

ASA system response to Department for Transport Centre for Connected and Automated Vehicles Consultation on 'Automated Vehicles: protecting marketing terms'

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 system is providing this written submission in response to the CCAV Consultation on 'Automated Vehicles: protecting marketing terms'
- 1.3. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for over 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 20, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.
- 1.4. 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.
- 1.5. We work closely with a network of statutory and self-regulatory partner regulators including Ofcom, 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.
- 1.6. 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.

- 1.7. 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.
- 1.8. 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.

2. Role of the ASA system in supporting enforcement of marketing offences in the Automated Vehicles Act 2024

2.1. The ASA system understands that the Act creates two new marketing offences:

2.1.1. Section 78 – restricts the use of certain protected terms to commercial communications for vehicles that are listed or authorised to use them (the subject of the current consultation)

2.1.2. Section 79 – applies to a person making a commercial communication likely to confuse end-users that an unauthorised vehicle can travel autonomously.

2.2. The ASA system would welcome clarity on the envisaged enforcement framework for the new marketing restrictions. The ASA works in partnership with several [statutory enforcement partners](#) to deliver frontline enforcement of rules that reflect legal provisions. The ASA system looks forward to engaging with the CCAV and any other relevant bodies about how, in practice, the provisions will be enforced on a day-to-day basis.

2.3. We do not comment on the questions set out in the consultation relating to the specific terms that are proposed for protection under Section 78 in the secondary legislation. As a regulator, we will work with the approach that Government ultimately chooses.

2.4. Do you agree or disagree that there will be sufficient legal safeguards to prevent the protection from being applied to marketing which is unconnected with driving automation?

In the event that the ASA system were to engage in any enforcement partnership working with CCAV or other relevant bodies, we would like to make the following points on how the three defences set out in Section 78 of the Act would interact with the requirements of the advertising Codes:

2.4.1. **Terms used in a way not connected with automation:** Section 78(4) applies where the accused proves that the protected term was ‘used in way

which was not intended to convey and could not reasonably be understood as conveying, any meaning to do with automation’.

We agree that this should prevent the protection from being applied to marketing that is unrelated to driving automation. As at **2.8** below, would reasoning akin to the average consumer test used in UK consumer law be relevant here?

2.4.2. Terms directed at end-users from outside Great Britain: The business has a defence if it can prove that it has taken ‘all reasonable precautions and exercised all due diligence’ to ensure that end-users in Great Britain understand that the term was not directed at them.

The remit of the Advertising Codes is limited to ads targeted at UK consumers. Therefore, if a rule reflecting the protected terms offence were to be incorporated into the Codes this would not apply to material targeted at consumers outside the UK.

2.4.3. Secondary involvement: Special rules apply to secondary businesses, which are not involved in the manufacture or supply of the vehicle or equipment in question. Under section 78(6), such businesses have a defence if they can show that they did not know, and had no reason to suspect, that the communication would constitute an offence.

Primary responsibility for complying with the Advertising Codes lies with the advertiser themselves. Secondary parties such as publishers would not be held accountable but may be asked for comment in cases that involve harm, offence or social responsibility.

2.5. Please note that the ASA system regulates ads by legitimate businesses by reversing the burden of proof, which requires the advertiser, publisher or other party involved in preparing or publishing the ad to substantiate how a potentially non-compliant ad complies with the UK Advertising Codes; failure to do so constitutes a breach of the rules and requires the ad to be amended or removed. Reversing the burden of proof provides for fast and effective resolution of cases. The ASA is not a law enforcement body, and we are not constituted or resourced, nor do we have the expertise, to undertake the work of prosecution subject to the burden of proof and factors that necessarily entail detailed and lengthy investigations overseen by expert law enforcement professionals.

2.6. The second offence under Section 79 refers to communications likely to ‘confuse’ end-users that an unauthorised vehicle can travel autonomously. We note that offence is not subject to the current consultation and CCAV have stated that secondary legislation is not required in relation to this offence. However, we would appreciate the opportunity to gain further understanding of the parameters of what might constitute ‘confusing’ end-users under this offence.

2.7. Currently, the ASA system would likely assess a complaint that an ad implied a vehicle had autonomous travel capabilities that it did not under misleading advertising rules reflecting UK consumer law in the form of the Unfair Commercial Practices Provisions in the Digital Markets, Competition and Consumers Act 2024. These rules involve the application of the transactional decision test, which asks whether the ad would cause the average consumer to whom it is addressed (assumed to be reasonably well-informed, observant and circumspect) to take a transactional decision that they would not have taken otherwise. A 'transactional decision' is any decision made by a consumer relating to the purchase or supply of a product. It is not limited to the decision to make a purchase, but may include enquiring further, clicking on an ad, entering a shop premises, etc.

2.8. We understand that the legal basis for the new marketing offences goes beyond consumers being misled into making transactional decisions and relates to concerns about danger to public safety that could result from public misunderstanding of the self-driving capability of vehicles. However, it would be useful to know to what extent reasoning around the interpretation of a term or depiction by the average consumer could have relevance.