

Evaluation of Responses: Proposals for guidance on the use of “Unlimited” claims in telecommunications advertising

Evaluation Table

<p>OPTION A – CAP and BCAP recommend that it is advisable to propose a change to present advertising practice.</p> <p>“Unlimited” usage claims where a service is subject to a fair usage policy (FUP) are likely to mislead unless:</p> <ul style="list-style-type: none"> i. The existence of the FUP is stated in the advertisement; and ii. The FUP is fair and reasonable; it must affect only atypical users <p>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?</p>			
	Respondent making points in favour of the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
1.1.1	BSkyB Which?	<p>Consumers do not generally understand what terms like FUP mean.</p> <p>BSkyB sent a summary of research they had carried out. It showed that 53% of respondents believed that an “unlimited” service allowed them to download as much as they liked without constraint or penalty.</p> <p>Which? sent details of their 2010 ISP Survey, which showed that there was a lack of awareness about usage limits. 40% of all respondents were unaware of whether there was a cap on their broadband package and 52% of respondents on “unlimited” packages did not know whether they had a FUP.</p>	CAP and BCAP note the research and consider that it supports the proposal outlined in the Consultation Document to publish new guidance recommending a change to advertising practice.
1.1.2	BSkyB	Where consumers are aware of limitations, they often do not understand how limitations, such as traffic management, will affect their service. BSkyB’s research showed that 55% of respondents did not understand how traffic management would affect their broadband speed, or thought that it would have a low impact only.	The existing policy allows traffic management under the auspices of an FUP provided that it affects only the “atypical” user. However, CAP and BCAP acknowledge the evidence of consumer concern over the various instances of traffic management associated with FUPs. The broader issue of traffic management is therefore considered in greater detail in the evaluation of points relating to the options below.
1.1.3	Which?	The Which? 2010 Internet Service Provider (ISP) Survey found	CAP and BCAP note the research and consider that it supports the

		<p>that, of respondents:</p> <ul style="list-style-type: none"> - Around 5% on “unlimited” broadband deals exceeded the FUP at some point; - 57% experienced reduced speeds at peak times; - 32% got a warning from their provider; and - 11% were subject to reduced speeds at all times. 	<p>proposal outlined in the Consultation Document to publish new guidance recommending a change to advertising practice.</p>
1.1.4	BSkyB Which?	<p>BSkyB sent research, which found that, of respondents:</p> <ul style="list-style-type: none"> - 64% believed that “unlimited” should mean no constraints or penalties for usage; and - 5% felt that “unlimited” should mean that speeds can be slowed beyond a usage threshold. <p>The Which? 2010 ISP survey showed that 72% of respondents agreed that the term “unlimited” should mean unlimited.</p>	<p>CAP and BCAP note the research and consider that it supports the proposal outlined in the Consultation Document to publish new guidance recommending a change to advertising practice.</p>
1.1.5	Ofcom	<p>Some consumers are likely to be misled by the description of services as “unlimited”.</p> <p>Ofcom provided a number of example complaints from their Advisory Team where consumers had been misled by use of the term.</p>	<p>Although the information provided by Ofcom refers to individual instances, CAP and BCAP consider that it supports the proposal outlined in the Consultation Document to publish new guidance recommending a change to advertising practice.</p>
1.1.6	Which?	<p>Which? provided information from ‘Conversation Pieces’ they held with groups of consumers about “unlimited” claims, which suggested that, in general, FUPs were poorly explained or hidden in the terms and conditions.</p> <p>Information on what fair usage means was considered to be difficult to locate on many websites. Usage limits and traffic management policies should be made clear to the consumer in the advertisement and at the start of the purchasing process. It should not be hidden in the small-print.</p>	<p>As a general principle of the Codes, significant information must be presented clearly and with the necessary prominence in advertising. The present ASA policy, for instance, requires that the existence of an FUP is stated in the advertisement. Point of sale material, however, is outside the scope of the CAP Code.</p> <p>CAP and BCAP acknowledge that the present policy does not require providers to explain the particular features of an FUP in advertising material. Although the proposals outlined in Options B and C would still require the existence of an FUP to be stated, CAP and BCAP consider that there is a more fundamental point at issue, which is whether certain FUP practices render an “unlimited” claim likely to mislead.</p>

1.1.7	Ofcom	FUPs are not necessarily “fair”, if they only affect atypical users. An FUP that only affects a small number of users could still cause significant consumer detriment and contradict an “unlimited” claim in a way that would likely mislead consumers, if the financial or other costs imposed on consumers, such as the disappointment at receiving slower speeds, are sufficiently large.	The ASA adopted a pragmatic position when it first considered the matter several years ago when services such as broadband and mobile were in their infancy. The ASA’s position related originally to fixed-line broadband services and was adapted subsequently to cover telephony and mobile services. Importantly, however, the original position did not comment on the type of sanctions imposed by fixed-line providers against customers who transgressed their FUP limit.
1.1.8	BSkyB	Allowing “unlimited” claims for services with usage limits is likely to permit advertising that is in breach of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Evidence suggests that a significant proportion of consumers are likely to be misled where “unlimited” is used to describe a service that has usage limits.	In light of more recent developments in the market and the concerns of consumers, CAP and BCAP consider that it is now necessary to reconsider this position. As the Consultation Document made clear, the ASA’s interpretation of the Misleading Advertising sections of the Codes is informed by the Consumer Protection Regulations 2008 (CPRs) and The Business Protection from Misleading Marketing Regulations 2008 (BPRs). The incidence of consumer complaints, along with evidence from various pieces of consumer research, shows that there exists concern over the use of “unlimited” claims for services subject to an FUP and other similar provider imposed limitations on usage.
1.1.9	BSkyB An organisation requesting confidentiality	There are significant disparities in the limits associated with different providers’ FUPs. This has resulted in unfairness to consumers who are directly affected and, more generally, has led to confusion among consumers, especially in relation to comparing different packages.	Consumers are likely to expect that their legitimate use of an “unlimited” service will not incur additional charges beyond the basic cost of the service and that they will be able to use the service without risk of suspension. Consequently, CAP and BCAP consider that FUPs that result in charging or suspension of service may mislead consumers and cause them to take transactional decisions that they would not otherwise have taken. Furthermore, as noted in the Consultation Document, there are also concerns over the use of traffic management. However, the issue of traffic management is dealt with separately in the evaluation of responses to the options below.
1.1.10	BSkyB Ofcom	Consumers who have been misled are likely to have taken different transactional decisions than they would otherwise have taken, especially as truly unlimited alternatives are available to services with FUPs.	On this basis, CAP and BCAP consider that guidance should be published recommending a change to advertising practice.
1.1.11	BSkyB	Under current policy, the limitations of services that are not really “unlimited” can be stated in the footnotes of the advert only, which makes it hard for consumers to understand the differences between these products. Allowing these to be contradicted in the footnotes of a comparison is at odds with requirements of the Advertising Codes and CPRs.	The CAP and BCAP Codes require that qualifications may clarify but must not contradict claims and that they must be presented clearly. The guidance will be informed by the policies outlined in CAP’s Help Note on Claims that Require Qualification, which makes clear CAP’s position on how the importance of a qualification relates to its prominence in a given marketing communication.

1.1.12	BSkyB	<p>Current advertising practice is inconsistent with CAP's Help Note on Claims that Require Qualification, which states:</p> <ul style="list-style-type: none"> - Any significant qualifications should be made one "step" less prominent than the primary claim; and - Qualifications cannot be used where they constitute so great a qualification as to contradict the primary claim. 	<p>CAP and BCAP acknowledge that no telecommunications service can be unlimited in an absolute sense. They are limited by natural constraints, such as the number of people using a service at once, and constraints imposed by providers to structure and manage their networks. It is therefore important to distinguish those limits that are understood and accepted as natural by consumers from those that are not and that may contradict an "unlimited" claim.</p>
1.1.13	An organisation requesting confidentiality	<p>The current policy approach is inadequate because it does not address:</p> <ul style="list-style-type: none"> - The specific level FUPs should be set at; - The actions a provider can take if the FUP is breached; and - The information that should be stated explicitly in advertising. <p>Consequently, each provider operates a different FUP and includes different amounts of information in their advertising.</p>	<p>The Review aims to produce guidance, which will establish a proportionate policy on the information necessary in marketing communications to ensure that the use of the term "unlimited" in advertising is not likely to mislead the average consumer. If providers wish to describe a service as "unlimited" in their advertising, it is for them to determine that their business practices are compatible with that claim. As the Consultation Document makes clear, the guidance will recommend an approach, but other approaches may prove justifiable to the ASA if it can be shown that they do not contradict an "unlimited" claim in a manner that might mislead the average consumer.</p> <p>The ASA's current policy takes the approach of assessing the impact of FUPs based on their effect in terms of the number of users in breach; the "atypical" user test. CAP and BCAP acknowledge that this criterion has allowed unlimited claims to be made in advertising for services with FUPs that vary significantly. However, CAP and BCAP do not consider that it is appropriate for the guidance to mandate the exact parameters for all FUPs. Furthermore, many of the elements of an FUP and other limitations imposed by providers are business practices that are not covered directly by the Code.</p> <p>Moreover, because the EU Directive from which the CPRs derive is a maximum harmonisation measure, CAP and BCAP cannot apply a greater or lesser restriction on advertising than is provided for in the CPRs. They could not, for instance, prescribe a particular approach to the exclusion of all others.</p> <p>[See also the evaluation of point 1.2.1 below]</p>

	Respondent making points against the proposal:	Summary of significant points:	CAP and BCAP's evaluation and action points:
1.2.1	Telefonica O2 An Organisation Requesting Confidentiality	<p>The fixed line broadband market is relatively mature and "unlimited" claims in advertisements for telecommunications services are understood by the average consumer to relate to services that are subject to an FUP.</p> <p>The number of complaints to the ASA about fixed line broadband has significantly declined over the last 24 months, from 108 in 2008 to 4 in 2010. This is evidence that the current advertising regime is understood and accepted by the vast majority of consumers.</p>	<p>The Review considers the matter from the perspective of the average consumer, as described in Appendix 1: the CPRs and BPRs. CAP and BCAP note the telecommunications market has developed significantly in recent years and, as a consequence, so has consumer understanding. It is not clear, however, that consumers in general readily understand the issues related to the advertising of "unlimited" broadband services that are subject to a FUP. The research cited in the Consultation Document, along with information sent by some respondents to this consultation, and the complaints received by the ASA and Ofcom, demonstrate that there is significant consumer concern in this area and evidence that consumers believe they have been deceived by the present approach to advertising.</p> <p>With regard to fixed line broadband, CAP and BCAP note the lower level of complaints. This may be due to the generally less restrictive approach to FUPs: for instance, very few providers employ measures such as charging for excess usage or suspension of service. Consumers have, however, found fixed line broadband advertising to be problematic where more restrictive models of FUP and other types of provider imposed limitation are employed. It is with this distinction in mind that CAP and BCAP proposed Options B and C, which would not affect less restrictive practices that involve forms of traffic management.</p> <p>Although they acknowledge the differing levels of complaints and the need to have regard to the inherent differences between platforms, CAP and BCAP do not consider that fixed line broadband services should be exempted from the guidance. There is a clear need for a consistent approach because telecommunications products are often marketed in bundles and consumers are likely to expect consistency in what "unlimited" means in relation to different types of service.</p>
1.2.2	Two Organisations Requesting Confidentiality	The current UK broadband infrastructure necessitates FUPs to protect against the small minority of heavy users who negatively affect networks to the detriment of ordinary users.	CAP and BCAP acknowledged in the Consultation Document that it is reasonable for providers to take steps to protect their networks. It proposes no options that will stop providers from taking such steps. The fundamental point at issue, however, is whether certain FUP practices render an "unlimited" claim likely to mislead.
1.2.3	An Organisation Requesting Confidentiality	For the vast majority of customers the term "unlimited" accurately describes the service that they will receive from service providers.	As the Consultation Document explained, although the percentage of users known to be affected is small, as an actual number of the total UK telecommunications service users, it is very significant. Furthermore,

			<p>CAP and BCAP consider that the present policy does not take account of the impact on other consumers who are forced to moderate their usage by an FUP in a way that would render an “unlimited” claim likely to mislead.</p>
1.2.4	<p>Vonage</p> <p>An Organisation Requesting Confidentiality</p>	<p>Consumers will be detrimentally affected by any change to the current policy, which enables service providers to provide a consistent and simplified service offering.</p> <ul style="list-style-type: none"> i. Many consumers who do not fully understand the level of data they will require on a monthly basis. Multiple packages with different limits could cause confusion. ii. Providers may use alternative explanations to describe data allowances that will create confusion and ambiguity for the average consumer. 	<p>CAP and BCAP do not agree that the present policy has resulted in consistent and simplified service offerings given the significant variation in the terms of FUPs and pattern of consumer complaint noted above. Although “unlimited” claims are arguably a useful mechanism for describing a service that is intended to be suitable for heavy users or those who are unsure about what level of usage they require, this must be considered against the significant potential for the term to mislead.</p> <p>Providers could take steps to improve consumer understanding of usage requirements beyond advertising, in point of sale material for example. This is addressed in Ofcom’s Voluntary Code of Practice: Broadband Speeds, but CAP and BCAP note many providers provide tools and information on their websites that explain data limits to facilitate consumer choice between the different packages available.</p> <p>As the Consultation Document makes clear, the Review is concerned with the use of “unlimited” claims and does not seek to constrain innovation in telecommunications advertising. However, in future, if providers use terms designed to convey the same or a similar meaning to “unlimited”, these must be compliant with the Codes.</p>
1.2.5	<p>An Organisation Requesting Confidentiality</p>	<p>There are difficulties with qualifying an absolute term such as ‘unlimited.’ We believe that, in the case of data usage, the exception to this approach should be maintained.</p>	<p>CAP and BCAP disagree. The Review’s objective is to issue guidance based on the available evidence and in accordance with requirements of the Code and the associated legislation.</p> <p>[See also the evaluation of point 1.2.1 above]</p>

OPTION B – Develop the ASA’s present policy to make “unlimited” claims unacceptable for services that adopt FUPs that involve additional charges or suspension of service.

“Unlimited” usage claims where a service is subject to an FUP are likely to mislead unless:

- i. The existence of the FUP is stated in the advertisement.
- ii. The FUP is fair and reasonable; it must affect only atypical users.
- iii. Legitimate users incur no additional charge or suspension of service (or similar) as a consequence of exceeding any usage threshold associated with the FUP.

QUESTION 2: Do respondents agree that the proposed option as it is worded is sufficient to meet CAP and BCAP’s policy objectives? Please give reasons for your answer.

	Respondent making points in favour of the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
	N/A	[None]	N/A
	Respondent making points against the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
2.2.1	An Organisation Requesting Confidentiality	<p>The fixed line broadband market is relatively mature and “unlimited” claims in advertisements for telecommunications services are understood by the average consumer to relate to services that are subject to an FUP.</p> <p>The number of complaints to the ASA about fixed line broadband has significantly declined over the last 24 months, from 108 in 2008 to 4 in 2010. This is evidence that the current advertising regime is understood and accepted by the vast majority of consumers.</p>	[See the evaluation of point 1.2.1 above]
2.2.2	Two Organisations Requesting Confidentiality	The current UK broadband infrastructure necessitates FUPs to protect against the small minority of heavy users who negatively affect networks to the detriment of ordinary users.	[See the evaluation of point 1.2.2 above]
2.2.3	An Organisation Requesting Confidentiality	For the vast majority of customers the term “unlimited” accurately describes the service that they will receive from service providers.	[See the evaluation of point 1.2.3 above]

2.2.4	Telefonica O2	There are significant costs for providers in changing their approach.	<p>CAP and BCAP note this point and respond to the issue of the costs to providers of changing current advertising practice below.</p> <p>[See the evaluation of point 5.26 below]</p>
2.2.5	An organisation requesting confidentiality	The management of networks is a factor that allows providers to offer products at competitive prices and ensures the majority of users get a good service.	CAP and BCAP acknowledge that various network management practices allow providers to share network resources among users thereby reducing costs and the price offered to the consumer. However, the Review seeks to address a more fundamental issue, whether certain practices render an “unlimited” claim likely to mislead. For a more detailed discussion of the types of practice that CAP and BCAP consider to be covered by the scope of the guidance, see the evaluation of point 5.13 below, where the issues of network and traffic management are addressed in greater detail.
2.2.6	An organisation requesting confidentiality	The easiest and most practical way for providers to protect their telephony networks from abuse, especially fraud and arbitrage, is to charge for excess use.	<p>CAP and BCAP acknowledged in the Consultation Document that it is reasonable for providers to take steps to protect their networks. It proposes no options that will stop providers from taking such steps. The Review is concerned with the more fundamental question of whether certain FUP practices render an “unlimited” claim likely to mislead.</p> <p>CAP and BCAP consider that consumers are likely to expect that their legitimate use of an “unlimited” telecommunications service will not incur additional charges beyond the basic cost of the service. This consideration is supported by the focus of consumer complaints to the ASA on services where charging is employed under as a sanction under an FUP. At the same time, however, CAP and BCAP stress that Options B and C make a key distinction between ‘legitimate’ usage, that which is in accordance with the terms and conditions of the service, and ‘illegitimate’ usage, such as the examples of fraud and arbitrage noted by the respondent. CAP and BCAP do not consider that it is reasonable for advertising policy to offer protection for illegitimate usage.</p> <p>[See the evaluation of points 1.1.7-1.1.10 above]</p>
2.2.7	An organisation requesting confidentiality	<p>Monitoring large customer bases to identify abuse is very difficult. Scrutiny of certain types of behaviour does not always result in firm conclusions about whether abuse is taking place or not. Detecting fraud and arbitrage is a complex ever changing area and cannot be easily predicted or addressed by the proposed response.</p> <p>Do CAP and BCAP expect providers:</p> <p>i. To carry out forensic analysis of a customer's</p>	CAP and BCAP did not specify that monitoring for misuse was required or expected. The Consultation Document referred to monitoring of user behaviour for evidence of illegitimate usage as an example of one of the practices currently employed by some providers that Options B and C recognise as being compatible with an “unlimited” claim. At a wider level, CAP and BCAP do not consider it appropriate to comment specifically on providers’ business practices. The guidance merely seeks establish an effective policy approach to the question of fundamental point at issue, which is whether certain FUP practices render an “unlimited” claim likely to mislead. It is for providers themselves to consider whether the full

		<p>behaviour each time a customer is suspected of abusing a service?</p> <p>ii. Not to take any action against such customers during an investigation?</p> <p>iii. To seek to recover any lost costs if a customer is suspected of abuse?</p>	terms of their service justify an “unlimited” claim in their advertising.
2.2.8	An Organisation Requesting Confidentiality	It is important that service providers retain the ability, in the most severe cases, to write and request that a customer using the service excessively during certain peak periods of the day to limit their usage during this time. If a customer continues their excessive use of a service, it is important for service providers to retain the ability to take further action.	[See the evaluation of points 2.2.6 and 2.2.7 above]
2.2.9	An Organisation Requesting Confidentiality	The ultimate sanction should not be a financial penalty. However, cancellation is an entirely fair and reasonable solution for a customer that consistently breaches an FUP. The excessive user would not receive increased costs or a reduced/restricted speed of service and other users are protected.	The Consultation Document did not make an explicit distinction between FUP measures that result in temporary suspension of service or those that result in cancellation of the contract without penalty to the user. However, CAP and BCAP do not consider that there is a case for treating cancellation of service for heavy but legitimate users any differently. Such a practice under the terms of a service advertised as “unlimited”, is likely in CAP and BCAP’s view, to cause consumers to make a transactional decision that they would not have otherwise made and render an “unlimited” claim likely to mislead.
2.2.10	Telefonica O2 An Organisation Requesting Confidentiality	<p>Consumers will be detrimentally affected by any change to the current policy, which enables service providers to provide a consistent and simplified service offering.</p> <p>i. Many consumers who do not fully understand the level of data they will require on a monthly basis. Multiple packages with different limits could cause confusion.</p> <p>ii. Providers may use alternative explanations to describe data allowances that will create confusion and ambiguity for the average consumer.</p>	[See the evaluation of point 1.2.4 above]
2.2.11	An Organisation Requesting Confidentiality	There are difficulties with qualifying an absolute term such as ‘unlimited.’ We believe that, in the case of data usage, the exception to this approach should be maintained.	[See the evaluation of point 1.2.5 above]
2.2.12	BSkyB	Where consumers are made aware of limitations, they often do not understand how limitations like traffic management will affect their service. BSkyB’s research showed that 55% of respondents did not understand how traffic management would affect their broadband speed, or thought that it would have a low impact only.	CAP and BCAP note this research and consider that it supports the concern outlined in the Consultation Document over Option B and how it could permit services that involve severely restrictive forms of traffic management under the auspices of an FUP to be described as “unlimited” in a way that is likely to mislead consumers.

		<p>BSkyB's research also found that, of respondents:</p> <ul style="list-style-type: none"> - 64% believed that "unlimited" should mean no constraints or penalties for usage; and - 5% felt that "unlimited" should mean that speeds can be slowed beyond a usage threshold. 	
2.2.13	BSkyB	<p>Although Option B prevents charges, consumers will still suffer financial detriment whenever the speed of their "unlimited" service is limited in such a way that they receive less value for money by comparison to a consumer of a truly unlimited service. The Consultation Document recognises that providers must not take measures that materially affect legitimate users. However, Option B allows "severe" impacts on consumer services as later acknowledged by paragraph 4.12.</p>	<p>Because it does not make a distinction between different types or degrees of traffic management, CAP and BCAP acknowledge that Option B would be likely to permit limitations that include more restrictive forms. However, the proposed Option does include a provision, carried over from the present policy, to ensure that FUPs affect only the atypical user. In practice, this would limit the application of FUP sanctions to a small minority of excessive users. Nevertheless, CAP and BCAP acknowledge the concerns over limitations to the speed of a service under a variety of traffic management mechanisms.</p>
2.2.14	Which?	<p>Option B does not offer sufficient safeguards for legitimate but heavy users against the possibility of having their service throttled. There is no set definition of what FUP means resulting in too great a variation between different providers.</p> <p>Which? does not object to FUPs and traffic management as such and recognises that ISPs, in order to ensure a smooth and uninterrupted service to a majority of consumers that use their broadband in a reasonable manner, must resort to policies such as the throttling of speeds. However, where traffic management is used, even where it only results in slower speeds at peak times, ISPs should not be allowed to use the term "unlimited". Instead providers should be open about what this threshold is, what behaviour is likely to breach it and advertise accordingly.</p>	<p>Although highly restrictive traffic management is likely to affect only a small minority of excessive users, those users would still suffer detriment in terms of reduced speed of service, beyond what they might have been led to expect by an advertisement for an "unlimited" service. This issue is similar to the concerns over the present policy as Option B would assess the impact of traffic management on the basis of the number of users affected rather than actual impact of the FUP. Option C responds to these concerns by preventing "unlimited" claims from being made for services that employ "severe" traffic management mechanisms.</p> <p>Concern over traffic management must be balanced against the reality that speeds of data services and the speeds required to use different services online vary constantly due to a variety of factors. Consumers are likely to be aware of the variations in peak time speeds due to traffic congestion, for example. Nevertheless, CAP and BCAP consider that Option B should be ruled out because it does not adequately address the issue.</p>
2.2.15	BSkyB	<p>Allowing "unlimited" services with usage limits is likely to permit advertising that is in breach of the CPRs. Evidence suggests that a significant proportion of consumers are likely to be misled where "unlimited" is used to describe a service that has usage limits.</p>	<p>[See the evaluation of points 2.2.13 and 2.2.14 above]</p>

2.2.16	BSkyB	Consumers who have been misled are likely to have taken different transactional decisions than they would otherwise have taken, especially as truly unlimited alternatives are available to services with FUPs.	
<p>OPTION C – Develop Option B to cover “severe” forms of traffic management.</p> <p>“Unlimited” usage claims where a service is subject to an FUP are likely to mislead unless:</p> <ul style="list-style-type: none"> i. The existence of the FUP is stated in the advertisement. ii. The FUP is fair and reasonable; it must affect only atypical users. iii. Legitimate users incur no additional charge or suspension of service (or similar) as a consequence of exceeding any usage threshold associated with the FUP. iv. FUPs may employ traffic management (or similar) as a consequence of exceeding a usage threshold. However, any such policies must not severely restrict the speed of access of the users who exceed the threshold. <p>QUESTION 3: Do respondents agree that the proposed option as it is worded is sufficient to meet CAP and BCAP’s policy objectives? Please give reasons for your answer.</p>			
	Respondent making points in favour of the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
3.1.1	Ofcom	A modified version of the Consultation Document’s Option D best meets CAP and BCAP’s objectives. Advertising a service as “unlimited” should not necessarily preclude all forms of traffic management that are designed to prevent strains on network capacity. Some forms of traffic management may be a necessary component of good network management.	<p>CAP and BCAP consider that Ofcom’s proposal differs from what is proposed in Option D, which recommended that any FUP or traffic management related limit would be likely to render an “unlimited” claim likely to mislead. However, CAP and BCAP broadly agree with the proposed principle that the guidance should not necessarily preclude all forms of traffic management and consider that Option C addresses that issue adequately.</p> <p>[See the evaluation of points 3.2.12-3.2.15 below for more details of CAP and BCAP’s consideration of Option C]</p>
	Respondent making points against the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
3.2.1	An Organisation Requesting Confidentiality	The fixed line broadband market is relatively mature and “unlimited” claims in advertisements for telecommunications services are understood by the average consumer to relate to services that are subject to an FUP. The number of complaints to the ASA about fixed line broadband has	[See the evaluation of point 1.2.1 above]

		significantly declined over the last 24 months, from 108 in 2008 to 4 in 2010. This is evidence that the current advertising regime is understood and accepted by the vast majority of consumers.	
3.2.2	Two Organisations Requesting Confidentiality	The current UK broadband infrastructure necessitates FUPs to protect against the small minority of heavy users who negatively affect networks to the detriment of ordinary users.	[See the evaluation of point 1.2.2 above]
3.2.3	An Organisation Requesting Confidentiality	For the vast majority of customers the term “unlimited” accurately describes the service that they will receive from service providers.	[See the evaluation of point 1.2.3 above]
3.2.5	An organisation requesting confidentiality	The easiest and most practical way for providers to protect their telephony networks from abuse, especially fraud and arbitrage, is to charge for excess use.	[See the evaluation of point 2.2.6 above]
3.2.6	An organisation requesting confidentiality	<p>Monitoring large customer bases to identify abuse is very difficult. Scrutiny of certain types of behaviour does not always result in firm conclusions about whether abuse is taking place or not. Detecting fraud and arbitrage is a complex ever changing area and cannot be easily predicted or addressed by the proposed response.</p> <p>Do CAP and BCAP expect providers:</p> <ul style="list-style-type: none"> i. To carry out forensic analysis of a customer's behaviour each time a customer is suspected of abusing a service? ii. Not to take any action against such customers during an investigation? iii. To seek to recover any lost costs if a customer is suspected of abuse? 	[See the evaluation of point 2.2.7 above]
3.2.7	An Organisation Requesting Confidentiality	It is important that service providers retain the ability, in the most severe cases, to write and request that a customer using the service excessively during certain peak periods of the day to limit their usage during this time. If a customer continues their excessive use of a service, it is important for service providers to retain the ability to take further action.	[See the evaluation of points 2.2.6 and 2.2.7 above]
3.2.8	An Organisation Requesting Confidentiality	The ultimate sanction should not be a financial penalty. However, cancellation is an entirely fair and reasonable solution for a customer that consistently breaches an FUP. The excessive user would not receive increased costs or a	[See the evaluation of point 2.2.9 above]

		reduced/restricted speed of service and other users are protected.	
3.2.9	Telefonica O2 Vonage An Organisation Requesting Confidentiality	<p>Consumers will be detrimentally affected by any change to the current policy, which enables service providers to provide a consistent and simplified service offering.</p> <ul style="list-style-type: none"> i. Many consumers who do not fully understand the level of data they will require on a monthly basis. Multiple packages with different limits could cause confusion. ii. Providers may use alternative explanations to describe data allowances that will create confusion and ambiguity for the average consumer. 	[See the evaluation of point 1.2.4 above]
3.2.10	An Organisation Requesting Confidentiality	There are difficulties with qualifying an absolute term such as 'unlimited.' We believe that, in the case of data usage, the exception to this approach should be maintained.	[See the evaluation of point 1.2.5 above]
3.2.11	An organisation requesting confidentiality	No equivalent mechanism to throttling speeds at peak times is available to telephony service providers to protect their networks, even though CAP and BCAP recognise the need to do so.	<p>CAP and BCAP acknowledge that there is no equivalent to traffic management for telephony services but have made clear the reasons for the decision to publish guidance recommending a change to current advertising practice in the evaluation of points 11.1.7-11.1.10 above.</p> <p>The Consultation Document also makes clear that CAP and BCAP consider that there is a material difference between the speed and amount of use of a service. The Review has taken the view that to describe a service as “unlimited” in advertising material when it involves direct restrictions to the amount of usage, as permitted by the existing policy, is likely to mislead consumers. It is CAP and BCAP’s view that this consideration should be applied equally to all platforms and services in order to promote consistency. They have seen little evidence to suggest that consumers have a significantly different understanding of what an “unlimited” claim means across different types of service.</p> <p>Addressing the respondent’s latter point, CAP and BCAP would point out, that, in line with evaluation of points 2.2.6 and 2.2.7 above, it should be noted that the proposed Option C does not preclude providers from taking steps to protect their networks. For example, they could monitor consumer behaviour to detect evidence of misuse.</p> <p>[See also the evaluation of point 5.8 below]</p>

3.2.12	BSkyB	Where consumers are aware of limitations, they often do not understand how limitations like traffic management will affect their service. BSkyB's research showed that 55% of respondents did not understand how traffic management would affect their broadband speed, or thought that it would have a low impact only.	Under Option C, a service subject to traffic management that has what is termed a "severe" effect on users, should not be described as "unlimited". However, CAP and BCAP do not consider that traffic management in and of itself is incompatible with an "unlimited" claim. As the Consultation Document noted, CAP and BCAP consider that there is a difference between the amount of usage and the speed of usage. Internet connections tend to vary in speed due to a variety of factors. Furthermore, different internet services have different requirements in terms of speeds. For instance, streaming audio has a lower speed requirement than streaming video content. This makes it more difficult to identify potential consumer detriment from traffic management. The available evidence suggests that, while there are concerns about more restrictive models of traffic management, less restrictive models are the subject of less consumer concern. For instance, BSkyB's research suggests that a significant proportion of consumers thought that it would have a low impact only. CAP and BCAP therefore consider that it is inappropriate to treat all variants of traffic management in the same manner as, for instance, charging per unit of excessive usage.
3.2.13	BSkyB	BSkyB's sent research, which found that, of respondents: <ul style="list-style-type: none"> - 64% believed that "unlimited" should mean no constraints or penalties for usage; and - 5% felt that "unlimited" should mean that speeds can be slowed beyond a usage threshold. 	
3.2.14	BSkyB	Allowing "unlimited" services with usage limits is likely to permit advertising that is in breach of the CPRs. Evidence suggests that a significant proportion of consumers are likely to be misled where "unlimited" is used to describe a service that has usage limits.	
3.2.15	BSkyB	Consumers who have been misled are likely to have taken different transactional decisions than they would otherwise have taken, especially as truly unlimited alternatives are available to services with FUPs.	As noted in the evaluation of points 2.2.13 and 2.2.14, the Review must give more detailed consideration to how the guidance should differentiate between the various traffic management practices under the auspices of an FUP. CAP and BCAP consider that the "severe" criterion in Option C should be incorporated into the guidance to address the question of the extent to which traffic management approaches are likely to be compatible with an "unlimited" claim. [See also the evaluation of point 5.13 below where the issues of network and traffic management are addressed in greater detail]
3.2.16	Two organisations requesting confidentiality	Unless the term "severely restrict" is defined it will cause an inconsistency of approach and implementation. "Severe" is a subjective benchmark and too vague to provide adequate guidance for advertisers.	In line with the evaluation of points 3.2.12-3.2.15, the term "severe" was used in the Consultation Document to denote practices that have a significant impact on users in a manner contrary to their expectations of an "unlimited" service.
3.2.17	An organisation requesting confidentiality	The respondent proposed that "severely restrict" should be defined as slowing a customer's speed down to lower than 1Mbit/s.	Although the Evaluation Document uses the terminology of the Consultation Document to ensure consistency with wording of the responses, CAP and BCAP acknowledge that the proposal as drafted is not sufficiently clear. They consider that traffic management is

3.2.18	BSkyB	<p>Option C can only meet CAP and BCAP's objectives of addressing the problem of traffic management affecting a consumer's service, if it is amended to prevent policies that "materially" restrict consumers' speeds.</p> <p>Slowing download speeds is a "material" restriction. For instance, at 20Mbit/s a HD movie can be downloaded in 30 minutes, whereas at 5Mbit/s it takes 1:30 minutes. The total data available at these speeds would be 9GB and 2.25GB respectively.</p>	<p>permissible but it must be moderate only. The maintenance of the use of the term "severe" might imply that this criterion is intended only to catch the harshest and most restrictive forms of traffic management, whereas the Consultation Document made clear that the intention was to identify those forms of traffic management that are likely to be contrary to a consumer's reasonable expectation of a service described as "unlimited".</p> <p>[See also the evaluation of point 5.13 below where the issues of network and traffic management are addressed in greater detail]</p>
3.2.19	BSkyB	<p>Current advertising practice is inconsistent with CAP's Help Note on Claims that Require Qualification, which states:</p> <ul style="list-style-type: none"> i. Any significant qualifications should be made one "step" less prominent than the primary claim. ii. Qualifications cannot be used where they constitute so great a qualification as to contradict the primary claim. 	<p>The proposal will still require advertisers to state the existence of an FUP in their advertising. However, under Option C, services with FUPs that involve severe traffic management should not be described as "unlimited".</p>
3.2.20	An organisation requesting confidentiality	<p>The term "legitimate user" requires further definition because each provider could interpret this differently resulting in different approaches to the use types of use that are considered "illegitimate".</p>	<p>Although the Consultation Document did explain the concept, CAP and BCAP acknowledge the need for clarity in the meaning of this term in relation to the proposals under Option C.</p>
3.2.21	An organisation requesting confidentiality	<p>If a "legitimate user" is one that uses a product in accordance with the terms and conditions, what is there to control what types of behaviour or activity are included in one provider's terms and conditions but not another?</p>	<p>The "legitimate user" does not carry out activities that are against the terms and conditions of the service, for instance, using a consumer service for business purposes or downloading copyrighted content without permission. However, providers may not simply use the terms and conditions as a means of imposing usage restrictions similar to those found under an FUP. The provision must be justifiable, for instance, it might be mandated by legislation.</p> <p>CAP and BCAP consider that the guidance should provide appropriate details of the criteria by which the ASA will assess what constitutes legitimate usage. However, they do not consider that it is appropriate to mandate what can be in providers' terms and conditions. These are business practices that are beyond the scope of the Codes. It is for providers to determine themselves whether the terms and conditions of their service justify advertising that service as "unlimited".</p>
3.2.22	BSkyB	<p>Option C is unclear about what a "suspension of service (or similar)" means. For example, is a 50% speed reduction similar to a suspension of service because the user receives only half of the previous bandwidth? Without further clarification, it is uncertain what "(or similar)" means and this may require otherwise unnecessary ASA adjudications to</p>	<p>The Consultation Document included the words "(or similar)" in the proposals under Option C to cover practices that do not strictly result in suspension of service, but have a similar impact on the user. However, CAP and BCAP acknowledge that the term is ambiguous and will clarify their intended meaning in the guidance.</p>

		resolve.	
3.2.23	Which?	<p>Option C still does not go far enough in restricting the use of “unlimited” claims in advertising.</p> <ul style="list-style-type: none"> i. Since definitions of FUP vary it is down to the discretion of the ISP to decide when usage becomes unreasonable. ii. Heavy users have no safeguard against penalties such as restricted speeds. 	<p>It is at providers’ discretion to set the parameters of their FUP. It is natural that there will be variations in the approach taken by different providers. However, the Review seeks to address the more fundamental point at issue, which is whether certain FUP practices render an “unlimited” claim likely to mislead.</p> <p>CAP and BCAP do not agree that there is no safeguard for heavy users. Under Option C the FUP must only affect the atypical user and any effect of traffic management must not “severely restrict” the user. However, as noted in the evaluation of points 3.2.16-3.2.18 above, the term used in the Consultation Document should be clarified to ensure its meaning is clear.</p>
3.2.24	Which? An Individual	Option C still allows the use of the word “unlimited”, where there is still a limit, as defined in the FUPs. This is a literal contradiction and is incompatible with the definition of an unlimited service.	[See the evaluation of point 4.1.1 below]
<p>OPTION D – Discourage advertisers from describing services that include an FUP that restricts usage in any way as “unlimited”.</p> <p>“Unlimited” usage claims are likely to mislead in advertisements for a service that is subject to a fair usage policy that limits the legitimate user’s usage of the service, whether by imposing a limit on the level of usage or the speed at which the service can be used.</p> <p>QUESTION 4: Do respondents agree that the proposed option as it is worded is sufficient to meet CAP and BCAP’s policy objectives? Please give reasons for your answer.</p>			
	Respondents making points in favour of the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
4.1.1	Which? Three Individuals	The word “unlimited” must be interpreted in its literal sense in order to protect consumers from being misled. “Unlimited” claims should not be used where the service is subject to FUPs which restrict legitimate users’ usage of the service or the speed they receive.	<p>CAP and BCAP note the concern that FUPs and other provider imposed limitations contradict the literal definition of an “unlimited” service. CAP and BCAP’s decision to launch the Review was based in part on the need they had identified to determine the extent to which that is true. However, in determining where the line will now be drawn, CAP and BCAP do not consider that an absolutely literal approach takes into account the limits which users are likely to expect during the course of their normal use of a telecommunications service and which do not cause them to take transactional decisions that they would otherwise not have taken.</p> <p>Telecommunications services are subject to a variety of limitations, many</p>

			<p>imposed by providers to structure their networks and facilitate the provision of service to the user. To require that telecommunications services must be literally unlimited as a test for whether the claim can be used in advertising is excessive and would, in CAP and BCAP's view, make it virtually impossible to use the claim at all. This would especially be the case for complex services like broadband that are subject to a variety of provider controlled limitations, like contention or signal attenuation, which, it could be argued, contradict the notion of the service being "unlimited" in the literal sense.</p> <p>Whilst the potential for literal contradiction is an important consideration, the ultimate test of whether an element of an FUP renders an "unlimited" claim problematic is whether the consumer is likely to be misled and make a transactional decision that they would not have otherwise made. Whereas practices such as charging for excessive use and suspension of service lead to considerable limitations, the impact of traffic management is sometimes less severe. As noted in the Consultation Document, the focus of complaints has been on services where FUPs are considered to be unduly restrictive. CAP and BCAP therefore consider that it is reasonable for "unlimited" to continue to act as a useful and legitimate descriptor for services intended for heavy users, as long as FUPs are not used to impose unreasonable limits on users' speeds.</p>
4.1.2	An Individual	The figures provided by Which?, quoted in the Consultation Document, underline the fact that the average consumer has been misled by the format of the advertisements used, where the FUPs are often not included, even in small or miniscule fonts.	Although the exclusion of a reference to the existence of an FUP in a marketing communication would breach the present policy, CAP and BCAP note the concern over the potential for consumers to be misled by the contradiction between an "unlimited" claim and the impact of an FUP. This is why they intend to publish new guidance recommending a change in current advertising practice.
4.1.3	BSkyB	This is the only option that meets the policy objectives and is necessary to proportionately respond to the substantial complaints received and the inconsistency of current advertising practice with CAP's Help Note on Claims that Require Qualification.	[See the evaluation of point 4.1.1 above]
4.1.4	Telefonica O2	We continue to believe that Option A is viable. However, if CAP and BCAP were to make changes to their current guidance, we could support a context in which all players in the market were prohibited from using the word "unlimited" to describe services, which can never be truly unlimited on a strict literal interpretation of the word.	CAP and BCAP acknowledge the importance of encouraging consistency and a level playing field for advertisers. They agree that a telecommunications service cannot be "truly unlimited" in the strict literal sense as they are all subject to the constraints necessary to provide the service. As such, CAP and BCAP will establish proportionate criteria to allow the ASA to deal with each instance on a case-by-case basis.
4.1.5	Which?	We cautiously agree that telecoms providers should be allowed to use the term "unlimited" in relation to services that are truly	CAP and BCAP note the distinction made by Which? Some providers have already adopted this type of approach to "unlimited" claims over the

		without limits to usage and speed such as simple web-browsing. However, in order to meet the policy objective, providers must refrain from using the term in a way that could lead consumers to believe that all types of services within the package are unlimited.	past 18 months. The guidance will make clear that the context of the “unlimited” claim is a key factor in assessing whether it is likely to be acceptable.
4.1.6	BSkyB	<p>Due to the way in which “FUP” has been used throughout the paper, we consider that Option D would clearer if it was amended as follows:</p> <p>“Unlimited” usage claims are likely to mislead in advertisements for a service that is subject to a fair usage policy that limits the legitimate user’s usage of the service, whether by imposing a limit on the level of usage or the speed at which the service can be used.</p> <p>Without this change, it could be understood that Option D applies only to services with a fair usage policy and does not therefore apply to services with a traffic management policy.</p>	<p>The term is used throughout the Consultation Document and this document is intended to refer to any policy, whether it is specifically called an “FUP” or not, by which a provider imposes a limit on the level of usage or the speed of usage. CAP and BCAP acknowledge the need to clarify what types of policy will fall under the scope of the guidance.</p> <p>[See also the evaluation of point 5.13 below where the issues of network and traffic management are addressed in greater detail]</p>
	Respondent making points against the proposal:	Summary of significant points:	CAP and BCAP’s evaluation and action points:
4.2.1	An Organisation Requesting Confidentiality	The fixed line broadband market is relatively mature and “unlimited” claims in advertisements for telecommunications services are understood by the average consumer to relate to services that are subject to an FUP. The number of complaints to the ASA about fixed line broadband has significantly declined over the last 24 months, from 108 in 2008 to 4 in 2010. This is evidence that the current advertising regime is understood and accepted by the vast majority of consumers.	[See evaluation of point 1.2.1 above]
4.2.2	An organisation requesting confidentiality	CAP and BCAP do not have the power to prohibit providers from describing a network product as “unlimited”, if it has a limit. Such power lies with the Courts who would have to consider whether such a prohibition did not go further than the CPRs and BPRs.	For the avoidance of doubt, neither Option D nor any other proposed option prohibits a marketing practice. CAP and BCAP intend to publish guidance to inform the industry on compliance with the Misleading Advertising sections of the Codes. The proposed guidance will recommend an approach that CAP and BCAP consider is likely to be acceptable within the legal framework but it will not proscribe other approaches. CAP and BCAP have made clear that all cases will be assessed by the ASA Council on a case-by-case basis. Nevertheless, they recognise the need to ensure that the guidance makes clear its nature and scope of application.

4.2.3	An organisation requesting confidentiality	Consumers value “unlimited” products for both data and non-data products in both the consumer and business markets. Option D will be detrimental to consumers because such products are popular and give the customer peace of mind and cost certainty.	CAP and BCAP do not consider that the popularity of an “unlimited” product among consumers is strictly relevant to the point at issue, nor that the guidance will prevent such products from being offered. Although “unlimited” claims are arguably a useful mechanism for describing a service that is intended or suitable for heavy users or those who are unsure about what level of usage they require, it is vital to ensure that consumers are not misled by advertising that features them.
4.2.4	Telefonica O2	Option D might make sense as a literal interpretation of the Code, but it will not work in practice. Consumers will potentially suffer detriment as they rely on “unlimited” as a concept and will not buy a package otherwise.	Although CAP and BCAP do not agree that there is evidence to suggest that consumers will be detrimentally affected by a change in advertising practice that refines the criteria for using “unlimited” claims, as the evaluation of point 4.1.1 made clear, Option D will not form the basis of the published guidance.
4.2.5	An organisation requesting confidentiality	Millions of consumers use “unlimited” products. The number of complaints received is very small. It cannot be reasonable, fair or proportionate for this small number to result in the prohibition of a service that millions of people want and enjoy especially when there is no such thing as a truly unlimited telecommunication service.	CAP and BCAP do not agree that the proportionately small number of complaints received by the ASA presents a full picture of the scale of the problem. Principally, there is significant potential for consumer detriment when considering the proportion of telecommunications product consumers who, under the current policy, could be considered an “atypical user”. Up to 2% of this group is a very significant number of consumers, more so if the fact that many consumers have multiple telecommunications services is taken into account. Nonetheless, CAP and BCAP acknowledge the concern that Option D is likely to be overly restrictive.
4.2.6	An organisation requesting confidentiality	Option D could lead to an increase in cost of telecommunications products. If consumers demanded “unlimited” products providers would want to provide them. However, if no limits were allowed, providers would have to find a way to protect their voice networks from abuse and invest heavily in extra capacity in their data networks.	CAP and BCAP do not consider that this is relevant to the Review. Providers may protect their networks in whatever way they see fit. The proposals do not restrict advertisers in marketing or providing their services to consumers. The guidance merely seeks to establish whether certain FUP practices render an “unlimited” claim likely to mislead.
4.2.7	An Organisation Requesting Confidentiality	For the vast majority of customers the term “unlimited” accurately describes the service that they will receive from service providers.	[See the evaluation of point 1.2.3 above]
4.2.8	Vonage An Organisation Requesting Confidentiality	Consumers will be detrimentally affected by any change to the current policy, which enables service providers to provide a consistent and simplified service offering. i. Many consumers who do not fully understand the level of data they will require on a monthly basis. Multiple packages with different limits could cause confusion. ii. Providers may use alternative explanations to describe data allowances that will create confusion and ambiguity	[See the evaluation of point 1.2.4 above]

		for the average consumer.	
4.2.9	An Organisation Requesting Confidentiality	There are difficulties with qualifying an absolute term such as “unlimited”. We believe that, in the case of data usage, the exception to this approach should be maintained.	[See the evaluation of point 1.2.5 above]
4.2.10	Consumer Focus	<p>The use of the term “unlimited” is appropriate in relation to reasonable traffic management practices that allow the proper functioning of the network. However, we object to applying the term to traffic management practices in order to camouflage discriminatory practices arising from anti-competitive behaviour, access restrictions and traffic degradation experienced by the end users.</p> <p>At present, there is no official benchmark of what constitutes legitimate traffic management practice in the form of regulation or a recognised self-regulatory code. In practice, this means that claims of so called ‘reasonable’ traffic management practices phrased under the term ‘unlimited’ are likely to be exposed to ambiguous interpretation and potential abuse. Therefore, until the benchmark for reasonable and legitimate traffic management is established, we recommend ASA applies the term ‘unlimited’ to information on all traffic management policies under the CAP and BCAP Codes in order to duly comply with the new legislation requirements.</p>	<p>CAP and BCAP note Consumer Focus’s view on the permissibility of traffic management. However, they disagree that the absence of an established benchmark or self-regulatory code renders an “unlimited” claim problematic, if it is subject to traffic management. While CAP and BCAP note the specific concerns cited by Consumer Focus, the issue of traffic management, as noted throughout this document, is highly complex and is not one which can be easily generalised.</p> <p>Furthermore, CAP and BCAP disagree that they must reserve judgement on what a reasonable benchmark for traffic management is. They have committed to producing guidance for the industry in line with their general objective of ensuring that the average consumer is not likely to be misled. It is implicit to the Review that the guidance produced will not be a static document. It will be updated in the future to address any changes to technology, advertising practice, consumer understanding or the legislative framework as they arise.</p> <p>[Net neutrality is addressed in the evaluation of point 5.13 below alongside points relating to network management.]</p>
4.2.11	Ofcom	<p>The word “unlimited” is used in different contexts to describe different aspects of the service and whether its use is misleading depends on the specific context in which it is used. For example, some ISPs advertise “unlimited” broadband whereas others advertise “unlimited downloads” or “unlimited usage”. We consider that where “unlimited broadband” is advertised the service in question should not be subject to either traffic management or download limits.</p> <p>Where a service is advertised as “unlimited downloads” or “unlimited usage” it may not be misleading if the service in question employs some form of traffic management (e.g. slowing of all peer-to-peer traffic, or slowing the speed of very heavy users during peak times when they exceed a threshold) provided the context indicates that use of the term “unlimited” refers to the amount of downloads rather than the service in its entirety, and the existence and nature of the traffic management are both made clear.</p>	<p>CAP and BCAP agree with Ofcom’s general point that the context of an “unlimited” is important. For instance, an “unlimited broadband” claim is materially different from an “unlimited browsing” claim. The latter is an activity, which is an element of the former that might not be subject to limitations under and FUP or traffic management that affect the wider service.</p> <p>CAP and BCAP do not however agree with Ofcom’s assertion of how consumers understand different types of “unlimited” claim. We have seen no evidence to suggest that consumers would make a distinction between “unlimited broadband” and “unlimited downloads” and marketing communications commonly use the terms interchangeably. Downloading is arguably the key element of a broadband service for the vast majority of consumers and is also generic to virtually all internet applications and uses. To apply different qualification requirements to different types of claim, without evidence to suggest that consumers regard there to be a distinction, goes against CAP and BCAP’s aim of ensuring a consistent and proportionate approach. Nevertheless, the guidance will make clear the importance of context in assessing whether an “unlimited” claim is</p>

			likely to mislead. [See also the evaluation of point 4.1.5 above]
4.2.12	Ofcom	Whether consumers are being misled by use of the term “unlimited” where speed of access has been reduced by, for instance, traffic management, is likely to depend on what ancillary information is provided. For example, if an ISP states with a sufficient degree of prominence and clarity that a usage threshold applies, describes where the threshold lies and sets out what the consequences of exceeding the threshold are (e.g. “unlimited downloads - after 50GB of downloads per week, speeds will reduce by half”) it is unlikely to mislead.	In line with the evaluation of point 4.2.11 above, CAP and BCAP do not consider that it is reasonable to permit the qualification of an “unlimited” claim where that qualification is likely to contradict consumers’ reasonable expectation of an “unlimited” service. The guidance will recommend that certain types of traffic management are likely to be acceptable provided that they are qualified. However, the primary criteria for the acceptability of these practices will not be the disclosure of information in the marketing communication, but the test outlined in evaluation of points 3.2.12-3.2.15. As noted above, it is an established principle of advertising policy that qualifications should not be so significant as to contradict the original claim. [See also the evaluation of point 5.13 below where the issues of network and traffic management are addressed in greater detail]
QUESTION 5: Do you have other comments or observations on CAP and BCAP’s Review that you would like taken into consideration as part of their evaluation of responses?			
	Respondent:	Summary of significant points:	
5.1	BSkyB	In carrying out this Review, it is important that CAP and BCAP: <ul style="list-style-type: none"> i. Take proportionate, accountable and evidence based action that is technology neutral and does not favour any particular form of broadband access; ii. Have regard to the maximum harmonisation obligations imposed by the Unfair Commercial Practices Directive and ensure that advertisements for broadband services are unlikely to mislead the average consumer into making a transactional decisions that they would not otherwise have made; and iii. Act objectively and within the scope of their respective powers to regulate misleading claims in advertising. 	CAP and BCAP have taken these points into consideration.
5.2	An organisation requesting confidentiality	This consultation is about advertising, not contractual offers. The law treats advertisements as invitations to treat and it is very important to always bear this in mind.	CAP and BCAP have taken this point into consideration.

5.3	BSkyB	Paragraph 1.3 of the Consultation Document acknowledged that “unlimited” services are intended, by their nature, to be for heavier users and, therefore, should ensure that the Options proposed are critically assessed according to the expectations of a heavy user when considering the “average consumer” for the purposes of the CPRs.	Although they consider that “unlimited” packages are not likely to be of interest to heavy users only, CAP and BCAP acknowledge this point.
5.4	An organisation requesting confidentiality	Two more points should be added to CAP and BCAP's objectives: <ul style="list-style-type: none"> i. The guidance should result in consistency across the industry as to what “unlimited” means and what happens if any FUP is breached; and ii. The guidance should allow providers to employ fair measures to protect their networks from abuse. 	As noted in the evaluation of point 1.1.13, CAP and BCAP do not consider that it is appropriate for the guidance to be overly prescriptive. The legal framework of CPRs prevents CAP and BCAP from taking any such steps. The objective is to produce guidance outlining an approach to use of “unlimited” claims that is likely to be compliant with the Codes. [See the evaluations of points 2.2.6 and 2.2.7 above]
5.5	Everything Everywhere	Telecommunications advertising should be open and transparent but this must be balanced with a flexible scheme of regulation that does not unduly fetter providers in their marketing to consumers.	It is not CAP and BCAP's intention to unduly fetter providers. The Review seeks to address evidence of consumer concern and to ensure that advertising for services within its scope does not mislead. As outlined above, the Review will result in guidance that will establish a proportionate set of requirements for the use of the term “unlimited” and, as the Consultation Document made clear, advertisers may deviate from the approach, if they can adequately justify their approach to the ASA.
5.6	An Individual	Consumers have a reasonable expectation that words used in advertisements should have the normally accepted dictionary meaning for those words.	[See the evaluation of point 4.1.1 above]
5.7	BSkyB	As bandwidth intensive services such as BBC iPlayer become mainstream, both consumers' increasing data requirements and the impact of limitations, make it difficult to use “unlimited” to describe services that in fact have provider controlled limitations.	As indicated in the Consultation Document, CAP and BCAP acknowledge that the increasing demands of bandwidth intensive services, as part of wider technological developments in the telecommunications sector, are a factor in the decision to review the ASA's present policy.
5.8	An organisation requesting confidentiality	It is not possible to treat data and telephony services in the same way and so we encourage CAP to reconsider its decision to include both under the same proposals for guidance.	Although they acknowledge the differences between platforms, CAP and BCAP consider that it is important to ensure a reasonable level of consistency in the approach recommended by the guidance. CAP and BCAP have endeavoured to assess the average consumer's reasonable expectations of a service advertised as “unlimited”. As noted in section 1.1, the term has a general and widely accepted meaning beyond advertising. It is therefore for providers to demonstrate that consumer expectations differ for different products. CAP and BCAP are not satisfied that consumers have differing expectations of the nature the respondent implies. Firstly, instances of

			<p>charging and suspension are considerably to the consumer's detriment and the ASA has received a series of complaints about telephony networks in this respect. Furthermore, telecommunications products are primarily sold in bundles, which make a consistent approach particularly desirable. Moreover, CAP and BCAP have made clear that there are other means of protecting telephony networks from misuse.</p> <p>Finally, CAP and BCAP would also emphasise that, if there are significant obstacles to a provider being able to offer a service as "unlimited", the provider should consider other options for describing their service in advertising.</p> <p>[See also the evaluation of point 3.2.11 above]</p>
5.9	An organisation requesting confidentiality	In the Consultation Document CAP and BCAP asked whether consumers are moderating their usage to ensure they do not breach FUPs. CAP and BCAP have not supplied any evidence to support this possibility. The respondent presented evidence contending that it was not occurring. The evidence showed that the vast majority of customers are nowhere near the threshold in the FUP.	The Consultation Document questioned whether this was the case. CAP and BCAP do not believe that it is unreasonable to expect that consumers faced with certain sanctions for exceeding a usage limit might moderate their behaviour and find themselves unable to use the service in the manner they might have expected when making their transactional decision. Evidence from complaints received by the ASA suggests that consumers are concerned about the potential to be charged for excessive usage.
5.10	An organisation requesting confidentiality	Do CAP and BCAP believe the average consumer measures the time they spend on each call or the data they use each time they go online to ensure they do not breach an FUP?	CAP and BCAP do not believe that the average consumer measures their usage as a matter of course. They consider that this only underscores the potential problems for consumers who are unaware of how their usage fits within the requirements of an FUP.
5.11	BSkyB	<p>Advertisers may need to protect their networks, but they do not need to use the word "unlimited" in advertising. As a practical response to this issue, there are many alternatives to "unlimited" claims and there is no justification this word being used differently in telecoms advertising than in any other area of advertising, for example:</p> <ul style="list-style-type: none"> i. Usage caps can be stated; and ii. Other words are available confer heavy usage benefits without contradiction (e.g. Anytime, Max, etc). 	CAP and BCAP have taken this point into consideration.
5.12	Which?	The issue of misleading advertisements goes beyond the use of "unlimited" claims and should include a review of branding and marketing practices. Some package names for instance, suggest that a service is unlimited when in reality it is capped.	CAP and BCAP do not consider that this is within the scope of the Review, which is concerned with advertising claims only.
5.13	BSkyB	Consumers need to be aware that FUPs are broader than just	CAP and BCAP consider that, under Option C, the guidance should

		<p>traffic management. CAP and BCAP have used “FUP” as an umbrella term to describe different aspects of network management. However, we consider it important to describe these in further detail both to assist in distinguishing qualifications from additional information and in understanding the parameters of a truly unlimited service.</p> <ul style="list-style-type: none"> i. Acceptable use policies (AUPs), which apply to all customers and set the parameters of legitimate usage and may, for example, prohibit commercial uses of a residential service, illegal acts or the malicious distribution of spam. These policies do not qualify an “unlimited” claim and as such should be referred to by way of additional information only. ii. FUPs, which only exist for “unlimited” products (as limited products are subject to a transparent usage cap) and apply to all customers. In practice these should not affect consumers’ usage of their service because they are intended to address usage that is so extreme that it is beyond the reasonable expectation of any legitimate consumer taking a residential or business service (as applicable). These policies are incompatible with an unlimited service because they limit legitimate usage. iii. Traffic and network management policies, which can apply to either some or all customers depending on the policy concerned and reduce a customer’s speed and therefore their ability to consume network bandwidth. These policies are incompatible with an unlimited service because they limit legitimate usage. <p>We recommend that CAP and BCAP explain these distinctions in any guidance because using “FUP” as an umbrella term confuses the facts that Acceptable Use Policies are consistent with an “unlimited” product, while FUPs and traffic management policies are not.</p>	<p>outline the criteria by which the ASA should assess: a) whether a traffic management practice is “severe” [see the evaluation of points 3.2.16-3.2.18] and b) the types of traffic management that might be compatible with the use of an “unlimited” claim within the scope of the guidance.</p> <p>In response to (a), CAP and BCAP consider that the overarching element of any assessment must be consumers’ reasonable expectations of a service advertised as “unlimited”. CAP and BCAP do not consider that there is a reasonable basis on which to adopt an arbitrary benchmark figure proposed in point 3.2.17 above.</p> <p>With reference to the respondent’s proposal in point 3.2.18 for adopting a test of materiality, CAP and BCAP are mindful that the Review dealing with “up to” broadband speeds has found that the ASA’s ‘meaningfulness’ test for speeds, whether consumers could achieve speeds of 6Mbit/s, is no longer an appropriate benchmark. Instead, CAP and BCAP consider that the onus should be on the advertiser to demonstrate that the traffic management practice they implement is moderate only. As an illustration, CAP and BCAP note the speed of the internet varies during the day and consider that, as a consequence, consumers are likely to be more accepting of similar reductions in speeds during busy times i.e. moderate forms of traffic management. CAP and BCAP consider that this would fall within the consumer’s reasonable expectation of a service advertised as “unlimited”.</p> <p>In response to (b) and the points raised by BSkyB, the scope of the guidance should encompass claims that are likely to have the same meaning for consumers.</p> <p>The ASA may ask providers to justify the provisions included within an AUP if a complainant challenges that they contradict the likely meaning of “unlimited”. If an AUP is used as a proxy for the types of restrictions to legitimate users that are currently found in FUPs and traffic management policies and the service is consequently limited in a way that consumers might not have expected from a service advertised as “unlimited”, the ASA is likely to find the advertising misleading.</p> <p>Consumers are likely to expect that they can use a service as much as they might want to, if it is advertised as “unlimited”, but FUPs can contain provisions to curtail usage. Providers should be able to demonstrate that they do not do so severely. Application-based traffic and network management policies are also limitations on “unlimited” usage, although they are not a consequence of user behaviour. CAP and BCAP consider that these should also be considered on a case-by-case basis under the scope of the guidance.</p>
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5.14	An organisation requesting confidentiality	Any products that do not have a limit and/or an FUP, which is to be distinguished from an AUP, fall outside the scope of the guidance.	As per the evaluation of point 5.13, CAP and BCAP do not consider that AUPs are beyond the scope of the guidance, given the potential for providers to use the AUP to apply restrictions on the usage of legitimate users in a way that contradicts the advertising of the service as “unlimited”.
5.15	Virgin Media	FUPs should be properly defined. The term should not include broader network management measures. Broadband traffic management is a complex area where confusion can easily arise. Certain high speed networks require the use of traffic management to ensure both the customer’s ability to achieve unlimited downloads and to ensure that they achieve the advertised quality of service.	As per the evaluation of point 5.13, CAP and BCAP do not consider that broader network management measures are beyond the scope of the guidance. They are limitations on usage imposed by providers. However, using the criteria outlined in the guidance, the ASA will assess whether an “unlimited” claim is likely to mislead, if the service advertised is subject to “severe” limitations.
5.16	Ofcom	There is a distinction between traffic management policies, which affect the speed experienced by particular users, often called subscriber-based traffic management, and those which apply more generally to all users, application-based traffic management. Given the variations in how the word “unlimited” is used, however, we do not believe that it is appropriate to make a blanket distinction between subscriber-based traffic management and application-based traffic management in determining whether the use of “unlimited” is potentially misleading.	CAP and BCAP acknowledge Ofcom’s point about the distinction between different types of traffic management and how they relate to FUPs and “unlimited” claims.
5.17	BSkyB	Consumers need to know that truly unlimited services exist. CAP and BCAP state at paragraph 2.1 that “no telecommunications service [...] can exist in an absolute sense”. However, it is important that consumers are not given the impression that unlimited end user services do not or cannot exist, particularly given that Sky already offers such a service. This may lead some consumers to understand that they have no alternative and disadvantage truly unlimited providers.	<p>CAP and BCAP note the respondent’s point about the service that they offer and acknowledge their concern that consumers should have the necessary information to make informed choices. However, CAP and BCAP do not agree that a service, which is not subject to an FUP, can simply be defined as “truly unlimited”. Telecommunications services are subject to a variety of limitations necessary to facilitate the provision of the service.</p> <p>At the same time, CAP and BCAP do not take a position on whether a “truly unlimited” service actually exists; they have sought only to identify the criteria that are relevant to the assessment of an “unlimited” claim. It will be for the ASA to make that assessment on a case-by-case basis while having regard to the relevant elements of the guidance.</p>
5.18	Consumer Focus	The term “unlimited” should also take account of traffic management practices commonly applied by ISPs to manage traffic on their networks. We would like to point out that the revised EU electronic communications regulatory framework to be transposed into UK law by the end of May 2011, sets the	The implementation of the Directive is a matter for the Department of Culture Media and Sport and Ofcom. However, CAP and BCAP do not consider that the proposed guidance note conflicts with the provisions of that Directive. They would point out that the provision of information by providers, for instance in the terms and conditions of a contract, is

		new transparency rule that requires ISPs to inform consumers about the nature of the service to which they are subscribing, including traffic management techniques and their impact on service quality, as well as any other limitations such as bandwidth caps or available connection speeds.	beyond the scope of the guidance and relates to a provider's business practices in informing consumers of the nature of their service. Furthermore, the respondent's point about the provision of information misses the fundamental question of whether "unlimited" claims made in advertising for services that employ certain FUP practices are likely to mislead and cannot be disclaimed but only contradicted by other information in the advertising.
5.19	Which?	While we are not opposed to traffic management practices as such, we are nevertheless concerned about the potential impacts on net neutrality. Which? strongly believe that where traffic management is applied it should respect this principle and not interfere with user's speed or usage on the basis of them using specific services such as BBC's iPlayer for instance. Throttling, where used, should be blind to the type of internet service and only focus on the task of ensuring an adequate and smooth service to the majority of consumers which use their connection in a reasonable way.	CAP and BCAP consider that the criteria laid out in the evaluation of point 5.13 are adequate to inform the ASA in their assessment of the use of an "unlimited" claim to describe a service that employs traffic management or network management practices. They do not consider, however, that issues of net neutrality are directly relevant to the advertising and the Review. Should the on-going debate over this issue result in a change to statute that has an impact on the position established by the guidance, CAP, BCAP and the ASA will take the appropriate steps to ensure that ASA policy is consistent with the law.
5.20	Telefonica O2	Although the present policy should be maintained, there must be clearer guidance around what an "atypical user" is to clarify the thresholds for "unlimited" products.	The "atypical user" concept is an element of the existing ASA policy and, in line with CAP and BCAP's stated intention to develop several Options for the guidance based on the ASA's position, it was added to Options B and C. However, CAP and BCAP consider that the concept should not be incorporated into the guidance. The test has been superseded by the criteria protecting the "legitimate" user from additional charges or suspension of service and "severely" restrictive forms of traffic management.
5.21	Virgin Media	If CAP and BCAP do not make the distinction between speed and usage, all other network impacts affecting speed, including contention and line length should also preclude providers from using the claim "unlimited"	CAP and BCAP acknowledge Virgin Media's concern over the distinction between the two concepts and made the point clear in the Consultation Document. Whilst CAP and BCAP do not accept that they are entirely separate, the Consultation Document and this document have attempted to take proportionate account of the difference and the likely impact in line with consumer expectations. This is why CAP and BCAP have opted to base the guidance on Option C, which makes a distinction between practices such as charging for excess use and traffic management. CAP and BCAP do not, however, agree with the subsequent point that failure to make an absolute distinction between the two will result in all the factors listed being taken into consideration.
5.22	Virgin Media	'Speed' and 'usage' should not be conflated. There are many individual network factors that affect the speed a user can achieve; these are not limited to network and traffic management and include factors like line length, the user's	Signal attenuation, for example, is fundamentally different to traffic management policies or network management policies. It has a fixed impact on each individual consumer that is not set by the ISP. It affects all aspects of their service, but mainly the maximum speed that the

		hardware, congestion, contention ratio, protocol specific traffic shaping. These affect the speeds available to the user at any given time but do not impact on the total level of usage.	<p>consumer can receive. CAP and BCAP consider that it is not a limitation on “unlimited” usage but a parameter of what consumers can expect i.e. it is possible to have “unlimited” usage of a service that is subject to significant signal attenuation. However, the potential effects of signal attenuation should be made clear in marketing communications in order to appropriately set consumer expectations; this issue is dealt with by the “up to” broadband speeds element of the Review.</p> <p>CAP and BCAP consider that this distinction should also be applied to the other factors listed. For instance, an individual user’s hardware set-up is not the provider’s responsibility and general congestion on the internet is similar to signal attenuation in that it is inherent to the network. By contrast, contention is, to an extent, a factor under the control of providers, and could therefore be considered against the criteria laid out in the evaluation of point 5.13 above.</p>
5.23	An Individual	The use of contention factors appears to be ignored in the application of limits, being dressed up in the euphemism “traffic management”. The acknowledgement of the use of “traffic management” is a statement by the providers that they already limit the connection speed and this must, by definition, be considered as part of this consultation. I would strongly suggest that the use of “traffic management” be investigated, particularly as the providers appear to be heading towards the removal of net neutrality and the implementation of yet another “limit”.	[See the evaluation of point 5.22 above]
5.24	An Individual	The provider's backhaul may have a limited capacity for a given number of users. To enable 'fair use', where there is insufficient bandwidth available, that bandwidth should be shared equally between the contending users giving each an equal capacity to utilise the service. This should be tied to a minimum service level guarantee to ensure the service remains usable for all customers.	CAP and BCAP consider that this point goes beyond the scope of the Review and refers to the business practices of providers.
5.25	An organisation requesting confidentiality	The respondent provided data demonstrating that their business customers preferred “unlimited” packages, which gave them cost certainty when budgeting.	<p>As CAP and BCAP have noted, any perceived benefit to the use of the term “unlimited” to describe a telecommunications service must be considered against the potential for consumers or businesses to be misled where the service is subject to limitations that are contrary to their likely expectations of an “unlimited” service.</p> <p>[See also the evaluation of point 4.2.3 above]</p>
5.26	An organisation requesting	There are significant costs beyond advertising concerns that must be taken into account if CAP and BCAP recommend a	CAP and BCAP acknowledge the respondent’s concern over the cost to providers of any change to advertising practice on “unlimited” claims. In

	confidentiality	<p>move away from the status quo. Along with these costs it would be unreasonable to expect, especially the larger providers to be able to carry out the necessary business changes within the six month grace period specified in the consultation document.</p> <p>The changes would include:</p> <ul style="list-style-type: none"> - System Changes Required - Billing System and Bill updates - Product Code Changes/System updates to the product platform - Reporting Platform - Internal Sales tool systems (used to update sales people and generate customer tailored material) - Marketing Systems/After Care Customer Systems (generates welcome letters, anniversary letters, marketing notices etc) - Governance System changes - Customer collateral updates needed to all product related material - Website update/design changes - Customer Notification: we would need to consider the impact on existing customers as they may well become confused and concerned about a name change to their existing product; - Internal re-training and briefing: as we have been using “unlimited” claims for some time we would need to schedule training time to our sales people so they adhered to the change. 	<p>particular, they note the respondent’s concern over the Consultation Document’s proposal for a six month period of grace for existing advertising campaigns and the immediate application of the new guidance for new campaigns that might already be in development.</p> <p>CAP and BCAP would remind the respondent however, that changes required to advertising by an ASA adjudication would require an advertiser to amend an advertising campaign immediately. Furthermore, CAP and BCAP gave notice to the telecommunications industry that a Review was considering the present policies in mid-2010. As such they consider that the proposal for a six month period of grace is proportionate.</p> <p>CAP and BCAP consider, however, that, in the interests of simplicity and in recognition of the business changes providers will have to make, the period of grace of six months will apply to both existing and new campaigns.</p>
5.27	Vonage	<p>We would propose an alternative option as follows:</p> <p>“Unlimited” usage claims where a service is subject to an FUP are likely to mislead unless:</p> <ul style="list-style-type: none"> i. The FUP is fair and reasonable; it must affect only atypical users; and ii. The existence of the FUP is referenced in the advertisement through the use of an asterisk which would refer to a footnote stating clearly: <ul style="list-style-type: none"> a. that a FUP applies; b. the applicable reasonable usage limit (e.g. [x] minutes); 	<p>CAP and BCAP consider that this proposal matches the present ASA approach. For the reasons outlined in the responses to Question 1, CAP and BCAP do not consider that it represents a viable option for consideration.</p>

		<p>c. that as a consequence of exceeding the usage limit additional charges may be incurred or services may be suspended or terminated.</p> <p>Paragraph (c) is necessary because any FUP would be unenforceable and of no use if appropriate action cannot be taken against atypical users. The fundamental point though is that paragraph (c) serves notice on customers of the potential consequences of unreasonable and atypical usage.</p>	
5.28	An organisation requesting confidentiality	<p>As an alternative proposal, the following conditions should be added to current policy:</p> <ul style="list-style-type: none"> i. An FUP should only be considered acceptable if it only excludes up to 2% a customer base as 'atypical' users. This figure is derived from ASA precedents. ii. The only permissible sanctions for breaching an FUP are: <ul style="list-style-type: none"> a. Charging standard rates for excessive use for voice/text traffic; b. Managing the traffic of individual users for data traffic; and c. Suspending/terminating the contract after two written warnings. iii. All of the above should be stated in advertising. <p>If these conditions are added to the current rules we submit that they will satisfy the Policy Objectives because:</p> <ul style="list-style-type: none"> i. Consumers are unlikely to be misled if they know: <ul style="list-style-type: none"> a. What level an FUP is set at; b. That the FUP only affects up to 2% of customers; and c. What sanctions for breaching the FUP are. ii. It will result in consistency across the industry as to what each provider means by "unlimited" and what happens if their FUP is breached. iii. It allows providers to protect their networks from abuse. 	CAP and BCAP consider that this point goes beyond the scope of the Review and refers to the business practices of providers.

5.29	An Organisation Requesting Confidentiality	An option might be to amend the terminology commonly used and rather than call such a policy, rename it 'Anti abuse policy' so that its purpose is made clear.	CAP and BCAP consider that this point goes beyond the scope of the Review and refers to the business practices of providers.
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