

Introduction

This twelfth edition of the Code comes into force on 1 September 2010. It replaces all previous editions.

As well as this Code, non-broadcast marketing communications are subject to legislation. See www.cap.org.uk for a non-exhaustive list. The advertising rules that apply to video-on-demand services which are subject to statutory regulation are reflected in the rules set out in Appendix 2.

I The code applies to:

- a. advertisements in newspapers, magazines, brochures, leaflets, circulars, mailings, e-mails, text transmissions (including SMS and MMS), fax transmissions, catalogues, follow-up literature and other electronic or printed material
- b. posters and other promotional media in public places, including moving images
- c. cinema, video, DVD and Blu-ray advertisements
- d. advertisements in non-broadcast electronic media, including but not limited to: online advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements); paid-for search listings; preferential listings on price comparison sites; viral advertisements (see III l); in-game advertisements; commercial classified advertisements; advergames that feature in display advertisements; advertisements transmitted by Bluetooth; advertisements distributed through web widgets and online sales promotions and prize promotions
- e. marketing databases containing consumers' personal information
- f. sales promotions in non-broadcast media
- g. advertorials (see III k)
- h. advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities.

II The code does not apply to:

- a. broadcast advertisements (The BCAP Code sets out the rules that govern broadcast advertisements on any television channel or radio station licensed by Ofcom)
- b. the contents of premium-rate services, which are the responsibility of PhonepayPlus; marketing communications that promote those services are subject to PhonepayPlus regulation and to the CAP Code
- c. marketing communications in foreign media. Direct marketing communications that originate outside the United Kingdom and sales promotions and ~~marketing communications advertisements in paid-for space that are published~~ on non-UK-registered websites, if targeted at UK consumers, are subject to the jurisdiction of the relevant authority in the country from which they originate if that authority operates a suitable cross-border complaint system. If it does not, the Advertising Standards Authority (ASA) will take what action it can. Most members of the European Union, and many non-European countries, have a self-regulatory organisation that is a member of the European Advertising Standards Alliance (EASA). EASA co-ordinates the cross-border complaints system for its members (which include the ASA)
- d. claims, in marketing communications in media addressed only to medical, dental, veterinary or allied practitioners, that relate to those practitioners' expertise
- e. classified private advertisements, including those appearing online
- f. statutory, public, police and other official notices or information, but not marketing communications, produced by public authorities and the like
- g. works of art exhibited in public or private
- h. private correspondence, including correspondence between organisations and their customers about existing relationships or past purchases

- i. live oral communications, including telephone calls and announcements or direct approaches from street marketers
- j. press releases and other public relations material not covered by part I above
- k. editorial content; for example, of the media or of books and regular competitions such as crosswords
- l. flyposting (most of which is illegal)
- m. packages, wrappers, labels, tickets, timetables and price lists unless they advertise another product or a sales promotion or are visible in a marketing communication
- n. point-of-sale displays, except those covered by the sales promotion rules or the rolling paper and filter rules
- o. political advertisements as defined in Section 7
- p. website content not covered by I d and I h, including (but not limited to) editorial content, news or public relations material, corporate reports and natural listings on a search engine or a price comparison site
- q. sponsorship; marketing communications that refer to sponsorship are covered by the Code
- r. customer charters and codes of practice
- s. investor relations (see III m)
- t. 'heritage advertising' by or from companies, organisations or sole traders on their own websites, or in other non-paid for space online under their control, where that advertising is not part of their current promotional strategy and is placed in an appropriate context. In cases where advertisements or other marketing communications recently adjudicated against by the ASA are featured, rule 1.2 (the spirit of the Code) may be invoked to bring those advertisements or other marketing communications within remit.

III These definitions apply to the code:

- a. product encompasses goods, services, ideas, causes, opportunities, prizes or gifts
- b. consumer is anyone who is likely to see a given marketing communication, whether in the course of business or not
- c. the United Kingdom covers the Isle of Man and the Channel Islands
- d. a claim can be implied or direct, written, spoken or visual; the name of a product can constitute a claim
- e. the Code is divided into numbered rules
- f. a marketing communication includes all forms of communication listed in part I
- g. a marketer includes an advertiser, promoter or direct marketer
- h. a supplier is anyone who supplies a product that is sold by a distance-selling marketing communication (and can be the marketer)
- i. a child is anyone under 16
- j. a corporate subscriber includes corporate bodies such as limited companies in the UK, limited liability partnerships in England, Wales and Northern Ireland or any partnerships in Scotland.

It also includes schools, hospitals, Government departments or agencies and other public bodies. It does not include sole traders or non-limited liability partnerships in England, Wales and Northern Ireland. See rule 10.14
- k. An advertorial is an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement
- l. A viral advertisement is an e-mail, text or other non-broadcast marketing communication designed to stimulate significant circulation by recipients to generate commercial or reputational benefit to the marketer. Viral advertisements are usually put into circulation ("seeded") by the marketer with a request, either explicit or implicit, for the message to be forwarded to others. Sometimes they include a video clip or a link to website material or are part of a sales promotion campaign.

m. Investor relations material is information about an organisation (including its goods or services) addressed to the financial community, including shareholders and investors, as well as others who might be interested in the company's stock or financial stability.

IV These criteria apply to the code:

- a. the ASA Council's interpretation of the Code is final
- b. if it is not clear whether a communication falls within the remit of the Code, the ASA will be more likely to apply the Code if the material complained about is in paid-for space
- c. compliance with the Code is assessed according to the marketing communication's probable impact when taken as a whole and in context. That will depend on the medium in which the marketing communication appeared, the audience and its likely response, the nature of the product and any material distributed to consumers
- d. the Non-broadcast ASA Council may have regard to decisions made by the Broadcast ASA Council under the BCAP Code and, similarly, the Broadcast ASA Council may have regard to decisions made by the Non-broadcast ASA Council under the CAP Code. Factors that help to determine whether an ASA adjudication is likely to apply across media include, but are not limited to, the characteristics of the medium, how the advertisement is targeted, the context in which a claim is made and the extent to which the relevant CAP Code provisions correspond to those in the BCAP Code
- e. the Code does not have the force of law and its interpretation will reflect its flexibility. The Code operates alongside the law; the Courts may make rulings on matters covered by the Code
- f. an indication of the statutory rules governing marketing communications is given on www.cap.org.uk; professional advice should be taken about their application
- g. no spoken or written communication from the ASA or CAP should be understood as containing legal advice
- h. the Code is primarily concerned with the content of advertisements, promotions and direct marketing communications and not with terms of business or products. Some rules, however, go beyond content; for example, those that cover the administration of sales promotions, the suitability of promotional items, the delivery of products ordered through an advertisement and the use of personal information in direct marketing. Editorial content is specifically excluded from the remit of the Code (see II k) although it might be a factor in determining the context in which a marketing communication is judged (see IV c)
- i. the Code makes due allowance for public sensitivities but will not be used by the ASA to diminish freedom of speech unjustifiably
- j. the ASA does not arbitrate between conflicting ideologies
- k. in assessing compliance with the Code, the ASA may take account of honest market practices and the general principle of good faith in the traders' field of activity.
- l. in relevant cases the ASA will have regard to existing statutory enforcement bodies. The ASA reserves the right to refer complainants to the relevant statutory regulator in cases where a complaint about a marketing communication relates to a Code rule that reflects a legal provision for a regulated product.

How the System Works

The self-regulatory system

The self-regulatory system comprises three bodies: the Advertising Standards Authority (ASA), the Advertising Standards Board of Finance (ASBOF) and the Committee of Advertising Practice (CAP). Their work is described below.

The strength of the system depends on the long-term commitment of all those involved in advertising, sales promotions and direct marketing. Practitioners in every sphere share an interest in seeing that marketing communications are welcomed and trusted by their audience: unless they are accepted and believed, marketing communications cannot succeed. If they are offensive or misleading, they discredit everyone associated with them and the industry as a whole.

The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code), and the details of the guidance and training offered by CAP Services to help advertisers comply with the rules, can be found at www.cap.org.uk. The ASA publishes adjudications weekly on www.asa.org.uk.

The advertising Standards authority

The ASA was established in 1962 to provide independent scrutiny of the newly created self-regulatory system set up by the industry. Its chief tasks are to promote and enforce high standards in marketing communications, to investigate complaints, to identify and resolve problems through research, to ensure that the system operates in the public interest and to act as the channel for communications with those who have an interest in marketing communication standards.

The ASA is a limited company and is independent of both the Government and the marketing business. The Chairman of the ASA is appointed by ASBOF and is unconnected with the marketing business. Most of the 12-member Council appointed by the Chairman to govern the ASA is also unconnected with the marketing business. All Council members sit as individuals and are selected, as far as possible, to reflect a diversity of background and experience. Vacancies for independent members of Council are publicly advertised. Members serve for a maximum of two three-year terms.

The ASA investigates complaints from any source against marketing communications in non-broadcast media. Marketers are told the outcome of the ASA Council's rulings and, if necessary, are asked to withdraw or amend their marketing communications. The adjudications reached by the Council are published weekly on www.asa.org.uk. The ASA website contains information about the ASA's procedures for handling complaints about a marketing communication.

The ASA gives equal emphasis to conducting a substantial research and monitoring programme by reviewing marketing communications that fall within its scope. Specific media and product categories may be identified for scrutiny. In that way the ASA can identify trends and prevent future problems.

Publicising the ASA's policies and actions is essential to sustaining wide acceptance of the system's integrity. A comprehensive programme of seminars and speeches, advertising, e-mail and website updates, briefing notes on a wide range of topics, articles written for professional journals and newspaper, magazine, TV and radio coverage all augment the ASA's extensive media presence.

The advertising Standards Board of finance

The Advertising Standards Board of Finance sets the framework for industry policy making and is responsible for the Committee of Advertising Practice and for funding the self-regulatory system.

The self-regulatory system is funded principally by a levy on advertising and direct marketing expenditure collected by ASBOF. The separation of operation and responsibilities helps to ensure that the independent judgement of the ASA is not compromised.

ASBOF's members are advertisers, promoters and direct marketers, their agencies, the media and the trade and professional organisations of the advertising, sales promotion and direct marketing businesses.

The committee of advertising practice

CAP's role is to ensure that marketing communications within the Code's remit that are commissioned, prepared, placed or published in the UK comply with the CAP Code.

CAP co-ordinates the activities of its members to achieve the highest degree of compliance with the Code. It creates, reviews and amends the Code. From time to time, it produces for the industry Help Notes that

give detailed guidance on specific sectors or subjects that are covered only generally in the Code. It oversees the sanctions operated by its members. It operates a website, www.cap.org.uk, to provide information and guidance to the industry, including access to Help Notes, Advice Online and relevant Ad Alerts. It convenes *ad hoc* Working Groups for limited periods to address specific subjects arising out of the self-regulatory process.

The Code establishes a standard against which marketing communications are assessed. Other codes exist in many sectors; many require practitioners to comply with the CAP Code.

The Chairman of CAP works on a part-time basis and is appointed for an agreed period and remunerated by ASBOF.

CAP actively encourages participation in the self-regulatory system. Suggestions for improving Code rules or modifying their application should be sent in writing to the Chairman. If changes are adopted by CAP their introduction is normally deferred for a short time to give marketers an adequate opportunity to amend their marketing communications.

Cap Services

As well as writing and maintaining the rules, CAP also places great emphasis on the prevention of breaches and works to promote high compliance. CAP Services are a range of bespoke advice, training seminars and online resources to help all practitioners stay on top of advertising regulation, the requirements of the CAP and BCAP Codes, and how those are interpreted by the ASA.

Full details of CAP Services can be found at www.cap.org.uk. Practitioners are urged to register on the site and subscribe to the newsletters to help them keep up-to-date with regulatory developments, training events and updates to guidance.

The copy advice team

The Copy Advice team gives advice to marketers, their agencies, the media and other practitioners on the likely conformity with the CAP Code of marketing communications before they are published or distributed. It also checks marketing communications produced by marketers subject to mandatory pre-vetting (for example, those subject to the poster pre-vetting sanction).

Copy Advice is fast, free and confidential from competitors. Bespoke advice is provided by the specialist team of advisers who deal with the vast majority of written enquiries within 24 hours, although lengthy submissions can take longer, especially those that include detailed evidence that needs to be reviewed by external expert consultants. Advice is not binding either on enquirers or on the ASA. Favourable pre-publication advice does not automatically protect marketers from complaints being investigated and upheld by the ASA. It is, however, the best guide to what is likely to comply with the Code.

Online resources are available at www.copyadvice.org.uk. Visitors can register to access the most comprehensive database of guidance (AdviceOnline and Help Notes) on the CAP Code, as well as case studies and helpful checklists.

Online: www.copyadvice.org.uk

Phone: 020 7492 2100

E-mail: advice@cap.org.uk

The compliance team

The Compliance team ensures that marketing communications comply with the Code to protect consumers and ensure a level playing-field. It enforces ASA adjudications, disseminates any ramifications of them for an industry sector and acts against marketers that persistently break the Code. Exceptionally, if a marketing communication obviously breaches the Code, for example, if it contains a claim that is blatantly misleading, the team takes immediate compliance action to stop the marketing communication from reappearing. If it seems necessary to avoid harm, the Executive may take interim action during an ASA investigation (see "Sanctions").

The team co-ordinates the sanctions operated by the Executive and by CAP members; in particular, it issues Ad Alerts to CAP members, including the media, advising them to withhold their services from non-compliant marketers or deny those marketers access to advertising space.

Information on compliance is available on www.cap.org.uk. Companies that are members of a CAP trade association or professional body can access a database of relevant Ad Alerts on a secure section of the

CAP website.

The panels

Much of the detailed work of CAP is done by its ~~two~~ Panels. The Sales Promotion and Direct Response Panel concentrates on sales promotions and direct marketing. The Online Publications Media Panel advises on the proper distinction between editorial and advertising in online publications. The General Media Panel concentrates on all other CAP-related and BCAP-related matters. ~~Each Panel is~~ The Sales Promotion and Direct Response Panel and the General Media Panel are composed of industry experts and one ASA Council member; the Online Publications Media Panel is composed of the Chairmen of ASBOF and PRESSBOF.

The Panels guide the Executive and help the ASA and CAP to produce advice for the industry and to interpret the Code.

The Panels provide a forum to reassess recommendations and advice given by the Executive. The parties to a complaint can request a Panel assessment before the ASA Council has adjudicated; Council will take account of the Panel's opinion. Council's judgement on the interpretation of the Code is, however, final. Anyone directly affected by copy advice given by the Executive on behalf of CAP can ask for it to be considered by the relevant Panel. The Panel Chairmen can reject requests and will do so if it seems that a Panel is being used to hamper the effective running of the self-regulatory system.

The Independent review procedure

In exceptional circumstances, the ASA Council can be asked to reconsider its adjudication (including a Council decision not to investigate a complaint). Requests for a review should contain a full statement of the grounds, be in writing and be addressed to the Independent Reviewer of ASA Adjudications, 5th Floor, 21 Berners Street, London, W1T 3LP. They should be sent within 21 days of the date on the ASA's letter of notification of an adjudication. The Independent Reviewer may waive that 21-day time limit if he judges it fair and reasonable to do so.

Requests should come only from the complainant or the marketer. Those from the marketer or from an industry complainant should be signed by the Chairman, Chief Executive or equivalent; requests made only by its solicitor or agency will not be accepted. All dealings with the Independent Reviewer must be in writing.

Requests may be made on two grounds:

- If extra relevant evidence becomes available (an explanation of why it was not submitted previously, in accordance with rule 3.7, will be required).
- If the Council's adjudication or the process by which it was made is substantially flawed.

No review will proceed if the point at issue is the subject of simultaneous or contemplated legal action between anyone directly involved. Requests for review should make plain that no such action is underway or is contemplated.

The ASA will not delay publication of the relevant adjudication pending the outcome of a review save in exceptional circumstances (on the authorisation of the ASA Director General).

The Independent Reviewer will evaluate the substance of the request with advice from two Assessors (except for requests about a Council decision not to investigate a complaint). The two Assessors are the Chairman of ASBOF (or nominee) and the Chairman of the ASA.

If the Independent Reviewer decides not to accept the request (in whole or in part) because he considers that it does not meet either of the two grounds set out above, he will inform the person making the request.

If he decides to accept the request (in whole or in part) he will undertake an investigation, either by himself or with help from the ASA Executive or any other source of help or advice. He will inform the other parties to the Council adjudication or decision that he has accepted a request for review and will invite their comments on the submission made by the party requesting the review. At the end of his investigation, he will make a recommendation to the ASA Council.

The Council's decision on requests for review is final.

The Independent Reviewer will inform all parties of the Council's decision. Adjudications that are revised as a result of a review will be published on www.asa.org.uk.

Administration of the system

The ASA and CAP share a joint Executive whose duties are organised to recognise the distinct functions of the two bodies. The Executive carries out the day-to-day work of the system and acts as a channel of communication, ensuring that industry expertise, specialist advice and the decisions of the ASA Council are co-ordinated and disseminated. The ASA Council and CAP form an independent judgement on any matter reported to them after they have considered the Executive's recommendation.

Marketers bear principal responsibility for the marketing communications they produce and must be able to prove the truth of their claims to the ASA; they have a duty to make their claims fair and honest and to avoid causing serious or widespread offence. Agencies have an obligation to create marketing communications that are accurate, ethical and neither mislead nor cause serious or widespread offence. Publishers and media owners recognise that they should disseminate only those marketing communications that comply with the Code. That responsibility extends to any other agent involved in producing, placing or publishing marketing communications. They accept the rulings of the ASA Council as binding.

The ASA Council judges whether marketing communications breach the Code. Everyone responsible for commissioning, preparing, placing or publishing a marketing communication that breaches the Code is asked to act promptly to amend or withdraw it.

The law

Marketers, agencies and publishers have primary responsibility for ensuring that everything they do is legal. Since the Code was first published, the number of laws designed to protect consumers has greatly increased. More than 200 UK statutes, orders and regulations as well as several directly effective European laws affect marketing communications here (see www.asa.org.uk or www.cap.org.uk for a non-exhaustive list). The ASA maintains a rapport with those responsible for initiating or administering any law that has a bearing on marketing communications. The system is reinforced by the legal backup provided for the work of the ASA by the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 (see Scope of the Code).

The Code, and the self-regulatory framework that exists to administer it, was designed and has been developed to work within and to complement those legal controls. It provides an alternative, and in some instances the only, means of resolving disputes about marketing communications. It stimulates the adoption of high standards of practice in matters, such as taste and decency, that are extremely difficult to judge in law but fundamentally affect consumer confidence in marketing communications.

Some important aspects are governed by legislation enforced by local authority trading standards and environmental health officers. They include product packaging (except for on-pack promotions), weights and measures, statements on displays at point-of-sale and the safety of products.

Many Government agencies administer consumer protection legislation that ranges far wider and deeper than could be enforced through self-regulatory codes of practice. Marketers who break the law risk criminal prosecution or civil action. The Code requires marketers to ensure that all their marketing communications are legal but any matter that principally concerns a legal dispute will normally need to be resolved through law enforcement agencies or the Courts.

Europe

Most member States of the European Union, and many non-EU European countries, have self-regulatory organisations (SROs) that are broadly similar to those in the self-regulatory system in the UK. Together with organisations representing the advertising industry in Europe, those SROs are members of the European Advertising Standards Alliance (EASA), the single voice of the advertising industry in Europe on advertising self-regulation. The ASA is a founder member of EASA. EASA is located in Brussels and meets regularly to co-ordinate the promotion and development of self-regulation at a European level.

Among its wide range of operations, EASA acts as a focal point for cross-border complaints investigated by individual members; consumers need complain only to the SRO in their country, no matter where the marketing communication originated. EASA is a source of information and research on self-regulation. It helps in the development and establishment of SROs in Europe and corresponds internationally.

EASA has published a statement of common principles, the core values that underpin each of its constituent SROs, and recommended standards for operating best practice in self-regulation that all SROs should seek to achieve. Both are available on www.easa-alliance.org.

Information on EASA's objectives, activities and publications, including the Alliance Update and order forms for *The Blue Book*, which contains an analysis of self-regulation in 24 European countries, is available from the EASA website, www.easa-alliance.org.

Sanctions

Compliance surveys published periodically by the Executive have demonstrated that the vast majority of marketing communications comply with the Code. By providing advice, guidance or pressure, media owners, agencies and other intermediaries play a crucial role in ensuring compliance. If a marketing communication breaks the Code, the marketer responsible is told to amend or withdraw it. Most willingly undertake to do so. If they do not, the Compliance team will consider the sanctions available to it.

The ASA and CAP do not adopt a legalistic attitude towards sanctions and they ensure that sanctions are both proportionate to the nature of the breach and effective. They focus on ensuring that noncompliant marketing communications are amended, withdrawn or stopped as quickly as possible.

The ASA and CAP are not restricted to applying sanctions only against marketers that have been subject to a formal investigation. If a marketing communication is obviously misleading or offensive, the ASA and CAP may take compliance action in the absence of complaints or during an investigation (see "The Compliance team").

Adverse publicity

Publicising the ASA's adjudications is essential to sustaining wide acceptance of the system's integrity and the principal sanction available to the ASA is the unwelcome publicity that could result from the adjudications it publishes weekly on www.asa.org.uk. Adverse publicity is damaging to most marketers and serves to warn the public. Marketers may face more adverse publicity if they cannot or will not amend their own non-compliant marketing communication on their own website or in other non-paid-for space online under their control. Their name and their non-compliance may be featured on a dedicated section of the ASA website and, if necessary, in an ASA advertisement appearing on an appropriate page of an internet search website. Anyone who is interested can access ASA adjudications quickly and easily on the website and can set up a profile-specific account so they are automatically notified by e-mail of relevant adjudications as soon as they are published. ASA adjudications receive a substantial amount of coverage in local, regional, national and international media.

An adverse ASA adjudications could have consequences for compliance with other codes or legal requirements. For example, personal data gathered as a result of a misleading marketing communication might not comply with the fair processing requirement in the first data protection principle of the Data Protection Act 1998.

~~Ad alerts~~ Denial of media space

CAP may issue Ad Alerts to its members, including the media, advising them to consult the Copy Advice team before accepting advertisements for publication or, in some circumstances, to withhold their services from non-compliant marketers or deny the latter access to advertising space. Ad Alerts are issued at short notice, are carefully targeted for greatest impact, are sent electronically and, once issued, are available on a secure section of www.cap.org.uk to those who might need to consult them. They contain the name and contact details of the non-compliant marketer, a description of the compliance problem and, if possible, a scanned image of the marketing communication in question. CAP may issue Ad Alerts that cover an entire sector if it perceives a widespread problem. CAP may ask internet search websites to remove a marketer's paid-for search advertisement if that links directly to a page hosting the marketer's own non-compliant marketing communication on the its own website or in other non-paid-for space under the marketer's control.

Trading privileges and recognition

Many CAP trade associations and professional bodies offer their members, and others, recognition and trading privileges, which they may revoke, withdraw or temporarily withhold. For example, agency recognition offered by the print media members of CAP may be withdrawn or the substantial direct mail discounts offered by the Royal Mail on bulk mailings withheld. In exceptional cases of noncompliance, CAP members may expel companies from membership.

Pre-publication vetting

The ASA and CAP may require persistent offenders to have some or all of their marketing communications vetted by the CAP Copy Advice team until the ASA and CAP are satisfied that future communications will comply with the Code.

The poster industry members of CAP operate a poster pre-vetting sanction to deter abuse of the medium. If the ASA adjudicates against a poster on the grounds of serious or widespread offence or social irresponsibility, the poster advertiser becomes a candidate for mandatory pre-vetting. If they believe that the advertiser either is incapable of complying with the Code or seems to have deliberately flouted the Code with the intention of generating complaints, PR and subsequent notoriety, the poster industry members of CAP and the CAP Executive will compel the advertiser to check future posters with the CAP Copy Advice team for a fixed period (usually two years).

Legal backstop

The self-regulatory system is recognised by the Government, the Office of Fair Trading (OFT) and the Courts as one of the “established means” of consumer protection in non-broadcast marketing communications. If certain types of marketing communication, including those that are misleading or contain an impermissible comparison, continue to appear after the ASA Council has ruled against them, the ASA can refer the matter to the OFT for action under the Consumer Protection from Unfair Trading Regulations 2008 or the Business Protection from Misleading Marketing Regulations 2008. The OFT can seek an undertaking that the marketing communication will be stopped from anyone responsible for commissioning, preparing or disseminating it. If that is not given or is not honoured, the OFT can seek an injunction from the Court to prevent its further appearance. Anyone not complying can be found to be in contempt of court and is liable to be penalised.

The ASA and CAP maintain a rapport with the OFT and with other bodies that have a responsibility for creating, administering or enforcing laws that have a bearing on marketing communications. If necessary, they may notify those bodies of non-compliant marketers and work with them to ensure that unacceptable marketing communications are amended, withdrawn or stopped.

The OFT and other “qualified entities”, such as Trading Standards Authorities, can use the Enterprise Act 2002 Part 8 to enforce consumer protection laws, including the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. Those regulations provide that, before taking action, qualified entities should have regard to the desirability of encouraging control by the “established means”.

Cross-border marketing communications

The Code does not apply to marketing communications in foreign media. If marketing communications appear in media based in countries that have self-regulatory organisations (SROs) that are members of EASA or if direct marketing originates from countries that have SROs that are members of EASA, EASA will co-ordinate cross-border complaints so the SRO in the country of origin of the marketing communication has jurisdiction; consumers need complain only to their SRO. If not, the ASA will take what action it can. The SROs with jurisdiction are formally responsible for applying any sanctions, though the ASA and CAP will, whenever they can, adopt a pragmatic approach to ensure that consumers are protected.

The ASA and CAP work closely with CAP trade associations and professional bodies, Trading Standards officers, Government departments, the OFT and other UK regulators, EASA and overseas SROs and statutory authorities to stop unacceptable marketing communications, especially misleading or offensive mailings sent direct to UK consumers from overseas. That work has achieved some success but the ASA, CAP and other authorities, whether statutory or self-regulatory, experience difficulties in enforcing the Code and laws against companies based overseas. “Qualified entities” can, however, act to ensure compliance with Directive 2005/29/EC “concerning unfair business-to-consumer commercial practices in the internal market” throughout the European Union.

To clarify what can and cannot be done, the ASA and CAP have produced a fact sheet, “Overseas Mailings”, to explain how they tackle unacceptable mailings that originate outside the UK and to warn consumers to treat those mailings with the utmost caution. That fact sheet is available on www.asa.org.uk.