

Consultation on speed claims in broadband advertising

Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice's (BCAP's) proposals for new guidance on the use of speed claims in broadband advertising

Issue date: 04/05/2017

Closing date: 13/07/2017



Contents

1. Executive summary	3
2. Introduction to UK advertising regulation.....	5
3. Regulatory framework of the BCAP Code	7
4. Background: speed claims in broadband advertising	8
5. Policy background	10
6. CAP and BCAP's decision to consult	15
7. CAP and BCAP's options for a new recommended approach.....	24
Contact us	25

1. Executive summary

CAP and BCAP are consulting on proposals to introduce new guidance on speed claims in broadband advertising. This guidance will be taken into account by the Advertising Standards Authority (ASA) when it considers complaints about broadband speed claims in advertising.

Access to broadband services has become increasingly important to the UK's population. Broadband connections are used for a variety of activities, including entertainment, work, education and social media, for which users require different speeds. CAP and BCAP's regulation of the advertising of broadband speed claims must strike a balance between ensuring that advertisers are free to promote features of their products (like speed) that are important to consumers' transactional decisions, and ensuring that consumers are not likely to be misled by the advertising of those features into taking transactional decisions they would not otherwise have taken.

The speed of broadband services depends on a number of factors; the impact of these factors varies between technologies, service providers and between users of the same provider. This means that no single figure can accurately describe the actual speeds likely to be received over time by all potential users of a service who might see a particular ad. One-to-many advertising cannot reasonably be expected to provide the same amount of information as, for example, a salesperson or the full terms and conditions of a contract, and it plays only one part in the broader sales process. Despite the challenges of communicating the varying achievable speeds of products – and factors affecting these – to a large number of consumers in individual ads, CAP and BCAP must ensure that consumers are not likely to be misled.

The current [guidance](#) was introduced in April 2012 and focused on the use of maximum speed claims that were, and still are, often used by advertisers. It recommends that advertisers only use maximum speed claims that are achievable by at least 10% of customers and are preceded with the words “up to”, qualified, where appropriate, with information to help manage consumers' expectations of achievable speeds and the factors affecting them.

ASA research and pre-consultation with the industry suggests that ads following the current recommended approach still have the potential to mislead. Consequently, CAP and BCAP are consulting on the following options for change:

- a median download speed measured at peak-time or over 24 hours; or
- a range of download speeds available to the 20th to 80th percentile of users measured at peak time or over 24 hours.

New guidance will seek to better reflect and manage consumers' expectations and ensure that they are not likely to be misled. These options focus on the use of speeds that are achievable for many or most consumers, as opposed to the current recommended approach that speeds are achievable by at least 10% of consumers. The guidance will cover the basis of speed claims, their description in advertising and the substantiation that the ASA is likely to require to support them.

The legal framework in which CAP, BCAP and the ASA operate means that advertising must be assessed on a case-by-case basis to determine whether claims, such as those for broadband speeds, are misleading. Guidance can neither prescribe information that must be contained in advertising generally, nor proscribe certain approaches to advertising generally. Accordingly, the new guidance will recommend an approach that CAP and BCAP consider is likely to be acceptable and not likely to mislead consumers: if complaints are received that a particular ad that does not follow the recommended approach is misleading, the ASA will require the advertiser to explain why the ad in question is not misleading. If advertisers are unable to do this, they run the risk of an upheld ruling by the ASA.

Respondents are asked to indicate which of CAP and BCAP's options they favour and their rationale for this. CAP and BCAP also invite respondents to provide reasons for rejecting options and alternative options / wording of their own, and to give a view on the scope of the guidance.

The consultation will close at **5pm on 13 July 2017**. For more information on the next steps, please see section 7 and, for full details of how to respond to the consultation, please see Annex 1.

2. Introduction to UK advertising regulation

2.1 The Committee of Advertising Practice (CAP)

CAP is the self-regulatory body that creates, revises and enforces the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing ([the CAP Code](#)). The CAP Code covers non-broadcast marketing communications, which include those placed in traditional and new media, promotional marketing, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from rulings by the Advertising Standards Authority (ASA), or further sanctions including the denial of media space.

CAP's members include organisations that represent advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those organisations agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained.

By practising self-regulation, the marketing community ensures the integrity of advertising, promotions and direct marketing. The value of self-regulation as an alternative to statutory control is recognised in EC Directives, including [Directive 2005/29/EC](#) (on misleading advertising). Self-regulation is accepted by the Department for Business, Energy and Industrial Strategy and the courts as a first line of control in protecting consumers and the industry.

Further information about CAP is available at www.cap.org.uk.

2.2 The Broadcast Committee of Advertising Practice (BCAP)

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising ([the BCAP Code](#)) under agreement with the [Office of Communications](#) (Ofcom). Ofcom has a statutory duty, under the [Communications Act 2003](#), to maintain standards in TV and radio advertisements. In 2004, Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in recognition of CAP and the ASA's successful regulation of non-broadcast marketing for over 40 years, and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to adhere to the standards set out in the BCAP Code.

BCAP members include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). Under Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule-making is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Further information about BCAP and the AAC is available at www.cap.org.uk.

2.3 The Advertising Standards Authority

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertising is legal, decent, honest and truthful.

The ASA assesses complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the [ASA's website](http://www.asa.org.uk) and made available to the media. If the ASA Council upholds a complaint about an ad, it must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions.

Information about the ASA is available at www.asa.org.uk.

2.4 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The [Communications Act 2003](#) (the Act) sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to this consultation is:

[319\(2\)\(h\)](#) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The Act requires Ofcom to set and, from time to time, review and revise, a Code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#).

Ofcom has contracted out the setting of advertising standards to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and Specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and agreement of Ofcom.

4. Background: speed claims in broadband advertising

4.1 Types of broadband services

In recent years, access to broadband has become increasingly important to the UK's population. Broadband connections are used for a variety of activities, including entertainment, work, education and social media. The main types of technology through which the internet is accessed can be described as follows¹:

- **ADSL (asymmetric digital subscriber line)** technology delivers broadband using the standard copper telephone line. The connection speed provided by ADSL will depend on which type of ADSL is available where the consumer lives and the quality and length of the line from the telephone exchange to the consumer's home (the longer the line, the slower the consumer's ADSL broadband will be).
- **Cable** technology uses fibre-optic lines, which are made of glass or plastic, to transport data from the exchange to a point near the consumer's home (a street cabinet). From here, a form of copper-based cable (called a coaxial cable) is used to transmit data to the consumer's home. Unlike with ADSL, speeds are not lost with distance over cable connections.
- **Fibre-to-the-cabinet (FTTC)** technology uses fibre-optic lines to transport data to a point near the consumer's home (a street cabinet), and from here data is transmitted to the consumer over a standard copper telephone line. This means that with FTTC there will be some loss in speed from the street cabinet to the consumer's home, but this loss is less than with ADSL.
- Other types of broadband connection are available, such as fibre-to-the-premises (FTTP), satellite broadband, and home broadband provided over 4G mobile networks.

4.2 Broadband speeds

Some online activities need faster connection speeds than others to work well. For example, streaming an HD film requires a faster speed than surfing the web or accessing emails. Similarly, as the number of connected devices (PCs, laptops, tablet computers, games consoles, mobiles etc.), and people per household increases, so will the speed required.

The speed of an internet connection is measured in megabits per second (Mbit/s). A megabit is a unit of data, so the speed of an internet connection refers to how quickly units of data can be transmitted over it. Ofcom currently states that a connected speed of at least 10Mbit/s is necessary to deliver an acceptable user experience of broadband². Speed is an important factor in consumers' decisions about which

¹ Source: Ofcom, [UK Home Broadband Performance, March 2016: The performance of fixed-line broadband delivered to UK residential consumers](#) (Ofcom's 2016 Performance Report), p. 1 -2

² Source: Ofcom, [Making communications work for everyone, February 2016: Initial conclusions from the Strategic Review of Digital Communications](#), p.3

service to use, and many products are marketed on the basis of the theoretical maximum speed available.

4.3 Factors affecting performance of broadband services

A number of factors affect the performance of broadband, including location. In some parts of the UK, people can choose between ADSL, FTTC and cable broadband services; however, in other areas, many homes have limited choice because technologies like FTTC or cable have not been rolled out in those areas. Rural areas are less likely than urban areas to have access to FTTC and cable services. The distance of the consumer's home from the telephone exchange affects the speed of the ADSL services that are available, as does the distance from the street cabinet to the consumer's home, in the case of FTTC. For both technologies, broadband speed declines as these distances increase, meaning that the further away a consumer lives from the exchange or street cabinet, the lower the consumer's home broadband speeds are likely to be (this is not the case for cable services).

So, speed of broadband services depends on a number of factors, and the impact of these factors varies between technologies, service providers and between users of the same provider. This means that no single figure can accurately describe the actual speeds received by all users of a service. Three factors have a significant and general impact on users' speeds:

- 1. Contention.** This describes speed depreciation through congestion caused by the number of users contending to access the bandwidth available to groups of users in a particular area. If a large number of users are online at the same time, or a small number of users are carrying out bandwidth-intensive activities, such as downloading large files, speeds are reduced. The impact of contention is affected by the capacity that the provider has in its wider network and any traffic management measures are employed to mitigate it.
- 2. Signal attenuation.** For ADSL services, the strength of the signal depends on the length of copper telephone wire between the exchange and the user's premises, the type of and quality of wire used and any external electrical interference. The main determinant of the speed of ADSL services is the length of the copper wire between the exchange and the user. This creates huge variation in the performance of a particular ADSL product for different users. For mobile broadband services, the speed of the service depends on the strength of the signal, which is mainly determined by the distance between the user and the mast; the average distance between a user and the mast varies in different areas, with users in urban areas being typically closer to the mast than those in rural areas.
- 3. Protocol overheads (such as IP headers).** All broadband services transmit and receive data in small units (called "packets") that make up larger units, like files or e-mails. They are a standard size, but have something akin to packaging that facilitates the transmission of the data contained in the packet. This "header" or "overhead" takes up a percentage of the bandwidth available to a user.

5. Policy background

5.1 General policy objectives

CAP and BCAP's general policy objective is to set standards to ensure that all advertising is legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility. Additionally, BCAP's general policy objectives accord with those of the Communications Act 2003 noted in section 3.1.

CAP and BCAP intend their Codes to be based on the enduring principles that advertisements should be responsible, respect the principles of fair competition generally accepted in business and should not mislead, harm or offend. They seek to maintain an environment in which responsible advertising can flourish. The rules are intended to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that they are easily understood, easily implemented and easily enforced.

5.2 Specific rules which apply to the regulation of broadband speed claims

The following Code rules are most relevant to the ASA's regulation of speed claims in broadband advertising:

CAP Code:

- 3.1 Marketing communications must not materially mislead or be likely to do so.
- 3.3 Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

Material information is information that the consumer needs to make informed decisions in relation to a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.

BCAP Code:

- 3.1 Marketing communications must not materially mislead or be likely to do so.
- 3.2 Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

Material information is information that the consumer needs to make informed decisions in relation to a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.

5.3 Policy objectives in the regulation of broadband speed claims

The following policy objectives apply to the regulation of broadband speed claims under the CAP and BCAP Codes:

- CAP and BCAP’s regulation of broadband speed claims must strike a balance between ensuring that advertisers are free to promote features of their products (e.g. achievable speeds) that are important to consumers’ transactional decisions, and ensuring that consumers are not likely to be misled by the advertising of those features into taking transactional decisions they would not otherwise have taken.
- As noted in section 4, a number of factors affect broadband speed, and the impact of these factors varies between technologies, service providers and between users of the same provider; the variations in speed can be negligible or significant. This means that no single figure can accurately describe the actual speeds likely to be received by all potential users of a service who might see a particular ad.
- One-to-many advertising is constrained, to a greater or lesser extent, by time and / or space: advertising cannot reasonably be expected to provide the same amount of information as, for example, a salesperson or the full terms and conditions of a contract, and it plays only one part in the broader sales process. CAP and BCAP’s regulation does not extend to the reliability / performance of consumers’ broadband service in practice.
- Notwithstanding the challenges of communicating the varying achievable speeds of products – and factors affecting these – to a large number of consumers in individual ads, CAP and BCAP must ensure that consumers are not likely to be misled. In applying the Misleading Advertising rules of the Codes (set out in 5.2) to business-to-consumer advertising (for example, the advertising of broadband), the ASA must not impose stricter or less strict standards than those contained in the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs)³.
- The CPRs include a “transactional decision”⁴ test to determine whether advertising is likely to mislead, and therefore constitutes an unfair commercial

³ This is because the CPRs implement the provisions of Directive 2005/29/EC on unfair business-to-consumer commercial practices (UCPD), a maximum harmonisation measure. Misleading advertising is a type of unfair commercial practice under this legislation.

⁴ Under Regulation 2(1), a “transactional decision” is “*any decision taken by a consumer whether to act or refrain from acting, concerning whether, how and on what terms to purchase, make payment in*

practice: if an ad contains false information that causes an “average consumer”⁵ to take a transactional decision that they would not otherwise have taken, it will be likely to mislead⁶; similarly, if an ad omits material information that is likely to affect an average consumer’s transactional decision, it is likely mislead⁷. The ASA applies this test when assessing ads under the Misleading Advertising rules.

- The ASA must carry out a case-by-case assessment of whether advertising is misleading: it (and CAP and BCAP) can neither prescribe information that must be contained in advertising generally, nor proscribe certain approaches to advertising generally⁸.
- Given the legal framework set out above, the proposed guidance will recommend an approach that CAP and BCAP consider is likely to be acceptable under the Codes and not likely to mislead consumers: it will not proscribe other approaches, and if complaints are received that a particular ad that does not follow the recommended approach is misleading, the ASA will require the advertiser to explain why the ad in question is not misleading. If advertisers are unable to do this, they run the risk of an upheld ruling by the ASA.
- CAP and BCAP consider that it is important to have a consistent approach across different telecommunications services; however, the consultation seeks to examine guidance for business-to-consumer ads for fixed-line home broadband services. Consequently, the new guidance is not aimed at business-to-business advertising or non-residential broadband services.

5.4 CAP and BCAP’s current guidance on broadband speed claims

CAP and BCAP’s current guidance, entitled [Broadband speed claims Advertising Guidance \(non-broadcast and broadcast\)](#), came into effect on 1 April 2012 following public consultation between 26 January and 25 February 2011. CAP and BCAP’s objective was to produce guidance for the industry on how to interpret the Misleading Advertising sections of the CAP and BCAP Code in relation to “up to” speed claims in both business-to-consumer and business-to-business advertising. The consultation followed concerns about potentially misleading claims in advertising for

whole or in part for, retain or dispose of a product, or whether, how and on what terms to exercise a contractual right in relation to a product. European Commission [guidance](#) on the application / interpretation of UCPD states that “transactional decision” includes not only the decision to purchase a product but also a pre-purchase decision directly related to a decision to purchase; for example, a decision to visit a shop or click through a website as a result of a commercial offer (see p.37 and 38).

⁵ Under Recital 19 of UCPD, the average consumer is a notional, typical consumer (not a statistical average consumer) who is reasonably well-informed and reasonably observant and circumspect.

⁶ A “misleading action” under Regulation 5 of the CPRs, reflected in rule 3.1 of the CAP and BCAP Code.

⁷ A “misleading omission” under Regulation 6 of the CPRs, reflected in rule 3.3 of the CAP Code and rule 3.2 of the BCAP Code.

⁸ Annex 1 of UCPD contains a list of commercial practices which are considered to be unfair in all circumstances. Recital 17 of UCPD provides that these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment. In practice, this means that the ASA must assess individual ads under the transactional decision test where it receives complaints about them being misleading.

fixed line broadband services. The ASA Council agreed to have regard to the guidance when considering complaints against advertising for broadband services that feature “up to” speed claims. In short, the guidance recommends only using maximum speed claims that are achievable by at least 10% of customers that are preceded with the words “up to” and qualified, where appropriate, with information to help manage consumers’ expectations of achievable speeds and the factors affecting them.

The guidance outlines approaches to the use of “up to” speed claims in broadband advertising that are likely to not mislead (for the reasons set out in 5.3, it does not prescribe or proscribe approaches for all advertising). It introduced a change in advertising practice to reflect better and manage consumers’ expectations of broadband speed claims at a time when maximum speed claims were often being made on the basis of theoretical speeds which only a very small number of consumers might actually achieve. CAP and BCAP considered this approach was likely to mislead and introduced a fundamental principle that maximum speed claims should be based on the actual experience of users, and that advertisers should be able to demonstrate that the speeds claimed in their advertising can be achieved by a reasonable proportion of the ISP’s customers. The guidance introduced 10% as a reasonable proportion, and its effect was significant: theoretical maximum speeds were replaced with lower maximum speeds available to at least 10% of consumers.

The guidance identifies factors that are likely to cause some customers to receive speeds significantly below the claimed maximum speed: CAP and BCAP consider that such factors are likely to constitute material information the omission of which might make an ad likely to mislead. If a significant proportion of an ISP’s customer base is likely to receive a maximum speed that is so much lower than the “up to” speed that it prevents them from carrying out to an acceptable performance standard the types of online activity that they might reasonably expect to undertake on the service advertised, marketers must include further qualifying information to explain this. The guidance provides that substantiation for speed claims must be robust and reasonably representative of actual performance. Marketers should be able to explain clearly to the ASA how they designed their testing and how it is relevant to the claims made.

5.5 Other regulation of broadband speed claims

CAP and BCAP consider that advertising is not the only factor affecting consumer understanding of broadband services. Ofcom’s [2015 Voluntary Code of Practice: Broadband Speeds](#) covers point-of-sale information and rights of consumer redress. All internet service providers (ISPs) using technologies, such as ADSL, for which the access line speed can be lower than the headline speed, must provide facilities on their website that allow consumers to see the speed that their line is capable of delivering. Furthermore, before a sale is completed, all ISPs must also explain the factors affecting broadband speeds. The Voluntary Code goes some way towards ensuring that consumers have the information they need to make informed choices between services. Although, CAP and BCAP acknowledge the importance of speed-

checking facilities, available to consumers at no cost⁹, and advise advertisers to make reference to them where possible, these facilities do not of themselves remove the need for ads to include material information that consumers need to make an informed transactional decision.

⁹ For example, Ofcom's broadband and mobile checker app: <https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/advice/ofcom-checker>

6. CAP and BCAP's decision to consult

CAP and BCAP decided to consult for the following reasons:

- Research carried out by the ASA into consumers' understanding of broadband speed claims suggests that, despite the current guidance, consumers might be misled by the advertising of these claims.
- Pre-consultation with industry suggests that a different approach to the advertising of broadband speeds is supported.

6.1 The ASA Research

In May 2016, the ASA announced that it had commissioned GfK to carry out qualitative research into consumers' understanding of speed claims in broadband advertising; this followed concerns that, despite CAP and BCAP's guidance, consumers might be misled by such claims. The [research](#) was designed to develop the ASA's understanding of whether consumers are likely to be misled by current broadband speed claim ads that conform to CAP and BCAP guidance. While not clearly favouring an alternative formulation to speed claims, the research showed that consumers were confused by the current approach of using "up to" speed claims achievable to at least 10% of consumers and did not feel that advertised speeds should only be available to a minority of consumers.

The research explored:

- consumer understanding and interpretation of 'up to' speed claims made in ads and whether these claims are likely to mislead;
- how consumers arrive at this understanding and interpretations of speed claims;
- reactions and potential actions in response to speed claims; and
- alternative speed claim formulations with them.

Understanding and interpretation of broadband speed ads were affected by individuals' level of online usage and level of knowledge regarding technology or broadband services. The research identified five "typologies" whose perspectives were sought throughout:

- 'No problems and never think about speed' (low usage and less knowledge).
- 'Experienced problems and not investigated' (high usage and less knowledge).
- 'Experienced problems and investigated' (medium-high usage and medium knowledge).

- ‘Rural focus’ (high usage and more knowledge).
- ‘Tech savvy’ (high usage and more knowledge).

The key findings of the research were:

- Speed is an important factor for a significant proportion of consumers who are making decisions between providers.
- Levels of knowledge and understanding of broadband speeds vary, but it is low overall with many not knowing what speed they need to carry out daily online tasks.
- Most understand that the higher the number in the ad, the higher the speed of the service, but many are unclear on what this means for them and what speed they are likely to achieve. Some participants confused speed and reliability.
- Despite that uncertainty, most consumers believe they are likely to receive a speed at or close to the headline speed claim when, for many, that is not likely to be the case. Some participants did not see / take notice of the words “up to” and had to be prompted to look at it. Once made aware that an ‘up to’ speed was available to at least 10% of customers, participants felt that the claim lacked transparency. Because the speed advertised could be applicable to only 10% of customers, they felt that based on the claim, they could not determine what speed they were likely to personally achieve.
- During the first stage of the research, participants considered alternative percentages for use with ‘up to’. While participants agreed that it was more useful to know the speed that at least 25% or 50% of customers could achieve when compared to 10% of customers, views were still largely negative. Participants reflected that even at 50%, it was difficult to gauge what speed they might expect to achieve. The 50% figure was not included in the next stages of the research.

Participants expressed the following views about alternative speed claim formulations:

Average

- Participants had mixed views about averages. Some in rural areas reflected that the average must be based on all participants and therefore were reassured that the average would include customers such as themselves, who typically received lower speeds. Negative comments about average speed claims often focused on queries that arose when participants began to think about what the average means and how it had been calculated. Questions included:
 - How is the average calculated?

- Does the average figure take into account both peak and off-peak times?
 - Is it a UK-wide average or a local average?
 - Does it include domestic and business customers?
 - Is it an average for me or an average across customers?
- After considering these types of queries, some participants concluded that average speed claims were too vague. Some participants suggested that detail about how the average had been calculated could be included in the small print but overall this suggestion was not met with much support. Many felt that information in small print would be overlooked, and the fact that an average needed to be explained suggested that an average was not clear or simple enough for an advert.
 - As the research progressed, the materials were refined to try to help participants' understanding. However, as mentioned above, the recommended option for change may need further review to ensure that the wording is clear and transparent for consumers.

Range

- The concept of a range was tested using typical speeds. Views were mixed when looking at the first set of stimulus for this. Range information was particularly useful for those who felt that they could best determine the speed they would achieve by knowing what the majority of customers would achieve. Most participants felt that they would fall within the typical range. They felt that this would help manage their expectations. Those with more knowledge regarding factors that could impact on speeds achieved had mixed views towards range claims, with some unsure what it meant for this. This was particularly the case for those who did not feel they were a 'typical customer'. Some participants overlooked the word 'typical' when they read the range speed claim. This meant they thought it was the maximum and minimum achievable speeds. And when prompted to consider the inclusion of the word typical, participants assumed that this meant that the remaining 20% of customers would achieve below the range stated. A differently-worded version of the range was included in the third stage of testing. Given the positive reaction to information that ranges referred to a speed that 80% of customers achieved, this was included upfront in stage 3. Participants reinforced positive views towards inclusion of this information.

6.2 Pre-consultation perspectives

In preparation for this consultation, CAP and BCAP undertook pre-consultation work with the UK's largest ISPs (according to size of subscriber base) and a trade body representing over 200 UK ISPs. The aim was to seek the pre-consultees' views on the current guidance and the case for regulatory change. Pre-consultees were invited to share their views on: the basis of speed claims; the description of the claims in ads; and the substantiation that might support the claims. A broad consensus was achieved on the proportion of consumers for whom a speed should

be achievable; however, there was no consensus on how this should be described in ads or substantiated by ISPs.

The options for the basis of speed claims that pre-consultees considered were:

- speeds that at least 50% (or 51% - the majority / most) of consumers can achieve;
- speeds based on the 24-hour average used by Ofcom in its Annual Performance Report;
- peak-time average download speeds;
- range of speeds available to the 20th to 80th percentile of consumers; and
- speeds that 100% of consumers can achieve.

The following views were held by all pre-consultees:

- The current approach to numerical speed claims in CAP and BCAP's guidance (recommending 10% as a reasonable proportion of consumers for whom the speed claim is achievable) is no longer fit-for-purpose.
- Where numerical speeds are quoted, they should be available to around 50% of consumers (views differed on exactly what proportion should be used and these differences are set out below). This has a parallel in the Financial Conduct Authority's regulation of the inclusion of representative annual percentage interest rates in financial promotions, which applies a "51% test"¹⁰.
- ISPs have a role to play in educating consumers about the factors affecting broadband speed.
- A range does not give individual consumers an indication of whether they would fall within the range and if they did, where in the range they were likely to fall; the use of a range could mislead consumers, particularly those who did not fall within the range.
- A speed that 100% of consumers can achieve is dependent on the speed of the slowest consumer and does not give consumers an idea of the likely speed they will achieve.
- Speed-checking facilities, such as those provided on websites, were useful in managing consumers' expectations before they subscribed to broadband services, and that information about these should be included in ads.

Views held by one or more, but not all, pre-consultees included:

¹⁰ "Representative APR" is defined in the [Glossary](#) of the Financial Conduct Authority's Consumer Credit Sourcebook as "an APR at or below which the firm communicating or approving the financial promotion reasonably expects, at the date on which the promotion is communicated or approved, that credit would be provided under at least 51% of the credit agreements which will be entered into as a result of the promotion".

- Peak-time download speeds (as distinct from modem synchronisation speeds¹¹, also known as “sync speeds”) have the potential to mislead, as consumers could be confused by what “peak time” meant; a more general measure of performance is preferable.
- Peak time is measured at an exchange, not national, level; as such, it is subject to significant geographic variation.
- Peak time is the time when most people are online, so it seems like a reasonable point at which to measure the speeds customers could expect from the service. The issue is not whether customers understand the concept of peak time, but whether the speeds quoted in ads are representative of the speeds they will receive.
- The average UK download speed per technology (ADSL, VDSL, Cable, etc) is more suitable for advertising purposes, both in terms of the speed itself but also in terms of the nature of the services offered. This is because – for a given technology – any variation on average advertised speeds per ISP (based on their existing base) cannot be an accurate enough indication of the actual speed for a new customer, since this is heavily determined by the individual line length and quality. The average UK download speed featured in section 2 of Ofcom’s 2016 Performance Report would provide a useful methodology.
- Quoting a sync speed minus protocol overheads would not address the slowdown created at busy times. Speeds quoted in advertising should be the median sync speed minus a measured peak time overhead, and described in advertising as “Average XMBit/s”.

¹¹ The modem synchronisation speed is the maximum download speed that a line is capable of supporting according to the way a line is configured by a customer’s ISP.

7. CAP and BCAP's options for a new recommended approach

7.1 Introduction

In light of the factors set out in section 6, CAP and BCAP have decided to consult on four options for a new recommended approach to advertising numerical speeds. These options seek to achieve the policy objectives set out in section 5, taking into account the following criteria which derive from the findings of the ASA research and the information received during pre-consultation:

- If an ad includes a numerical speed claim, that speed should be achievable by many or most customers¹².
- Although the options for guidance are technology-neutral, the guidance is likely to have different implications according to the technology underpinning the service being offered: the greater the variation in consumer experience, the greater the amount of qualifying information that is likely to be required to ensure that consumers are not likely to be misled.
- Numbers on their own are unlikely to be enough, and qualifying information is likely to be necessary.
- Speed-checking facilities, for example those provided on ISPs' websites, are useful to consumers and should be promoted in ads wherever possible.

As noted earlier in this consultation document, the option that CAP and BCAP decide on after consultation will be an approach to advertising broadband speeds that CAP and BCAP recommend as being likely to comply with the Codes: it will not be a mandatory approach for all advertising. Despite seeking to decide on one recommended approach, CAP and BCAP acknowledge that there might be different approaches to advertising particular services that are not likely to mislead. In the event of a complaint about an ad, the ASA will ask advertisers using a different approach to that recommended in the guidance to justify why that approach is not likely to mislead consumers. If advertisers are unable to do this, they run the risk of an upheld ruling by the ASA.

As individual consumers can only receive the most accurate indication of their likely speeds by checking with the provider or a third party website, CAP and BCAP will advise advertisers, as they do under the current guidance, to include a statement urging consumers to check their likely speed independently or with the provider themselves.

7.2 Summary of options for guidance

CAP and BCAP's proposals for guidance relate to three key parts:

¹² CAP and BCAP also note that in its "[Broadband advertising not up to speed](#)" report, Which? called on Ofcom / the ASA system to ensure that advertisers only advertise speeds available to the majority of their customers.

Part 1: basis of speed claims likely to be acceptable in ads.

Part 2: description of speed claims in ads.

Part 3: the substantiation likely to be required by the ASA to support speed claims.

The options can be summarised as follows:

Part 1: basis of speed claims

Option	Outline
A	Advertised speeds are based on the median download speed for users (the speed available to at least 50% of users) over 24 hours.
B	Advertised speeds are based on the peak-time median download speed (the download speed available to at least 50% of peak-time users).
C	Advertised speeds are based on the range of download speeds for the 20 th to 80 th percentile of users over 24 hours.
D	Advertised speeds are based on the range of download speeds for the 20 th to 80 th percentile of users at peak time.

Part 2 – description of speed claims in ads

Option	Description in ads
A	Advertised speeds should state “average” alongside them. The headline speed claim should be further qualified (for example, in the smallprint) setting out how the average is calculated.
B	Advertised speeds should state “average” alongside them. The headline speed claim should be further qualified (for example, in the smallprint) setting out how the average is calculated.
C	Speed claims should make clear that some consumers might achieve speeds that are lower or higher than the range, for example by using wording like “typical speed” alongside the advertised range.
D	Speed claims should make clear that some consumers might achieve speeds that are lower or higher than the range, for example by using wording like “typical speed” alongside the advertised range.

Part 3 – substantiation

The current guidance states that the substantiation required for speed claims must be robust and reasonably representative of actual performance. CAP and BCAP do not propose to change the current guidance's general approach to substantiation. However, depending which option CAP and BCAP decide on after consultation, specific amendments to the guidance may be needed to reflect this.

7.3 Four options for guidance

CAP and BCAP are consulting on four options for guidance on speed claims:

Option A

Speed claims should be based on the median download speed for users (the download speed available to at least 50% of users) over 24 hours. CAP and BCAP propose the following wording:

Where advertisers make a numerical speed claim, they should be able to show that the advertised speed is the median speed for users over 24 hours. The speed claim should be prominently qualified with “average” and should be further qualified (for example, in the smallprint of the ad) with a description of the measurement of the speed claim.

Option B

Speed claims should be based on the peak-time median download speed for users (the download speed available to at least 50% of users at peak time). CAP and BCAP propose the following wording:

Where advertisers make a numerical speed claim, they should be able to show that the advertised speed is the peak-time median download speed. The speed claim should be prominently qualified with “average” and should be further qualified (for example, in the smallprint of the ad) with a description of the measurement of the speed claim.

Option C

Speed claims should be based on the range of download speeds available to the 20th to 80th percentile of users over 24 hours. CAP and BCAP propose the following wording:

Where advertisers make a numerical speed claim, they should present it as the range of speeds available to the 20th to 80th percentile of users over 24 hours and qualified prominently with a statement that this is the “typical performance” of the service, for example “Typical performance: 8-12 Mbit/s”.

Option D

Speed claims should be based on the range of download speeds available to the 20th to 80th percentile of users at peak time. CAP and BCAP propose the following wording:

Where advertisers make a numerical speed claim, they should present it as the range of speeds available to the 20th to 80th percentile of users at peak time and qualified prominently with a statement that this is the “typical performance” of the service, for example “Typical performance: 8-12 Mbit/s”.

Respondents are invited to indicate which option they favour and their rationale for this. CAP and BCAP also invite respondents to provide reasons for rejecting options and alternative options / wording of their own.

CAP and BCAP consider that it is important to have a consistent approach across different telecommunications services. The consultation seeks to examine guidance for business-to-consumer ads for fixed-line home broadband services, which were the subject of the ASA research. Consequently, CAP and BCAP propose that the new guidance will apply to business-to-consumer advertising, but it may also be relevant to business-to-business or other non-residential broadband service advertising.

Do respondents agree that the scope of the guidance should be confined to business-to-consumer advertising of residential broadband services?

7. Next steps

CAP and BCAP are committed to considering all responses carefully and with an open mind. Responses have been invited from a cross-section of interested parties representing both consumers and industry.

The following summarises the consultation process and subsequent stages of CAP and BCAP's consideration of the proposed changes:

- the consultation will run for ten weeks, closing at **5pm on 13 July 2017**.
- CAP and BCAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions they make; and
- the evaluation will be published on the ASA website when the outcome of the consultation is announced.

Annex 1: Responding to this consultation

How to respond

CAP and BCAP invite written comments, including supporting evidence, on the proposals contained in this document, **by 5pm on 13 July 2017**.

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

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing.

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

If you are unable to reply by email, you may submit your response by fax (+44 (0)20 7242 3696) or by post:

Broadband Speeds Consultation

Regulatory Policy Team

Committee of Advertising Practice

Mid City Place

71 High Holborn

London WC1V 6QT

Confidentiality

CAP and BCAP consider that everyone who is interested in the consultation should see the consultation responses. In their evaluation document, CAP and BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be attributed to you.

If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.


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

Contact us

Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2200
Textphone: 020 7242 8159
Email: enquiries@cap.org.uk

www.cap.org.uk

 Follow us: [@CAP_UK](https://twitter.com/CAP_UK)