

ASA System submission to the Department for Business and Trade consultation on Smarter regulation: improving price transparency and product information for consumers

1. Background and introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), and the Committees of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2. 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.
- 1.3. We are the UK’s independent frontline regulator of ads by legitimate businesses and other organisations in all media, including online. 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.
- 1.4. We work closely with a network of partner regulators 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. Our frontline ad regulation often complements their activities, or even frees them up entirely to concentrate on their other duties. 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.
- 1.5. We also 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 creating 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.
- 1.6. We call our model of partnering with businesses and other regulators ‘collective ad regulation.’ Our independence and the buy-in and support we receive through collective ad regulation delivers faster, more flexible, more joined-up and proportionate regulation.
- 1.7. 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 benefits for responsible businesses and for consumers, who benefit from the protection the rules afford.
- 1.8. 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 a million pieces of advice and training in 2022.

1.9. The ASA system is providing this written submission in response to the Department for Business and Trade consultation on Smarter regulation: improving price transparency and product information for consumers.

1.10. We are responding only to the questions most relevant to our regulation. We would not advocate for or against specific changes to the law, so our response is confined to highlighting how our regulation and the proposed changes to legislation might cover the same topics.

1.11. We are happy to assist with any follow-up questions.

2. Would an explicit requirement on traders to include all mandatory fixed fees in the up-front price be effective in reducing consumer detriment? Or would better guidance explaining the existing rules be more appropriate?

2.1. The ASA system would welcome clarity on the nature of the requirement that is being proposed. It is not clear whether Government is proposing that the omission of mandatory fixed fees from the up-front price should be added to the Schedule of prohibited practices in the Digital Markets, Competition and Consumers (DMCC) Bill.

2.2. The rules the ASA administers already provide that mandatory fixed fees are material information, the omission of which is likely to mislead consumers. CAP Code rules state that quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers¹.

2.3. Assessments are made on a case-by-case basis using the transactional decision test. CAP has a range of detailed existing guidance on specific sectors where additional mandatory fees are common – such as travel, event ticketing, auctions and letting agents².

2.4. An explicit requirement to traders to include all mandatory fixed fees in the upfront price would introduce a broader catch-all requirement in relation to material information than that in the current wording restated in the DMCC Bill from the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which refers to taxes, freight, delivery and postal charges. Such a change to the definition of material information would seem to bring the wording closer to that of the Code as written, which refers more generally to 'non-optional' charges. In practice, it seems unlikely that would entail significant change to our regulation, aside perhaps from minor wording change.

2.5. On the other hand, if the proposal is to create a prohibited practice, then that would alter the test involved. Essentially, if a fee was mandatory and fixed (in line with clear guidance on the topic) then it would not be permitted to be omitted, regardless of any assessment of whether its omission would be likely to mislead. However, the ASA's assessment of whether a fee is mandatory or not would likely remain similar.

3. Should traders be required to make clear the existence of mandatory variable fees, and how they will be calculated, when they display the price for a product? Or would better guidance explaining the existing rules be more appropriate?

3.1. The rules the ASA administers already provide that variable fixed fees are material information, the omission of which is likely to mislead consumers. CAP Code rules state that if a tax, duty fee or charge cannot be reasonably calculated in advance, for example,

¹ [Compulsory costs and charges: general - ASA | CAP](#)

² [Auction guide prices and non-optional charges - ASA | CAP](#)

[Compulsory costs and charges: Letting agents - ASA | CAP](#)

[Compulsory costs and charges: secondary ticket providers - ASA | CAP](#)

[Travel marketing: Pricing - ASA | CAP](#)

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 calculated³.

- 3.2. As above, a change to wording of the material information definition would likely not impact our regulation in practice. If it were made a prohibited practice, the test involved would change but the ASA's assessment of whether a fee is mandatory or not would likely remain similar.

4. Should the law be strengthened to address optional dripped fees that are detrimental to consumers, or should guidance be produced for specific sectors that sets out how to provide optional fees in a way that is fair, transparent, and lawful?

- 4.1. As the consultation acknowledges, this is a more complex area as it potentially involves a wide range of situations with different factors to take into account to determine whether a fee is 'optional', including to a specific audience.
- 4.2. However, we understand that there are two broad types of scenarios being discussed here.
- 4.3. Firstly, optional fees that a customer may believe are mandatory due to how they are displayed, for example through the use of pre-checked boxes (sometimes known as 'sneak into basket' in discussions of online choice architecture
- 4.4. Under rules on misleading advertising, including omission of material information, the ASA would and does assess on a case-by-case basis to determine whether the presentation of the fees is likely to lead to consumer to be misled into taking a transactional decision they would not otherwise have taken.
- 4.5. Secondly, fees presented as optional, but that must be paid by most or some consumers in order for a product to be usable or fit for purpose. For example, a battery for a battery-operated toy, check-in luggage for a long-distance flight, or seat selection on a plane for a family with young children.
- 4.6. Again, the ASA would and does consider on a case-by-case basis whether the omission of the fee in question from the initial price would be likely to mislead – based on factors including the context, medium and the audience to which the advertising is addressed.
- 4.7. The range of situations raised in the consultation document highlight the importance of taking flexible, principle-based approach, as there is wide variation between how different types of situations might be assessed. The ASA system is well-equipped to respond to advertising where fees are presented in a misleading way, regardless of whether they are mandatory for all customers in all circumstances or not.

5. Do you agree with the addition of the following commercial practices to Schedule 18 of the DMCC Bill?

- a) Submitting a fake review, or commissioning or incentivising any person to write and/or submit a fake review of goods or services.
- b) Offering or advertising to submit, commission or facilitate fake reviews.
- c) Misrepresenting reviews, or publishing or providing access to reviews of products and/or traders without: taking reasonable and proportionate steps to remove and prevent consumers from encountering fake reviews; taking reasonable and proportionate steps to prevent any other information presented on the platform that is determined or influenced by reviews from being false or in any way capable of misleading consumers.

³ [Compulsory costs and charges: general - ASA | CAP](#)

- 5.1.** All three of these practices appear to chiefly relate to the business practices of firms, and can therefore be separated from the content of 'fake reviews' as they are used in advertising and where they would be subject to ASA regulation. Therefore we do not comment on the content of the practices themselves. We set out a summary of our regulation in this area below.
- 5.2.** In relation to advertising to provide 'fake reviews', as any advertising would be for services that are unlawful, it would be without our remit of advertising by legitimate UK businesses.
- 5.3.** The CAP Code states that marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession; marketing communications must make clear their commercial intent, if that is not obvious from the context. This reflects an existing prohibited practice in the CPRs, which has been transposed to the DMCC Bill.
- 5.4.** It also states that marketers must hold evidence that a testimonial is genuine and relates to the product advertised⁴.
- 5.5.** The ASA can and does investigate whether reviews are genuine. An advertiser must hold evidence that a review is genuine. The ASA has also ruled that a review was not genuine due to it being incentivised – for example by giving a reviewer extra competition entries or cash back⁵.
- 5.6.** We note that the definition of a 'fake review' outlined in the consultation explicitly includes "an influencer who pretends to have used and be reviewing a product as a consumer but in fact has been incentivised to endorse or promote it in way they have not". As the consultation acknowledges, this would contravene the existing prohibited practice of falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer. It may also contravene the prohibited practice of not making clear where the advertiser has paid to promote a product in editorial media (advertorial). It is under our existing Code rule reflecting these prohibited practices that the ASA can and does regulate influencer marketing on social media where the influencer has failed to disclose a commercial relationship.
- 5.7.** Should Government introduce these new prohibited practices, we would welcome guidance on the legislation as a whole and prohibited practices in particular. At the time of the introduction of the Unfair Commercial Practices Directive (UCPD), the status of which in the UK is currently uncertain, the ASA system had the benefit of extensive guidance on the legislation from the European Commission.

⁴ [Testimonials and endorsements - ASA | CAP](#)

⁵ [Official iPhone Unlock Ltd - ASA | CAP](#)
[Vindicta Digital - ASA | CAP](#)