target a younger child audience, to assess the influencers’ disclosure practices and, as appropriate, to effect changes if we consider the disclosure inadequate.
2. As recently as June 2022 we updated ASA system guidance on ‘Recognising Ads: Children’ ([https://www.asa.org.uk/news/children-s-recognition-of-online-ads.html?dm\\_i=4PDW,OZ4C,4FAE63,32ABR,1](https://www.asa.org.uk/news/children-s-recognition-of-online-ads.html?dm_i=4PDW,OZ4C,4FAE63,32ABR,1)), which acknowledges that the cognitive development of children, particularly those aged 11 or younger, may limit their ability to recognise marketing communications and their understanding of the commercial intent underlying them. The evidence suggests that children’s abilities in these areas are further compromised when they engage in highly immersive or significantly integrated online environments where the distinctions between advertising and editorial may be less clear.
3. The ASA continues to actively enforce breaches of disclosure requirements, including where the advertiser or publisher has failed to provide ‘enhanced’ disclosure to younger children (<https://www.decisionmarketing.co.uk/news/firms-fingered-for-targeting-kids-with-hidden-marketing>).
4. We consider that the CAP Code already includes mandatory enhanced disclosure standards for ads targeted to children or an audience composed predominantly of children. This is because the underlying consumer protection legislation (reflected in our Codes and enforced by our backstops) means that we must take into account any vulnerabilities in the audience of ads. Regulation 2(5) of the Consumer Protection from Unfair Trading Regulations 2008 includes the following:

*(5) In determining the effect of a commercial practice on the average consumer— (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b) where the practice is likely*

*to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.*

5. Our guidance on children's understanding (above) combined with our consideration of this legal provision in applying our mandatory rules means that we already apply mandatory enhanced disclosure rules. As evidenced by the rulings referred to, we require enhanced disclosure of advertisements in circumstances when that is necessary.

#### **Committee Recommendation 16**

- **“The online advertising environment has changed significantly since 2012 when CAP conducted their review of the use of under-16s as brand ambassadors and in peer-to-peer marketing. During this time, the market for child influencers has expanded and there are considerable safeguarding concerns from industry experts. We, therefore, recommend that CAP conducts another review of the use of under-16s in marketing, ensuring that special focus is given to the use and impact of child influencers. This review should take place before the end of 2022.” (paragraph 127)**

ASA System response:

1. The preamble to the Committee recommendation suggests incorrectly that CAP had the means, in 2012, to ban the use of under-16s as brand ambassadors or as peer-to-peer marketers.
2. In 2012, we clarified the Advertising Codes do not cover the relationship (employment or otherwise) between the marketer and the child. Rather, the CAP Code applies to marketing communications that result from a reciprocal relationship between the marketer and a child and where editorial control rests with the marketer. Accordingly, the guidance we produced (<https://www.asa.org.uk/static/523b0b12-29f7-4bc4-b1cd678e2e8ae0d9/brand-ambassadors-and-peer-to-peer-marketing.pdf>) highlighted rules that we considered to be most pertinent to marketing communications that result from such a reciprocal arrangement.
3. The limits of the ASA system's role in relation to the use of under-16s as brand ambassadors and peer-to-peer marketing remain. We agree that the market for child influencers has expanded since 2012. The safeguarding concerns raised by the Committee, however, are not matters that fall within the remit of the ASA system given the Advertising Codes do not cover the relationship (employment or otherwise) between the marketer and the child or, indeed, the child and other parties, for example, parents, guardians etc.
4. We will, however, commit to review by the end of 2022 and, if necessary, update the guidance to ensure it remains fit and relevant to marketing communications that result from a reciprocal relationship between the marketer and a child, especially in relation to influencer marketing.

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