

FORMAL REFERRALS: CASE HANDLING PRINCIPLES BETWEEN THE UK ADVERTISING STANDARDS AUTHORITY AND THE LONDON BOROUGH OF CAMDEN

Introduction

This document captures practical working arrangements between the UK Advertising Standards Authority (ASA) and the London Borough of Camden (LBC). LBC agrees to provide a legal backstop for the ASA in relation to: misleading, aggressive or otherwise unfair non-broadcast advertising, impacting England and Wales which falls within the scope of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and any amendments; and misleading and impermissible comparative advertising that falls within the scope of the Business Protection from Misleading Marketing Regulations 2008 (BPRs) and any amendments.

LBC is commissioned by National Trading Standards (NTS) to provide the ASA's legal backstop. LBC will provide a quarterly update to NTS detailing progress with any ongoing ASA referrals. LBC are not required to share any confidential information with NTS.

Grounds for an ASA referral to LBC

1. For most cases that fall within the ASA's remit, the consumer interest is likely to be best served by the ASA. If the ASA is unable to achieve compliance with the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and it is a case about misleading, aggressive or otherwise unfair advertising impacting England and Wales, it can consider referring the matter to LBC. When the ASA is considering making such a referral, it will approach LBC to discuss whether LBC is best placed to deal with the issue.

Referral and follow-up process

2. If LBC is best placed to deal with the issue both parties will discuss the nature of the case, the supporting evidence held and the broader market implications.
3. In the course of the ASA referring a company to LBC the following shall occur:
 - a) The ASA must have completed its own route to compliance through appropriate sanctions before a case is referred.
 - b) Both parties will discuss and agree what materials will be submitted to support the referral and the *referral template* will be compiled by the ASA.
 - c) LBC will review the referral and determine if the matter can be dealt with by bringing the trader back into compliance using limited resources or if a website suspension request is appropriate.
 - d) Should the aforementioned not be appropriate, LBC will make an application to NTS for funding for further action, and confirm to the ASA when this is in place.

- e) In all cases LBC will seek to discuss the case with an identified local authority trading standards service (LATSS) where the referred party is based and determine with them the most appropriate course of action. In circumstances where the LATSS wish to deal with the party then this fact will be notified to the ASA.
- f) Where the advertiser is in a primary authority partnership¹ (PAP) with a LATSS, Camden will adhere to the Regulators' Code².
- g) The ASA will not take any further action against the referred party that might reasonably be regarded as prejudicing LBC's or another body's investigation. The ASA will refer on any subsequent substantive communications with relevant parties to LBC and will refer on any new similar complaints. On receipt of new complaints against the same advertiser, the complainant will be notified that their complaint will be passed to LBC but that they may not hear directly from an officer of LBC.
- h) LBC will provide the ASA with progress updates for referrals on a monthly basis and in writing.
- i) When LBC is considering asking an advertiser to sign undertakings (or other similarly binding assurances) it shall discuss the content and application of those undertakings with the ASA before they are signed.
- j) LBC will communicate the final regulatory outcome to the ASA in advance of any public announcement, so ASA, LBC and NTS communications teams can liaise effectively.

For cases that cannot be referred to LBC

4. In the unlikely event that a case cannot be progressed, LBC, in conjunction with NTS's National Tasking Group (NTG), will consider whether an alternative route not previously identified (e.g. referral to the Competition and Markets Authority (CMA) for cases with broader market implications) might be available. Having explored options, and on identifying when one is available, LBC will ensure that a letter is sent to the ASA outlining the proposed course of action (with appropriate contact details and any further instructions).
5. When LBC passes the case on to an alternative backstop better placed to deal with the case (e.g. CMA or another local authority), that other regulator should be advised by LBC to either liaise directly with the ASA and provide regular progress updates on the investigation, or to liaise through LBC.
6. If, in the opinion of LBC, a case cannot be progressed, then this will be discussed with the ASA and a course of action will be agreed upon. If the case cannot be progressed and there is no alternative means of referral available, LBC will inform the ASA in writing of the reasons for this. The case will then be

¹ <https://primaryauthorityregister.info/par/index.php/home>

² <https://www.gov.uk/government/publications/regulators-code>

reviewed if new evidence comes to light or new complaints are received by the ASA. If on review the case is suitable for adoption then this will be dealt with as per 2 & 3 above.

Communications

7. For most referral cases there is a strong possibility of media interest. The ASA, LBC, (or nominated alternative organisation) together with NTS will discuss and agree a communications policy to ensure effective and aligned communication throughout the referral process. Critical points in the process are likely to be: the referral itself, the release of any signed undertakings, the outcome of any court case, the point at which responsibility for complaints is handed back to the ASA.

Other processes

8. For cases that result in LBC (or nominated alternative organisation) receiving signed undertakings (or other similarly binding assurances), ASA shall monitor compliance with those undertakings and inform LBC (or the nominated alternative organisation) when there is evidence of serious or persistent non-compliance. At that point the parties shall discuss what further action LBC can take to ensure future compliance.

Freedom of Information Requests

9. The Freedom of Information Act (FOIA) gives persons the right to ask any public sector organisation for all the recorded information they have on any subject, this includes information held by local authority organisations.
10. It is anticipated that much of the information passed to LBC by the ASA will fall within one of the following exemptions under the FOIA and will therefore not be disclosed :
 - Section 30: investigations and proceedings conducted by public authorities
 - Section 31: law enforcement
 - Section 41: information provided in confidence
 - Section 42: legal professional privilege
11. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis. In the event information doesn't fall within one of the relevant exemptions, this information will have to be released.
12. LBC will consult with the ASA to obtain their views before any information is released. However, any decision to release information under the FOIA will ultimately be the responsibility of LBC as the data processor for the purposes of the FOIA, or HM Courts and Tribunals Service.

Environmental Information Requests

13. The Environmental Information Regulations 2004 (EIR) provide public access to environmental information held by public authorities.
14. The Regulations do this in two ways:
 - public authorities must make environmental information available proactively;
 - members of the public are entitled to request environmental information from public authorities.
15. When LBC receives a request for information, it must consider whether the requested information is environmental and whether it should be dealt with under the Regulations. In most cases this will be fairly clear.
16. As with the FOIA, EIR provides exceptions that allow the Authority to refuse to share requested information. It is anticipated that much of the information passed to LBC by the ASA will fall within one of the following exemptions under the EIR and will therefore not be disclosed:
 - The course of justice and inquiries exception (regulation 12(5)(b))
 - Confidentiality of proceedings (regulation 12(5)(d))
 - Interests of the person who provided the information to the public authority (regulation 12(5)(f))
17. However, decisions as to whether or not information falls within one of these, or any other exemptions, will have to be made on a case by case basis, and all are subject to a public interest test. In the event information does not fall within one of the relevant exemptions, or if it does fall within an exemption but the public interest in maintaining the exemption does not outweigh the public interest in disclosure, then this information will have to be released.
18. LBC will consult with the ASA to obtain their views before any information is released. However, any decision to release information under the EIR will ultimately be the responsibility of LBC as the data processor for the purposes of the EIR, or HM Courts and Tribunals Service.