

Committee of Advertising Practice Distance Selling Consultation: Regulatory Statement

CAP's Regulatory Statement



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1. Summary

The Committee of Advertising Practice (CAP), author of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), is removing the majority of its distance selling rules from the CAP Code.

On 13 June 2014, The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the 2013 Regulations) came into force, replacing The Consumer Protection (Distance Selling) Regulations 2000 (the 2000 Regulations). The obligation on CAP to consider the compatibility of its rules with the new legislation provided CAP with an opportunity to consider more generally the extent, if at all, to which it wished to reflect distance selling legislation in its Code.

The current CAP distance selling rules fall into two broad categories:

- pre-contractual information requirements; and
- post-contractual matters.

Between November 2014 and January 2015, CAP consulted on proposals to remove both categories of rule (along with some concomitant structural changes elsewhere in the Code), on the basis that the rules preventing misleading advertising effectively govern information requirements for ads, and that post-contractual matters are not strictly speaking advertising issues; low levels of complaint, coupled with many complaints still falling under the “Sales promotions” rules persuaded CAP that consumers already seek redress elsewhere in case of difficulty.

The statutory enforcement duty in respect of distance selling falls on Trading Standards. CAP welcomes responses to its consultation from the Trading Standards Institute and National Trading Standards Board indicating support for both proposals. CAP’s evaluation of all responses to the consultation can be found [here](#). CAP has decided to make the proposed changes to its Code, and they will take effect on **6 August 2015**.

2. Background

2.1 Legal framework

[Section 9](#) of the CAP Code reflects some of the requirements of [The Consumer Protection \(Distance Selling\) Regulations 2000](#) (the 2000 Regulations); it does so in a “best practice” fashion, sometimes providing a higher standard of consumer protection than that provided for in law. Until 13 June 2014, this was a permissible approach, owing to the minimum harmonisation nature of [Directive 97/7/EC](#) which the 2000 Regulations implemented. From 13 June 2014, the 2000 Regulations have been replaced by [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the 2013 Regulations). The 2013 Regulations provide significant changes to the old regime; perhaps most significantly for CAP, they implement a maximum harmonisation measure ([Directive 2011/83/EU](#)) and, consequently, where CAP seeks to regulate in the harmonised field, it can be no more restrictive or permissive than maximum harmonisation allows.

It should be noted that from 13 June 2014, CAP has issued the following notice in relation to its distance selling rules:

CAP and BCAP are reviewing the distance selling sections of their Codes in light of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which come into force on 13 June 2014. From 13 June, where any Code rule is inconsistent with any provision of the new Regulations, the rule will be interpreted in the light of the new Regulations.

The notice has been used to prevent any unlawful use of the CAP rules before the outcome of the consultation.

2.2 CAP’s decision to consult

CAP’s current rules reflect the requirements of the 2000 Regulations which implemented a minimum harmonisation directive. This is especially important because some of the rights given to consumers (in both the old and new legislation) depend on the trader’s behaviour: for example, if a trader fails to comply with the information requirements, the consumer has enhanced cancellation rights.

The current rules reflect a “best practice” scenario and do not set out all the different rights and obligations that apply in different circumstances. This approach is not possible under the 2013 Regulations, because the Code would then be imposing greater restrictions than are permitted under the maximum harmonisation principle. Because of this, CAP has had to examine the compatibility of its rules with the new legislation. CAP has also taken the

opportunity to consider to what extent, if at all, it wishes to reflect distance selling legislation in its rules, and the consultation was the result of that process.

CAP consulted on proposals to remove two categories of rules from its Code: those relating to pre-contractual information; and those relating to post-contractual matters (the rationale for these proposals is set out in **sections 3.1 and 3.2** below). It is important to note two important contextual points in relation to the proposals:

1. Consumers may continue to seek redress from Trading Standards under the 2013 Regulations. Under [Regulation 44](#) of the 2013 Regulations, every local weights and measures authority in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland are under a duty to consider any complaints made to them about a contravention of the Regulations; this duty would not be affected by any removal / retention of CAP's distance selling rules.
2. Consumers do complain to the ASA about advertisers failing to deliver products, failing to process cancellations or failing to provide refunds when reasonably requested; however from 2011-2013, the ASA resolved only 600 non-broadcast cases under the distance selling rules. These concerned post-contractual matters, mainly fulfilment problems (non-receipt of goods/refunds etc.). Half of these concerned non-receipt of prizes in competition or gifts in other sales promotions; these cases would continue to be considered under CAP's "[Sales promotions](#)" rules.

3. CAP's Decision

3.1 Proposal to remove rules relating to pre-contractual information

CAP considers it is proportionate to remove rules which do not mandate the content of advertising. The 2013 Regulations require certain information to be provided by traders to consumers before a consumer is bound by a distance contract. CAP considers that it could only require advertisers to include this information in their advertising where the advertising constituted the first and last stage of communication from the marketer before a distance contract is concluded. To require it in all ads would exceed the requirements of the 2013 Regulations, given that they allow the information to be provided *before a consumer is bound by a distance contract*. A non-broadcast ad does not always constitute the first and last stage of communication, and consumers sometimes have to take a further step after seeing the ad, for example by using a website or a telephone line to place orders; the 2013 Regulations allow for pre-contractual information to be given at this later stage.

CAP's regulation of information that must appear in business-to-consumer advertisements is also underpinned by [The Consumer Protection from Unfair Trading Regulations 2008](#) (the CPRs) which implement [Directive 2005/29/EC](#) concerning unfair business-to-consumer commercial practices (UCPD), and which [section 3](#) of the CAP Code seeks to reflect. Certain categories of material information are reflected, both expressly and through falling under the general category of 'material information', in rules contained in section 3.

CAP considers that even if a non-broadcast ad did constitute the first and last stage of communication before a consumer was bound by a distance contract, thereby allowing CAP to require certain information to be included under the new Regulations, the requirements of the CPRs, as reflected in [section 3](#) of the CAP Code, already effectively mandate the type of information that should be included in ads.

In 2011, CAP and BCAP consulted on how the Codes should reflect two advertising-related provisions contained in The Energy Information Regulations 2011 which transposed Directive 2010/30/EU. As a result of the consultation, [rule 9.10](#) was added to the distance selling section because it addresses information about energy-related products that must be provided before a consumer enters into a contract but which may be provided separately from a given marketing communication, for example in follow-up literature. Given that this rule relates to products that have a significant impact on the consumption of energy, CAP proposed to relocate the rule to the ["Environmental Claims"](#) section of the Code.

For the reasons above, CAP will remove distance selling rules relating to pre-contractual information requirements, and will relocate rule 9.10 to the "Environmental Claims" section.

3.2 Proposal to remove rules relating to post-contractual matters

CAP considers rules relating to post-contractual matters do not generally relate to advertising but rather to the trader's behaviour after a contract has been

concluded; a notable exception to this is where statements relating to post-contractual behaviour are made in advertising. In such cases, the ASA would look at these under its “Misleading advertising” rules, even in the absence of the above distance selling rules. CAP’s current view is that post-contractual matters are better regulated by other authorities and under legislation. The ASA will advise consumers where to complain in the event that they make a complaint to the ASA, and the Code will make references to distance selling legislation.

For the reasons above, CAP will remove distance selling rules relating to post-contractual matters from its Code.

4. Consultation Outcome

4.1 CAP's decision

In light of the above responses and analysis, CAP will make the following changes to its Code:

1. Deletion of the majority of section 9, preserving the following wording

09 Distance selling

Most business-to-consumer distance selling contracts are subject to the Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013. Contracts that wholly consist of exempt activities are not subject to the Regulations. These exemptions relate to:

- *gambling;*
- *banking, credit, insurance, personal pension, investment or payment services*
- *the creation of or rights in immovable property;*
- *residential rental agreements;*
- *construction of new or substantially new buildings;*
- *foodstuffs, beverages or goods intended for general household consumption on regular basis;*
- *package holidays, tours or travel; and*
- *certain aspects of timeshare, long-term holiday product, resale and exchange contracts.*

In August 2015, CAP removed its distance selling rules after consultation. Marketers should seek legal advice to ensure they comply with the Regulations.

The Direct Marketing Association (DMA) requires its members to observe the DM Code of Practice, which covers some practices that are not covered in the CAP Code.

2. Amendment of the misleadingness rules to remove cross-references to distance selling rules and add reference to distance selling legislation:

03 Misleading advertising

Background

The ASA may take the Consumer Protection from Unfair Trading Regulations 2008 into account when it adjudicates on complaints about marketing communications that are alleged to be misleading. See Appendix 1 for more information about those Regulations.

The ASA will take into account the impression created by marketing communications as well as specific claims. It will adjudicate on the basis of the likely effect on consumers, not the marketer's intentions

Other sections of the Code contain product-specific or audience-specific rules that are intended to protect consumers from misleading marketing communications. For example, the Children and Medicines sections of the Code contain rules that apply, as well as the general

rules, to marketing communications that fall under those sections.

If a marketing communication encourages consumers to buy a product or service through a distance-selling mechanism, marketers should seek legal advice to ensure they comply with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

...

3.5 *Marketing communications must not materially mislead by omitting the identity of the marketer.*

Some marketing communications must include the marketer's identity and contact details. Marketing communications that fall under the ~~Distance Selling~~, Database Practice or Employment sections of the Code must comply with the more detailed rules in those sections.

Marketers should note the law requires marketers to identify themselves in some marketing communications. Marketers should take legal advice

3. Relocation of rule 9.10 to section 11:

9.10 *This rule must be read in conjunction with Directive (EC) No 2010/30/EU and the Energy Information Regulations 2011 on labelling and standard product information of the consumption of energy and other resources by energy-related products and its subsequent delegated regulations. The Directive introduces an information and labelling framework whereby delegated regulations will detail which products need to contain an energy efficiency rating or fiche. The rule only applies to products which are subject to a delegated regulation.*

For more information on delegated regulations, go to <http://ec.europa.eu/energy>.

Advertisers must make product fiche information available about products that fall under delegated regulations to consumers before commitment.

The above changes will take effect from **6 August 2015**.

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