Proposals for guidance on the use of “Up to” Speed claims in broadband Advertising

CAP and BCAP Consultation

CAP and BCAP Consultation Document
Issued: 26/01/2011
Closing date for responses: 25/02/2011

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1. Background

The Review

1.1. The Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP), authors of the UK Advertising Codes, are reviewing "up to" broadband speed and "unlimited" claims ("the Review") with the aim of issuing guidance to the industry.[1]

1.2. CAP and BCAP consider that the complexities of the evolving communications market now necessitate broader consideration of these issues than would otherwise be possible through an ASA investigation into an advertisement for a particular service. Although the two issues are related, each is subject to a separate consultation.

1.3. In addition, Ofcom, the Department of Business Innovation and Skills (BIS) and consumers have expressed concern at potentially misleading advertising of broadband speeds and "unlimited" claims for communications services that are subject to a fair usage policy (FUP). Broadband speed claims are an important descriptor of broadband services and "unlimited" claims tend to describe telephony and broadband services intended for heavier users.

Pre-consultation

1.4. In June and July 2010, CAP and BCAP conducted pre-consultation with several key organisations including Ofcom. The objective was to develop a better understanding of the issues, including the technological factors affecting them. It revealed a significant division of opinion over the extent of the problem and potential course of the Review.

The Consultative Process

1.5. CAP and BCAP's objective is to produce guidance for the industry on how to interpret the Misleading Advertising sections of the respective Advertising Codes in relation to broadband speed claims as they appear in both consumer and business-to-business advertising. The guidance will take the form of a Joint Help Note for broadcast and non-broadcast advertising.

1.6. CAP and BCAP are not required to consult on guidance, but have decided to do so in the interests of transparency and the desire to ensure that industry and consumer perspectives are given the fullest consideration. Responses have been directly invited from a cross-section of interested parties representing both consumers and the industry.

1.7. CAP and BCAP undertake to look at each response carefully and with an open mind. A post-consultation evaluation will respond to all significant comments and will be published on the CAP and BCAP website, www.cap.org.uk.

1.8. The proposals for guidance outlined in Section 4 will be subject to a consultation, which will close at **5pm on Friday 25 February 2011**. For more information on the next steps in the Review see Section 5 and for full details of how to respond to the consultation, please see Annex 1.

[1] Copies of the full Codes are available on the CAP website: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the UK Code of Broadcast Advertising (the BCAP Code).

2. Broadband Speed Claims: The Issue

Introduction

2.1. The broadband market has changed significantly in recent years. Residential broadband is now in over 70% of households and there has been a rapid take up of mobile broadband, which is now used by 14% of households.[2] The following table details the main platforms that consumers presently use to access the internet.

Platform	Description
ADSL[3]	• Carried over a national fibre optic network to local telephone exchanges. • The traditional copper-wire telephone network delivers the broadband signal from the exchange to the end user. • There are presently two types of ADSL technology available, ADSL1 with theoretical maximum speeds up to 8Mbit/s, and ADSL2+ with theoretical maximum speeds of up to 24Mbit/s. The latter is based on different frequencies allowing greater speeds. • ADSL2+ is currently being rolled out across the UK.
VDSL[4]	• Carried over a national fibre optic network to local telephone exchanges. • Fibre optic cable delivers the service from local exchanges to the cabinet serving a neighbourhood. • The traditional copper-wire telephone network then delivers the service from the cabinet to the end user. • The use of shorter lengths of copper-wire means the service can be faster. It is technically a 'fibre to the cabinet' (FTTC) service; a current example is BT Infinity.[5]
Cable	• Carried over a national fibre optic network to local telephone exchanges. • Fibre optic cable delivers the service from local exchanges to the cabinet serving a neighbourhood. • Co-axial cable then delivers the service from the cabinet to the end user. • Co-axial cable can carry faster speeds than the traditional copper-wire telephone network. Also referred to technically as FTTC.
Mobile	• Uses a range of technologies for delivering data, including GPRS, EDGE, 3G and HSPDA. • Each of these has differing characteristics and ability to provide different speeds. However, to a greater or lesser extent, their performance depends on the user's coverage and handset capabilities.

2.2. Broadband speeds have increased greatly and, as faster services have come onto the market, consumers have started to use the internet in new ways, for instance, streaming or downloading large audio-visual files. Speed is an important factor in consumers' decisions about which service to use.

[2] Source: Ofcom, The Consumer Experience 2009: Telecoms, Internet and Digital Broadcasting
[3] Asymmetric Digital Subscriber Line technology enables faster data transmission over copper telephone lines than older 'dial up' technology by using frequencies that are not utilised by a voice telephone call.
[4] Very High Bit-rate DSL is a more advanced DSL technology providing even faster theoretical maximum speeds, 52Mbit/s downstream and 16Mbit/s upstream.
[5] FTTC services still use traditional copper wire or coaxial cable to deliver the service and can therefore be distinguished from 'fibre to the home' (FTTH), which can provide the fastest speeds and uses fibre optic cable all the way to the consumer's premises.

Many products are marketed on the basis of the theoretical maximum speed available. [6]

2.3. The actual speed of broadband services received by users depends on a number of factors, as explained in paragraph 2.6.[7] The impact of these factors varies between platforms, service providers and between users of the same provider. It also means that no single figure can accurately describe the actual speeds received by all users to a service.

2.4. At present, the ASA allows marketers to quote the theoretical maximum speed that a service could provide, using the following qualifiers to make clear to consumers that they are not guaranteed to receive that speed.

- All advertised speed claims must be qualified with the term "up to" to ensure that consumers understand that the top speed is not guaranteed and that the speed received may be subject to variation.
- Because the top speeds achievable are significantly affected by signal attenuation, ADSL services with a headline speed of over 2Mbit/s must make clear in the body copy or equivalent that actual speeds depend on a consumer's distance from their local exchange.
- Ads for all broadband services must state in the footnote text any other limitations that have a meaningful effect on the top speed, for instance, traffic management policies which restrict top speeds at certain times or for certain types of internet data traffic or users.

2.5. Both consumers and stakeholders are, however, increasingly concerned that, under the present ASA policies, a significant number of users receive a broadband service that is considerably slower than advertised.

Factors affecting actual speed performance

2.6. The Review has identified four factors that have a significant and general impact on user experience:

- Contention
- Signal quality
- Environmental factors and
- Protocol overheads (such as IP headers)

The factors affect each platform differently and their impact varies between service providers and from user to user.

2.7. The table below explains the factors affecting speeds identified in paragraph 2.6. The impact of each factor on users is explained in greater detail in the subsequent paragraphs of this Section.

Limitation	Description	Summary/Platforms affected
Contention	Speed depreciation through congestion caused by the number of users attempting to access the available bandwidth.	• Providers have finite amounts of available bandwidth, which they allocate to groups of users in a particular area. This can be, for instance, a fixed area where properties are connected to the network or an area covered by a mobile network, where users move in and out. • Users contend for bandwidth. If a large number of users are online at the same time, or a small number of users are carrying out highly bandwidth

[6] 'Theoretical maximum speeds' are based on the technical specification of the product. They are the speed at which the service is provided at the network end.
[7] 'Actual speeds' are the usable speed or bandwidth available to the user after the various limiting factors are taken into account.

		intensive activities, such as downloading large files, speeds are reduced. • As total data traffic nears the network's capacity, user access is slowed noticeably. If capacity is exceeded, the network will suffer degradation of service. • Many internet service providers (ISPs) manage traffic at busy times through what are commonly referred to as traffic management policies. For example, the ISP may reduce speeds for all users, reduce speeds only for particular heavy users, or reduce speeds for particularly bandwidth-intensive protocols, like those used to download large files. • The longer term remedy for contention is continued investment in network capacity to ensure that it keeps pace with demands.
		Affects all platforms – Has the greatest impact on cable and mobile services.
Signal Quality (fixed line)	The depreciation of the broadband signal	• For ADSL services, the strength of the signal depends on the length of copper telephone wire between the exchange and the user's premises, the type of and quality of wire used and any external electrical interference. • The main determinant of the speed of ADSL services is the length of the copper wire between the exchange and the user. • The overall effect is to create huge variation in the performance of a particular ADSL product for different subscribers.
		Affects ADSL services – The effect is most noticeable on ADSL services with greater theoretical maximum speeds.
Signal Quality (Mobile)	The depreciation of signal strength	• For mobile broadband services, the speed of the service depends on the strength of the signal, which is mainly determined by the distance between the user and the mast. • The average distance between a user and the mast varies in different areas: users in densely populated urban areas are typically closer to the mast than those in rural areas.
		Affects mobile services.
Environmental Factors	Man-made structures and natural features interfering with signal strength.	• Mobile signals depreciate when passing through objects like walls. • So mobile signal strength depends not only on the distance from the mast, but also on objects and structures between the mast and the user.
		Affects only mobile services.
Protocol Overheads (such as IP Headers)	The percentage of data used to 'package' users' data as it is transmitted over the network.	• All broadband services transmit and receive data in what are called "packets". Packets are small units of data that make up larger units, like files or e-mails. • They are a standard size, but have something akin to packaging that facilitates the transmission of the data contained in the packet. This "header" or "overhead" takes up a percentage of the bandwidth available to a user. • This is an inherent part of the internet's architecture.
		Affects all services.

Impact of Contention

2.8. Speeds vary according to how many users are online at a particular time. However, as cable and mobile services rely more on sharing their bandwidth between groups of users, they are more susceptible to contention at peak hours, generally around 6pm to 10pm for residential customers. The following figures show the impact of contention in terms of the difference in average speeds throughout the day:

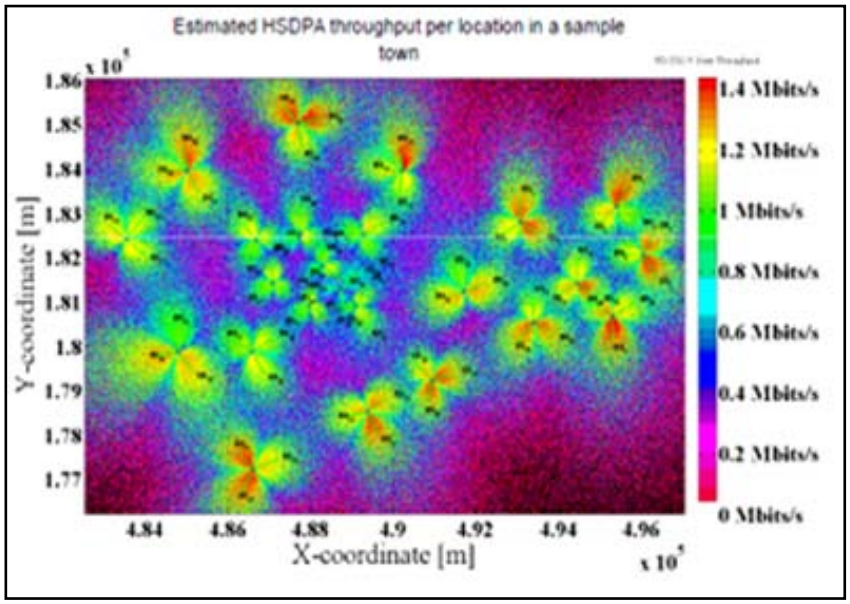
- **20/24 Mbit/s ADSL2+ services – 0.8Mbit/s.**
- **20Mbit/s cable services – 2.6Mbit/s.** [8]
- **Mobile services – Data is not readily available due to the difficulty in isolating the effect of contention as opposed to other factors (see paragraph 2.14).**[9]

2.9. Contention affects different providers on the same platform to different extents. The impact of contention is affected by the capacity that the provider has in their wider network and any traffic management measures they employ to mitigate it.

Impact of Signal Quality on Fixed Line Services

2.10. A significant proportion of ADSL users are affected by signal attenuation. The effect of signal attention on ADSL services is determined by the user's location and does not vary over time.

2.11. This diagram is illustrative of the theoretical maximum speeds available to a user at any given distance from their local exchange on ADSL1 and ADSL2+.[10]



2.12. The effect of signal attenuation is more significant for ADSL2+ services. Users living 4km from their exchange are unlikely to receive more than 5Mbit/s, irrespective of the ADSL product they subscribe to. According to the Broadband Stakeholder Group, 60% of households live too far from their exchange to benefit noticeably from the faster speeds made possible by the roll out of ADSL2+.[11]

2.13. Ofcom's most recent research into UK broadband speeds recorded the national average speed for different types of service:

- **Up to 20/24Mbit/s ADSL2+ services – 6.5Mbit/s.**

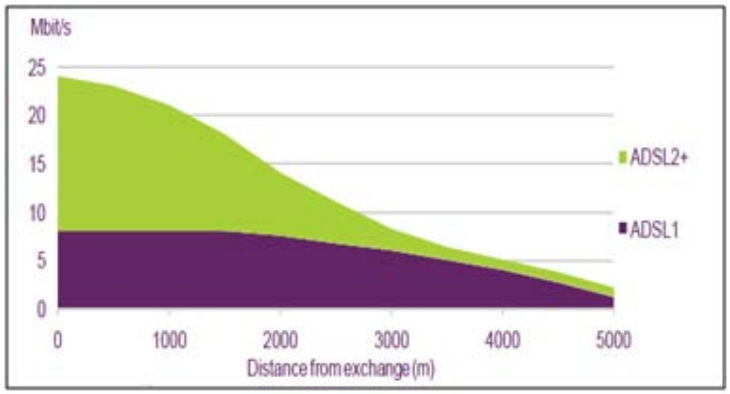
[8] Source: Ofcom, UK broadband speeds, May 2010: The performance of fixed-line broadband delivered to UK residential consumers, p. 43 (hereafter 'Ofcom, UK broadband Speeds 2010') based on the average speeds of all 20Mbit/s and 24Mbit/s ADSL2+ services tested. For details of Ofcom's methodology for determining average speeds, see p. 15-18.
[9] Ofcom has an on-going research project in this area that is expected to be completed early 2011. Information from mobile ISPs, seen by CAP and BCAP during the pre-consultation, suggests that there is a significant, though difficult to determine, variation in speeds due to contention.
[10] Source: Ofcom, UK broadband speeds 2010, p. 26
[11] The Broadband Stakeholder Group is an industry-government forum tackling strategic issues across the converging broadband value chain. There website can be viewed here. See also, Ofcom, The Communications Market 2010. 5 Telecoms and Networks: 'ADSL2+ offers significant benefits only to those living less than 3km from the local exchange'

- **Up to 8Mbit/s ADSL services – 3.3Mbit/s.**
- **Up to 20Mbit/s Cable services – 15.7Mbit/s.**[12]

Impact of Signal Quality on Mobile Services

2.14 Epitiro found that mobile broadband users received, on average, 24% of the advertised speed, under 1Mbit/s.[13] A pre-consultation respondent provided data from one of their more congested network sites, which showed average speeds of just above 1Mbit/s for a service with a theoretical maximum speed of 3.6Mbit/s, peaking at 2Mbit/s and dropping to around 500Kbit/s during peak time.

2.15 This map illustrates signal strength in a typical urban environment with several masts providing different levels of coverage for a HSDPA based service. The warmer colours indicate areas of higher speeds for a service with a theoretical maximum speed of 3.7Mbit/s and the darker colours indicate slower speeds.[14]



Impact of Protocol Overheads

2.16 The IP header uses up a proportion of the available bandwidth. For instance, just under 1Mbit/s of an 8Mbit/s service is taken up by the IP header.[15]

Other Factors

2.17. Other factors also affect an individual consumer's actual speeds, including the set-up of the user's hardware, internal wiring and the performance of connecting servers and computers. CAP and BCAP consider that these factors are beyond the control of ISPs and need not qualify a speed claim in advertisements.

[12] Source: Ofcom, UK broadband speeds 2010, p. 6
[13] Source: A summary of the Epitiro Report is available here.
[14] Source: Hutchinson 3G Ltd.
[15] Source: Ofcom, UK broadband speeds 2008. Consumer experience of broadband performance, p. 12 (hereafter 'Ofcom, UK broadband Speeds 2008')

3. Policy Considerations

Setting Expectations

3.1. The Review has considered speed claims in the context of advertisements covered by the UK Advertising Codes.[16] These ads are constrained, to a greater or lesser extent, by time and space; advertising cannot reasonably be expected to provide the same amount of information, for example, as a salesperson or a contract including full terms and conditions, and it plays only one part in the broader sales process. Nevertheless, it is a principle established in law and reflected in the UK Advertising Codes, that advertisements cannot materially mislead, including by the omission of information.

3.2. The ASA's interpretation of the Misleading Advertising sections of the Codes is informed by the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) and The Business Protection from Misleading Marketing Regulations 2008 (BPRs).[17]

- **The CPRs require that advertising must not contain misleading claims, or omit material information, to the extent that the advertisements are likely to adversely affect consumers' transactional decisions about products; the effect on consumers is considered from the point of view of the average consumer.**

- **The average consumer is assumed to be reasonably well-informed, observant and circumspect. Generally, the average consumer is taken to be the average consumer within the population as a whole. If an advertisement is targeted at a particular group of people, the advertisement is considered from the point of view of the average member of that group.**

- **The BPRs protect business consumers targeted by business-to-business advertising. The BPRs state that an advertisement is misleading if it deceives the traders to whom it is addressed and is therefore likely to affect their economic behaviour.**

3.3. CAP and BCAP consider that it is important to have a consistent approach across different telecommunications services as consumers, whether businesses or otherwise, are unlikely to have significantly differing views on the likely interpretation of the claim. Furthermore, the Codes apply fully to both consumer and business-to-business advertising.

3.4. CAP and BCAP consider that advertising is not the only factor affecting consumer understanding of broadband services. The Ofcom Voluntary Code of Practice: Broadband Speeds, for example, covers point of sale information and rights of consumer redress. All ADSL providers provide facilities on their website that allow consumers to see the speed that their line is capable of delivering. Furthermore, before a sale is completed, all ISPs must also explain the factors affecting broadband speeds. The Voluntary Code goes some way towards ensuring that consumers have the information they need to make informed choices between services.[18]

3.5. The proposed guidance will recommend an approach that CAP and BCAP consider is likely to be acceptable within this legal framework but it will not proscribe other approaches, nor is it intended to stifle innovation in telecommunications advertising. Because the EU Directive from which the legislation derives is a maximum harmonisation measure, CAP and BCAP cannot apply a greater or lesser restriction on advertising than is provided for in the CPRs. If complaints are received about an advertisement in which a marketer has chosen to depart from the approach ultimately recommended by the Joint Help Note, the ASA will simply expect the marketer to be able to justify why they did so and why the advertisement does not mislead as a result.

[16] Click the links to view the full Codes: The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the UK Code of Broadcast Advertising (the BCAP Code).
[17] The Code Annex summarising the CPRs and BPRs can be viewed here
[18] The Ofcom Voluntary Code of Practice: Broadband Speeds can be view in full here.

The ASA's Present Policies

3.6. The ASA has developed a policy on how many of the service limitations outlined in paragraph 2.6 should be addressed in advertising. Marketers may quote theoretical maximum speeds provided that they are qualified appropriately. The policy is outlined in paragraph 2.4.

3.7. The policy was developed in a period where 'superfast' services were not widely available.[19] It was also based on assumptions that have been affected by changes in the market. For instance, the 'meaningfulness' test of the effect of speed on user experience is now less valid due to changes in how the internet is used.[20] The policy was pragmatic in addressing consumer concerns as technology and advertising developed. Importantly, however, the disparity between theoretical maximum and actual speeds was not until recently considered to be so great as to cause significant detriment to consumers.

3.8. CAP and BCAP also consider that the concerns over ADSL2+ feed into the question of the ASA's wider approach of the broadband market. There is evidence of competition between platforms and there is therefore a need for a consistent and proportionate policy. In particular, the issues affecting mobile services present an added dimension to how speed claims are used in light of the recent growth of the platform.

Reasons to Review the ASA's Present Policies

Consumer Perspectives

3.9. The theoretical maximum speeds available have increased considerably alongside changes in usage patterns. Internet usage no longer centres on basic functions like web browsing, which ordinarily require little bandwidth. The proportion of total UK data usage now devoted to audiovisual media and file sharing is around half of all UK usage.[21] Overall data usage has grown exponentially, rising 68% between 2008 and 2009, with mobile data usage increasing ten-fold over the same period.[22] It is clear that the market is highly dynamic and the take up of activities and applications with greater speed and usage requirements looks set to continue.

3.10. There have also been notable changes in the demands placed on broadband services. With wireless routers now a standard feature of most broadband packages, consumers can connect multiple devices on home networks. Ofcom has highlighted the imminent growth of Internet ready TVs, which will allow users to access content via the internet as well as from broadcasters. Such devices are anticipated to lead to content being streamed in HD using significantly greater bandwidth than is presently required for video-on-demand services like BBC i-Player.

3.11. Mobile access is the most dynamic part of the sector with rapid take up rates over recent years and an explosion in data volumes. The two key drivers have been mobile devices such as iPhone, which are designed to be permanently connected to the internet, and dedicated mobile broadband products. There are now over four million subscribers to mobile broadband services, a significant proportion of which use their service at home in a manner similar to fixed products.

3.12. Consumer satisfaction for fixed line services is generally high. Ofcom research shows over 80% of users are satisfied with their service. However, there is a consistent minority who remain dissatisfied, one in four citing the speed of their service as a reason.[23] Consumers are inevitably more aware of the limitations of mobile services given their familiarity with the way signal strength affects mobile telephony. Nevertheless, research has found that satisfaction with mobile broadband services is significantly lower than with fixed line broadband, some 20% rating their experience as poor.[24]

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[19] 'Superfast' is descriptive term for broadband services with theoretical maximum speeds of over 20Mbit/s.
[20] The ASA identified a threshold of 6Mbit/s as a speed above which individual users would be able to carry out even the more bandwidth intensive of activities.
[21] Source: Ofcom, The Communications Market 2010. 5 Telecoms and Networks: UK IP traffic, 2009
[22] Source: Ofcom, The Communications Market 2010. 5 Telecoms and Networks: The growing gap between data volumes and data revenues and Mobile data use and data revenues
[23] Source: UK broadband speeds 2009: Consumers' experience of fixed-line broadband performance, p. 28-29 (hereafter 'Ofcom, UK broadband Speeds 2009')
[24] Source: Ofcom, The Communications Market 2010. 5 Telecoms and Networks: Less than satisfied

3.13. In relation to advertising, respondents to CAP and BCAP's pre-consultation highlighted that the industry generally considers speed claims to be important for consumers to make informed choices between products. According to Ofcom, 91% of consumers regard connection speed as an 'important' consideration in choosing a broadband service with 67% saying it was 'very important'.[25]

3.14. There is some evidence that consumer knowledge in the sector has yet to catch up with the growth in the use of more bandwidth-intensive services. 64% of users are unaware of the speed they receive and less than 40% are able to identify their theoretical maximum speed correctly.[26] However, in terms of service limitations, 75% of consumers are aware of signal attenuation to some degree and 69% of the impact of contention.[27] It is notable that this survey was conducted prior to the launch of the Ofcom Voluntary Code of Practice: Broadband Speeds at the end of 2008, but after the ASA had taken steps to remedy concerns over the effect of the signal attenuation issue in early 2007.

3.15. The number of consumer complaints to the ASA about specific broadband speed claims has fallen significantly since 2007. The ASA continues, however, to receive general enquiries from the public and media comment, particularly in the technology press and user forums, which suggests some continuing dissatisfaction with the present policy. Ofcom has provided the information below on the number of complaints they received about broadband speeds in 2009 and 2010.

Complaint[28]	**2009**		**2010**	
Total	1415		1467	
'Speed slower than advertised'	220	15.5%	118	8.0%
'Too slow all the time'	775	54.8%	907	61.8%
'Too slow at certain times'	230	16.3%	224	15.2%

Market Perspectives

3.16. ISPs are divided over the question of how consumers perceive speed claims in advertisements. Virgin Media, a cable provider, has highlighted what it considers to be a serious inconsistency. It says some ADSL providers advertise services at 'up to' 20-24Mbit/s that do not perform as well, on average, as Virgin's 'up to' 10Mbit/s product. On the other hand, although they tend to acknowledge the need to revisit the ASA's present policies, ADSL providers maintain that most consumers are now more aware of the limitations of ADSL services. They believe the ASA's present policies, in conjunction with the Ofcom Voluntary Code of Practice: Broadband Speeds, already offer a reasonable degree of protection to consumers.

3.17. Ofcom, the Communications Consumer Panel and BIS are particularly concerned that the on-going roll out of ADSL2+ technology to the majority of UK homes significantly increases the possibility of consumers suffering detriment as a result of the ASA's present policy on broadband speeds. The difference between theoretical maximum and actual speeds for ADSL2+ subscribers located more than 3km from the exchange is considerable and means that ADSL2+ may offer no benefit over ADSL1 for those users.

3.18. These parties have also raised concerns about the effect that advertising has had on efforts to encourage the roll out of superfast fibre networks. The Digital Britain Report outlined the economic reasons for the UK to develop fibre networks and Ofcom has questioned why the take-up of such services is currently so low, with just 100,000 subscribers at present despite the significant investment

[25] Source: UK broadband speeds 2009, p. 33
[26] Source: UK broadband speeds 2009, p. 28
[27] Source: UK broadband speeds 2009, p. 35-36
[28] The category "speeds slower than advertised" is directly relevant to this review and represents the number of customers making complaints about this issue as a proportion of those responding to advertisements. The subsequent categories "too slow all the time" and "too slow at certain times" are not directly relevant to advertising considerations as they relate to the products in use. However, they do give a general indication of the level of concerns consumers over the speeds they receive in practice.

in extending such networks.[29] Giving consumers more information about the speed of access they are likely to receive has the potential to stimulate competition between providers and encourage the development of networks.

[29] BIS and DCMS, Digital Britain: Final Report. See Executive Summary and A Competitive Digital Communications Infrastructure; Ofcom, The Communications Market 2010. 5 Telecoms and Networks, 'So, why such low current take up?'

4. Proposed Guidance

Objectives

4.1. The objective of the Review is to produce guidance to ensure that advertisements for broadband services are unlikely to mislead the average consumer.

4.2. A general objective is that guidance should be written so that it is easily understood and implemented; we welcome comments on the wording of the guidance as well as its intent.

Overview of the Proposals

4.3. CAP and BCAP propose to present guidance on three topics:

Part 1: Speed claims that are likely to be acceptable in advertisements;

Part 2: Additional information about performance that should be included in advertisements whatever the approach to speed claims; and

Part 3: The substantiation likely to be required in support of speed claims.

4.4. The options are summarised as follows and are explained in more detail below.

Part 1 – Speed claims

Option	Outline
A	Maintaining the ASA's present policy.
B	Advertised speeds must be available to at least 10% of users.
C1	Advertised speeds may be based on theoretical maximum performance but must be accompanied by an indication of typical performance expressed as a range.
C2	Advertised speeds may be based on theoretical maximum performance but must be accompanied by an indication of typical performance based on the actual speeds available to at least 50% of users.
D	Quoted speeds must be available to at least 50% of users.

Part 2 – Additional information

Qualifier	Outline
1	Advertised speeds must be qualified with 'up to'.
2	Advertisements must include reference to factors likely to affect the actual speed received by consumers significantly.
3	Advertisements must state that consumers can check the actual speed they are likely to receive at the point of sale.

Part 3 – Substantiation (see page 19)

4.5. The approaches set out in Parts 1 and 2 are intended to complement each other, providing different levels of information proportionate to the potential for consumers to be misled by a particular limitation.

4.6. CAP and BCAP recognise that there are other potential approaches, variations or hybrids of the options and qualifiers outlined. Respondents are encouraged to propose alternatives to any of the proposals or suggest additional options. Please ensure, however, that any responses of this kind are clearly highlighted.

4.7. Respondents need not answer every question.

Guidance Part 1 – Speed claims

Option A

4.8. Maintain the element of the existing policy on advertised speed claims, which allows the use of theoretical maximum-based speed claims. The existing policy is:

> **Speed claims based on the theoretical maximum speed are likely to be acceptable provided that they are qualified appropriately.**[30]

4.9. Please note that CAP and BCAP have a preference to move away from this element of the existing policy for the reasons outlined in Section 3.

QUESTION 1: Do respondents agree with CAP and BCAP's view that guidance should recommend a change to advertising practice? If not, please explain why.

Option B

4.10. Require that the quoted speed is available to at least 10% of users of the advertised service. CAP and BCAP propose the following wording:

> **If a speed is advertised, that speed must be available to at least 10% of users.**

4.11. Advertisers will be required to use speed claims, which are demonstrably achievable for a significant proportion of their users.[31] For instance, a service currently advertised at 24Mbit/s may, in future, only be advertised at 18Mbit/s due to its measured performance. This is a significant change in advertising practice that is intended to provide consumers with a more realistic impression of the maximum actual speeds available.

4.12. This approach is consistent with the ASA's policy on "up to" claims in other sectors, which is derived from the position established in the BIS Pricing Practice Guide. The ASA usually allows "up to" claims only if at least 10% of consumers can obtain the advertised maximum and, equally, allows "from" claims only if at least 10% of consumers are able to obtain the quoted minimum.

QUESTION 2: Do you consider that Option B meets CAP and BCAP's policy objectives? Please give reasons for your answer.

Option C1

4.13. Continue to allow speed claims based on the theoretical maximum provided that they are qualified prominently with a "typical" performance claim. Typical performance should be the inter-quartile range.[32] CAP and BCAP propose the following wording:

> Speed claims based on a theoretical maximum speed are likely to be acceptable provided that they are qualified prominently with a statement of typical performance.
>
> The "typical" performance claim must be based on the inter-quartile range of actual speeds received by all subscribers to a service. For example, an advertisement for a service described as 'Up to 20 Meg' might state "Typical Performance: 8-12 Meg".

[30] See Part 2 of the proposed guidance below. Currently, all advertisers are required to include Qualifier 1 and ADSL providers are required to include Qualifier 2.
[31] See Part 3 for details of the substantiation required to support these claims.
[32] If performance data is ranked from the slowest user tested to the fastest, the inter-quartile range is the speed achieved by the middle two quarters i.e. the 25th to the 75th percentile (25% of the sample receive speeds slower than the bottom end of the range and 25% of the sample receive speeds faster than the top end of the range)"

Option C2

4.14. Continue to allow speed claims based on the theoretical maximum provided that they are qualified prominently with a "typical" performance claim. Typical performance should be the speed received by at least 50% of subscribers (the median speed). CAP and BCAP propose the following wording:

> Speed claims based on a theoretical maximum speed are likely to be acceptable provided that they are qualified prominently with a statement of typical performance.
>
> The "typical" performance claimed must be the median speed received by subscribers to the service. For example, an advertisement for a service described as 'Up to 24 Meg' might state "Typical Performance: 10 Meg".

4.15. Options C1 and C2 focus on communicating the typical performance of a service, in conjunction with the theoretical maximum available speed.

4.16. Option C1 increases the likelihood of a consumer receiving a service within the advertised speed range. However, the range will be inaccurate for 50% of customers who are in the top or bottom quartiles. The significant difference in available ADSL speeds also means that the range could be very broad. This approach may therefore be most appropriate for products like cable, where the spread of speeds received by consumers is smaller. For ADSL advertising, this approach would mean that consumers will effectively receive three speed indications in total during the sales process, if the point of sale indication is included.

4.17. Option C2 is subject to many of the points raised in paragraph 4.16, but as only the median speed will be included the effect could be exacerbated. Furthermore, the use of the 50% benchmark represents a significant departure from the availability practice established in the BIS Pricing Practice Guide.

4.18. CAP and BCAP also acknowledge that there are other potential benchmarks that could be used as the basis for a "typical" performance qualifier. Options C1 and C2 are intended to illustrate two straightforward approaches.

QUESTION 3: Do you consider that Option C1 meets CAP and BCAP's policy objectives? Please give reasons for your answer.

QUESTION 4: Do you consider that Option C2 meets CAP and BCAP's policy objectives? Please give reasons for your answer.

QUESTION 5i): Do you consider that the inter-quartile range is a suitable benchmark for a "typical" performance as a qualifier? Please give reasons for your answer.

QUESTION 5ii): Do you consider that the speed received by at least 50% of subscribers (the median speed) is a suitable benchmark for "typical" performance as a qualifier? Please give reasons for your answer.

If you would like to propose another benchmark, why do you consider that benchmark is preferable?

Option D

4.19. Require the median speed to be adopted as the only measure of speed. Under this policy, theoretical maximum speeds would no longer be permissible. CAP and BCAP propose the following wording:

> Advertisers must be able to show that the claimed speed is achieved by at least 50% of users.

4.20. In practice, advertised speeds of 24Mbit/s ADSL services, for instance, could be reduced by around half. This would be more representative than the theoretical maximum speed for many consumers. However, it would result in potentially significant proportions of consumers achieving significantly more and significantly less than the advertised speed.

4.21. CAP and BCAP acknowledge that a benchmark higher or lower than 50% could justifiably be used. Option D sets out an easily understandable benchmark for consumers that will provide a more representative impression of what speed they are likely to receive.

QUESTION 6: Do you consider Option D meets CAP and BCAP's policy objectives? Please give reasons for your answer.

QUESTION 7: Do you consider a benchmark other than 50% is preferable under this option? Please give reasons for your answer.

Guidance Part 2 – Additional Information

4.22. The ASA already requires prominent qualifiers for broadband speed claims made in advertisements. CAP and BCAP are conscious of the need to ensure that such requirements are absolutely necessary and do not unreasonably constrain advertisers, especially in media subject to greater limitations of time and space. Respondents should also bear in mind that it is an established principle of the Codes that qualifications should not contradict a claim.

Qualifier 1

4.23. The ASA presently requires speed claims to be qualified with the phrase "up to".[33] CAP and BCAP do not propose a change to that practice. Whatever the basis of an advertised speed claim, whether the theoretical maximum (as proposed under options A, C1 and C2) or the speed available to at least 10% of subscribers (as proposed under option B), advertisements must make clear to consumers that they may not received the advertised claim. CAP and BCAP propose the following wording:

> Speed claims must always be qualified with the phrase "up to".

QUESTION 8: Do you consider that the proposal, as it is worded, is sufficient to meet CAP and BCAP's policy objectives? If not, please explain why.

Qualifier 2

4.24. Requirement for a prominent qualification for the effects of significant performance limitations. CAP and BCAP propose the following wording:

> Significant factors limiting consumers' ability to achieve an advertised speed must be stated prominently i.e. in the body copy of print ads or the equivalent for other types of advertisement.
>
> A significant factor is a limitation that results in a significant proportion of users achieving actual speeds that are markedly lower than advertised. For instance, the ASA currently requires ADSL providers to include a qualification referring specifically to the effect of signal attenuation. Evidence of the impact of a given factor will be considered on a case-by-case basis.
>
> The wording of a qualification must make clear, in terms easily understood by consumers, the likely effect of the relevant factor on consumers' ability to achieve an advertised speed. In particular, advertisers should avoid technical terms unless they are widely understood by consumers or are explained clearly within the ad.

4.25. It is envisaged that this element of the Guidance would not apply if the advertised speed could typically be achieved by a significant majority of users. This will be assessed on a case-by-case basis and might result in the requirement being removed if the performance of a service improves or changes are made to the way its speed is advertised.

QUESTION 9: Do you consider that the proposal, as it is worded, is sufficient to meet CAP and BCAP's policy objectives? Please give reasons for your answer.

Qualifier 3

4.26. Requirement for an indication that actual speeds should be confirmed at the point of sale. CAP and BCAP propose the following wording:

[33] Respondents should note Qualifier 1 is unlikely to be appropriate in conjunction with Option D due to the extent to which permissible speed claims would be reduced, in particular for ADSL services. CAP and BCAP consider that it would be potentially confusing to have an "up to X Meg" claim that a significant number of consumers would actually exceed in practice.

Advertisers should include a prominent disclaimer, i.e. in the body copy of non-broadcast ads or the equivalent, advising consumers that they can confirm the likely actual speed that they will receive at the point of sale.

4.27. The only point in the transactional process at which ADSL users can be given an indication of the actual speeds they are likely to achieve, given the likely impact of their distance from the telephone exchange, is the point of sale. The Ofcom Voluntary Code of Practice: Broadband Speeds requires providers to give this information to potential customers. For mobile providers, however, it is difficult to provide a reliable prediction of actual speed due to the greater variations involved.[34]

QUESTION 10: Do you consider that the proposal, as it is worded, is sufficient to meet CAP and BCAP's policy objectives? Please give reasons for your answer.

[34] Respondents should note the Ofcom Code of Practice does not apply to business broadband ISPs.

Guidance Part 3 – Substantiation Requirements

4.28. The use of a performance indication will place an added burden on advertisers to include information based on actual performance data. In terms of substantiation, CAP and BCAP acknowledge that performance data cannot be completely accurate or fully representative of all user experience. The variations affecting all broadband speeds are too significant and there are also concerns about structural variations within any data, for instance, variations caused by customer turnover rates and the rural/urban profile of customer bases.

4.29. CAP and BCAP propose the following wording on substantiation likely to support Options B and C1, C2 and D:

> The substantiation required for performance indications must be robust and sufficiently representative of actual performance.
>
> The ASA has previously accepted data gathered on behalf of ISPs from independent third parties and from ISPs' own tests. Data from either source is acceptable but a suitable body of evidence will likely have the following characteristics:
>
> - Data drawn from third party testing of a sample of lines should be normalised to account for factors such as line length on ADSL services and the profile of the overall customer base.[35]
> - Data drawn from an ISP's own line testing should be sufficiently representative of the experience of the customer base of a particular service and should be normalised to account for factors such as line length on ADSL services and the profile of the overall customer base.
> - The ASA would normally ask to see line test data for all lines on a particular service. In cases of very large customer bases, it might request a random sample of user data from different exchanges or hubs that are representative of the overall profile of a customer base.
> - All data should be adjusted to account for protocol overheads such as IP headers to ensure that it is representative of what users actually achieve.
> - All data should account for the variations in speeds during the course of the day. It should take account of the reductions in speed caused by factors such as congestion during peak times and policies imposed by ISPs, such as traffic management. For instance, line testing could be carried out at peak and off-peak times in order to create an average performance for the line.
> - All data should be periodically updated to ensure that it is an accurate representation of the current performance of a service. ISPs should employ reasonable statistical methods to account for short term variations in their customer base that might have a significant impact on the performance of a service, for instance, customer turnover.

4.30. The proposed guidance on substantiation would not result in a significant change in advertising practice. The difference from the ASA's existing policy is the consideration of protocol overheads such as IP headers, which CAP and BCAP consider to be a material factor that contributes to the disparity between advertised and actual speed performance on all platforms.

QUESTION 11: Do you consider that the proposal for guidance on suitable substantiation for claims made in the form described by Options B, C1, C2 and D, as it is worded, is sufficient to meet CAP and BCAP's policy objectives? Please give reasons for your answer.

[35] For example, data gathered by monitoring equipment at the user-end. This approach was followed recently in by Ofcom in their Broadband Speeds research.

5. Next Steps

5.1. CAP and BCAP invite interested parties to comment on its proposals. Given the technical nature of this consultation, CAP and BCAP would particularly welcome responses from industry parties and bodies representing consumer interests in the telecommunications market. Nevertheless, responses from other stakeholders are welcome. Information on how to respond to this consultation can be found in Annex 1.

5.2. The following summarises the consultation, evaluation and approval process for the finalised guidance.

- **The consultation will close at 5pm on Friday 25 February 2011.**
- **CAP and BCAP will evaluate all significant responses and finalise a proposal for guidance.**
- **The evaluation of responses will be published on the CAP website and will explain the reasoning behind CAP and BCAPs decisions.**
- **The approved guidance will then be presented to the ASA Council who will be asked to have regard to it when considering complaints about "up to" claims under the Misleading advertising sections of the Codes.**
- **CAP and BCAP will publish the guidance on the CAP website. The guidance will apply immediately to campaigns developed after the publication of the guidance. A grace period of six months will apply to existing campaigns.**

Annex 1: Responding to this consultation

How to respond

CAP and BCAP invite written comments including supporting evidence on the proposals contained in this document, by **5pm on Friday 25 February 2011**.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses.

Please send your response to andrewt@cap.org.uk.

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

Broadband Speed Consultation
Code Policy Team
Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Accessibility

We want our consultation process to be accessible to everyone. If you have particular accessibility needs please contact the Code Policy team and we shall be happy to help.

Telephone: 020 7492 2200
E-mail: andrewt@cap.org.uk
Fax: 020 7404 3404
Textphone: 020 7242 8159

Note that we do not need a hard copy in addition to an electronic version. Also note that, other than an automated response to responses received by email, CAP and BCAP will not routinely acknowledge receipt of responses.

CAP and BCAP have sent written notification of this consultation to the organisations and individuals listed in this annex. We welcome suggestions of others you think should be informed of this consultation.

More information

If you have any questions about this consultation or need advice on the form of response, please contact CAP's Code Policy team on +44 (0)20 7492 2200 or email us at codepolicy@cap.org.uk.

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, www.cap.org.uk, when we announce the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by e-mail or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

List of consultees invited to respond

To obtain a variety of opinions, CAP and BCAP have invited these individuals and organisations to respond to this consultation:

BE Un Ltd
British Sky Broadcasting Ltd
British Telecommunications plc
Citizens Advice Bureau
Communications Consumer Panel
Consumer Focus
Department for Culture Media and Sport
DSG Retail Ltd
Epitiro Ltd
Hutchison 3G UK Ltd
Internet Service Providers Association
KComm Group
Ofcom
Orange PCS Ltd
Mobile Broadband Group
Mobile Marketing Association
Phones 4u Ltd
Sam Knows Ltd
TalkTalk Telecom Group PLC
Telefónica O2 UK Ltd
Tesco plc
T-Mobile (UK) Ltd
Virgin Media Ltd
Vodafone UK Ltd
Vonage Marketing LLC
Which?

Please note that CAP and BCAP welcome responses from all other interested parties.

According to need, we will endeavour to provide copies of this document in alternative formats upon request.

Please contact us at:

Code Policy Team
Committee of Advertising Practice
Mid City Place 71 High Holborn
London WC1V 6QT
T +44 (0)20 7492 2200
F +44 (0)20 7404 3404
E codepolicy@cap.org.uk

The Committee of Advertising Practice (CAP) is the industry body responsible for writing and enforcing the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing to ensure that all non-broadcast advertisements are legal, decent, honest and truthful.

The Broadcast Committee of Advertising Practice (BCAP) is the industry body responsible for writing and enforcing the rules for TV and radio advertising, collected in the BCAP Code, to ensure that all broadcast advertisements are legal, decent, honest and truthful.

To find out more about the work of the Committees or to subscribe to our quarterly advertising industry e-mail newsletter, visit our website at: www.cap.org.uk.