APPENDIX 1 THE DMCCA AND THE BPRS

Background

Non-broadcast marketing communications are subject to legislation as well as to this Code. See www.asa.org.uk for a non-exhaustive list.

The Digital Markets, Competition and Consumers Act 2024 (DMCCA)

One important piece of legislation that affects marketing communications is the The Digital Markets, Competition and Consumers Act 2024 (DMCCA). For the purpose of the legislation and in this Appendix, "consumers" refers to individuals acting outside the course of their business. Chapter 1 of Part 4 of the DMCCA prohibits unfair marketing to consumers, including misleading or aggressive advertising. Whenever it considers complaints that a marketing communication misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the relevant section of the DMCCA. That means it will take factors identified in the DMCCA into account when it considers whether a marketing communication breaches the CAP Code.

The notes below summarise those factors.

Code rules that refer to misleading marketing communications should be read, in relation to business-to-consumer marketing communications, in conjunction with these notes.

Consumers

The likely effect of a marketing communication is generally considered from the point of view of the average consumer whom it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.

The average consumer is to be treated as not knowing information in relation to a commercial practice where such information has been concealed by the trader (even if the average consumer might know the information from another source).

In some circumstances, a marketing communication may be considered from the point of view of the average member of a specific group:

- If it is directed to a particular audience group, the marketing communication will be considered from the point of view of the average member of that group.
- If it is likely to affect the economic behaviour of a group of people who are particularly vulnerable, in a way that the advertiser could reasonably be expected to foresee, because of mental or physical health, age, credulity, or the circumstances that group of

people are in, the marketing communication will also be considered from the point of view of the average member of the affected group.

Unfair marketing communications

Marketing communications are unfair if they:

- are likely to cause the average consumer to take a transactional decision that the consumer would not have taken otherwise, as a result of a practice involving one or more of the following:
    - a misleading action
    - a misleading omission
    - an aggressive practice
    - a contravention of the requirements of professional diligence
- omit material information from an invitation to purchase
- involve a practice prohibited in all circumstances under the DMCCA

"Professional diligence" is the standard of skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice or the general principle of good faith in the trader's field of activity.

An “invitation to purchase” is a commercial practice involving the provision of information to a consumer which indicates the characteristics of a product and its price, and which enables, or purports to enable, the consumer to decide whether to purchase the product or take another transactional decision in relation to the product.

Misleading marketing communications

Marketing communications are misleading if they

- are likely to deceive consumers and
- are likely to cause consumers to take transactional decisions that they would not otherwise have taken.

A "transactional decision" is any decision made by a consumer relating to the purchase or supply of a product (including whether, how or on what terms to make the purchase or supply); the retention, disposal or withdrawal of a product (including whether, how or on what terms to retain or dispose of it); or the exercise of contractual rights in relation to a product (including whether, how or on what terms to exercise such rights).

Marketing communications can deceive consumers by ambiguity, through presentation or by omitting important information that consumers need to make an informed transactional decision, as well as by including false information.

Aggressive marketing communications

Marketing communications are aggressive if they use harassment, coercion or undue influence.

The Business Protection from Misleading Marketing Regulations 2008

Business-to-business marketing communications are subject to the Business Protection from Misleading Marketing Regulations 2008 (the BPRs). Business-to-business marketing communications that breach the CAP Code may be referred to Trading Standards for consideration under the BPRs. Under the BPRs, a marketing communication is misleading if it:

- in any way, including its presentation, deceives or is likely to deceive the traders to whom it is addressed or whom it reaches and by reason of its deceptive nature, is likely to affect their economic behaviour
- or, for those reasons, injures or is likely to injure a competitor.

The BPRs also set out the conditions under which comparative marketing communications, directed at either consumers or business, are permitted. This Code incorporates those conditions.