

ASA system response to CMA consultation on unfair commercial practices guidance

1. Background and Introduction

- 1.1.** This submission is provided by the Advertising Standards Authority (ASA), and the Committees of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2.** The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18, with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 1.3.** We are the UK’s independent frontline regulator of ads by legitimate businesses and other organisations in all media, including online. Our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.
- 1.4.** We work closely with a network of partner regulators including Ofcom, the Gambling Commission, the Information Commissioner’s Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority. Our frontline ad regulation often complements their activities, or even frees them up entirely to concentrate on their other duties. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line.
- 1.5.** We also bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creating a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees’ development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System’s processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.
- 1.6.** We call our model of partnering with businesses and other regulators ‘collective ad regulation.’ Our independence and the buy-in and support we receive through

collective ad regulation delivers faster, more flexible, more joined-up and proportionate regulation.

- 1.7. The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't mislead, harm, or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous benefits for responsible businesses and for consumers, who benefit from the protection the rules afford.
- 1.8. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies, and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over a million pieces of advice and training in 2022.
- 1.9. The ASA system is providing this written submission in response to the Competition and Markets Authority consultation on draft guidance on the unfair commercial practices (UCP) provisions in the Digital Markets, Competition and Consumers (DMCC) Act 2024.
- 1.10. This submission responds only to consultation questions on which the ASA system has significant comment.
- 1.11. CAP and BCAP have drafted amendments to the advertising Codes to bring them in line with UCP provisions. The consultation on these changes can be found [here](#).
- 1.12. We are happy to assist with any follow-up questions.

2. Consultation question 3: Do you have any comments on the Draft Guidance on the 'drip pricing' provisions in the DMCC Act (found in the 'Material pricing information' section of Chapter 9 of the Draft Guidance), including the illustrative examples? In particular, are there any specific pricing practices that have not been included in the 'drip pricing' illustrative examples which you think it would be helpful to include, and if so, what should such further guidance specifically cover?

2.1. The draft guidance states that where the invitation to purchase relates to a contract for services over a fixed period, the 'total price' advertised by a trader must be the price that the consumer will necessarily incur over the course of the contract. For example, a 6-month gym contract at £22 a month, the invitation to purchase must state that the membership costs £132.

2.2. We understand that this requirement will apply to mobile and broadband contracts. CAP and BCAP [guidance](#) on the presentation of mid-contract price increases in telecoms contracts was revised 2024 to account for changes made to Ofcom's General Conditions. Ofcom's amendments banned inflation-linked and percentage-based price increases, but still allow for providers to apply mid-contract price increases. CAP and BCAP's guidance makes recommendations on the relative prominence of the initial and future monthly price, but does not comment on inclusion

of the total price over the course of the contract. In line with expectations set out in the draft CMA guidance, CAP and BCAP will consider further amendments to the guidance to align with the proposed UCP guidance.

2.3. The ASA system notes that the telecoms market includes contract structures that may make it difficult to comply with this requirement:

- Tiered contracts that include an annual increase on a set date – the total price will depend on when the individual consumer’s contract commences
- Variable contracts allow for the provider to increase the price during the contract, and under the General Conditions the consumer would then have the right to be given notice and to exit the contract without penalty. In this case, the total price over the course of the contract cannot be known in advance.

2.4. We understand the prohibition on omission of material information from an invitation to purchase is subject to the same considerations about context and limitations of the medium as apply to misleading omissions generally.

3. Consultation question 4: Do you have any comments on the Draft Guidance on the banned practice relating to fake consumer reviews (found in Annex B to the Draft Guidance)?

Overlap with existing banned practices

3.1. A consumer review is defined in the DMCC Act as ‘a review of a product, a trader or any other matter relevant to a transactional decision’. While the term ‘review’ is not explicitly defined, we understand that it broadly refers to claims made about an experience with a product or trader.

3.2. We understand that the prohibition on banned reviews may in some circumstances apply to influencer marketing on social media.

3.3. We note there is an overlap with material that would currently be considered under existing prohibited practices, that have been maintained in Schedule 20 to the DMCC Act, as below:

12 Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.

25 Falsely claiming or creating the false impression that the trader is not acting for purposes relating to the trader’s business or falsely representing oneself as a consumer.

3.4. [Joint CAP and CMA guidance](#) sets out expectations for influencer marketing under these legal provisions, which are reflected in rules in the CAP Code.

3.5. The ASA system would welcome further clarification on when issues around the identifiability of influencer marketing material on social media would be more appropriately assessed under the new prohibition on fake reviews. For example,

where an influencer appears to describe their own experience of using a product or service, as opposed to referring to it without claiming or implying they have used it themselves, would the matter fall under the new banned practice, rather than prohibited practice (12)?

Application to other ads in other media that feature consumer reviews

3.6. We note that paragraph 13(5)(i) of Schedule 20 of the DMCC Act states that publishing in a “misleading way” includes (for example):

(i) failing to publish, or removing from publication, negative consumer reviews whilst publishing positive ones (or vice versa);

(ii) giving greater prominence to positive consumer reviews over negative ones (or vice versa);

(iii) omitting information that is relevant to the circumstances in which a consumer review has been written (including that a person has been commissioned to write the review).

3.7. Paragraphs (i) and (ii) above appear to prohibit ads from including positive testimonials where negative ones exist, as there is nothing to indicate that the examples given are subject to other considerations – it reads as though these scenarios will always constitute publishing in a misleading way, without regard to other factors such as medium.

3.8. While we understand that the provisions were primarily aimed at tackling fake and undisclosed incentivised reviews online, they are media-neutral and could therefore be applied to ads in a variety of different media, for example, a broadcast teleshopping ad, a poster or a magazine ad that featured a selected, positive customer testimonial - with the effect that the ad would also have to feature negative review or reviews as a balance, if the company did not have purely positive reviews.

3.9. Consumer expectations are likely to vary with the presentation of reviews in different media, and consumers are not necessarily likely to expect that the positive review chosen to feature in an ad reflects the entirety of reviews and opinions about the product. Further consideration is needed in this area to account for other types of media.