



Advertising Standards Authority
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Electoral Commission Political Advertising Consultation (October 2003)

Response of the Advertising Standards Authority

Introduction

The Advertising Standards Authority (ASA) is responsible for maintaining the highest standards in non-broadcast advertising in accordance with the British Code of Advertising, Sales Promotion and Direct Marketing. The CAP Code (the Code) applies to all non-broadcast marketing communications in the UK, covering such media as print, posters, sales promotions, direct mail, SMS and internet advertising.

The Code, adjudicated on by the ASA, requires all marketing communications to be 'legal, decent, honest and truthful'. They should be prepared with a sense of responsibility to consumers and to society, and should respect the principles of fair competition generally accepted in business. The Code, and the ASA's interpretation of it, is the standard to which all organisations involved in non-broadcast advertising in the UK defer. Although the system is non-statutory, participation in it is mandatory by virtue of the agreement of advertisers, agencies and media to maintain common standards.

More information about the ASA is available on our website www.asa.org.uk.

We welcome the opportunity to participate in this consultation and give our views on the future regulation of political advertising. This response is submitted on behalf of the ASA. A separate response will be submitted by the Committee of Advertising Practice (CAP).

Background

In its consultation paper, the Electoral Commission has provided a detailed and comprehensive analysis of the issues surrounding the adoption of a specific code of practice for political advertising.

It notes that responsibility for regulation of this sector lay formerly with the ASA-CAP system, with CAP creating the Code and the ASA administering it. Shortly after the 1997 General Election, CAP revised the British Codes of Advertising and Sales Promotion to exempt political advertising from the ASA's remit. A restating of the reasons behind this decision forms the basis of the ASA submission to the current Electoral Commission consultation.

Chairman. Lord Borrie, QC
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Specific Remarks

What the Electoral Commission recognises as 'political advertising' – understandably, given their remit – would be classed at the ASA as 'election advertising'. Outside election campaigns, the ASA adjudicates on many controversial advertisements by pressure groups and charities without problem or challenge.

What the ASA does not do is to seek to judge between competing claims in campaign material designed to move votes at elections or referendums. The reasons for this were summarized in the ASA's preliminary report to the Electoral Commission following the 2001 General Election, which is attached (Appendix 1).

The 10th edition of the Codes exempted such advertising from its other provisions:

- 12.1 Any advertisement, whenever published, whose principal function is to influence voters in local, regional, national or international elections or referendums is exempt from the Codes but advertisers are encouraged to make their identity clear.
- 12.2 There is a formal distinction between government policy and that of political parties. Advertisements by central or local government, or those concerning government policy as distinct from party policy, are subject to all the Codes' rules.

The formulation in the eleventh edition rewords this slightly reading:

- 12.1 Any advertisement or direct marketing communication, whenever published or distributed, whose principal function is to influence voters in local, regional, national or international elections or referendums is exempt from the Code.
- 12.2 There is a formal distinction between Government policy and that of political parties. Marketing communications (see clauses 1.1 and 1.2) by central or local government, as distinct from those concerning party policy, are subject to the Code.

The ASA system works where the partners – advertisers, agencies and media – are advertisers for the long haul and have an interest in maintaining standards. The political parties are occasional advertisers only and have never signed up to the Codes in their entirety. In particular, the political parties have never agreed to be judged against the provisions of clause 3.1, ie substantiation.

The consultation notes the distinction to be made between political and commercial advertising. While the reputation of politicians and the democratic process is of concern to all, it is not for the ASA to express a view about whether there should be advertising ground rules for elections – in addition to existing law – and, if so, whether the political parties or the Commission should devise them.

It would, moreover, be damaging to advertising – and indeed to the self-regulatory system – if the ASA were drawn back into attempting to referee a game played by quite different rules.

The ASA should not be put in the position of having to police someone else's code. Self-regulation is not a game of cops and robbers. It has to involve self regulation by those involved.

If the political parties and/or the Electoral Commission agreed to establish self-regulatory ground rules for election advertising, it could not be for the ASA to administer them.

It would surely not be practicable to maintain an independent adjudicatory body solely to judge on election material. Such a body would have very little work to do most of the time, but would have to be staffed so as to investigate and resolve speedily occasional multiple and simultaneous complaints. Electors might also be confused by yet another advertising regulator. There is already evidence of confusion among consumers between the ITC, Radio Authority, BSC, ASA and ICSTIS, all of whom have responsibility for some aspects of advertising. There are currently moves to establish a 'one-stop-shop' for advertising regulation. It is hard to see who other than the Electoral Commission itself would be in a position to adjudicate on breaches of any code for election advertising.

Dr David Webster
Head of Policy

24 November 2003

Appendix: Preliminary Report on the conduct of political advertising during the 2001 General Election

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22 June 2001

Lord Borrie has asked me to thank you for your letter of 6 June about General Election advertising and to respond for the ASA.

You ask for our preliminary thoughts about the effect, if any, of the provisions of new Clause 12.1 in the 10th edition of the Codes and whether the decision to exempt election advertising from our remit had been a positive step for the Authority or for the consumer.

You are right to suggest that it is too early to offer a definite assessment of this election's advertising. The Committee of Advertising Practice (CAP), which represents the industry side of the self-regulatory system for non-broadcast advertising, undertook to review election advertising in the light of the new clause. This review is underway but it is not yet complete. We welcome the opportunity to comment in general terms at this stage and should be glad to give further information to the Commission in due course.

Background

The authors of the Codes are not the ASA but the Committee of Advertising Practice. The Codes are available on the CAP website www.cap.org.uk and also on the ASA site www.asa.org.uk. Some background might be helpful.

Prior to an amendment to the Codes in 1993, 'political' advertisements (including those by charities and pressure groups) were exempt from truthful presentation requirements, but had still to observe the Codes' other rules – for example, on decency, fear etc. The 9th edition of the Codes (1995) defined political advertising more narrowly, still limiting the exemption to some provisions of the Codes only. The position was described as 'half in, half out' and came to be seen as unsatisfactory and unsustainable. The 10th edition of the Codes, introduced in October 1999 and implemented in full in January 2000, exempted from all provisions of the Codes 'any advertisement, whenever published, whose principal function is to influence voters in local, regional, national or international elections or referendums'.

The rules for 'political advertising' which applied under the previous 9th edition of the Codes stated:

Political advertising

- 12.1 Any advertisement whose principal function is to influence opinion in favour of or against any political party or electoral candidate contesting a UK, European parliamentary or local government election or any matter before the electorate for a referendum, is exempt from clauses 3.1, 7.1, 14.3, 19.2 and 20.1. All other rules in the Codes apply.
- 12.2 The identity and status of such advertisers should be clear. If their address or other contact details are not generally available they should be included in the advertisement.
- 12.3 There is a formal distinction between government policy and that of political parties. Advertisements by central or local government, or those concerning government policy as distinct from party policy, are subject to all the Codes' rules.

The clauses from which 'political advertising' was exempt under the 9th edition dealt with substantiation, truthfulness, testimonials, comparisons and denigration. In effect, the Codes accepted that the conventions of party political warfare were such either that politicians should not be expected to tell the truth or avoid unfair attacks, or that the self-regulatory system could not be expected to enforce compliance. Either way, it was a case of 'caveat elector'.

The 'half in, half out' regime did not, however, achieve its objective of protecting consumers as far as possible while keeping the self-regulatory system out of political controversy. The celebrated Conservative Demon Eyes 'New Labour, New Danger' campaign in 1996 was ruled against by the Authority because the clause forbidding an adverse portrayal of a person from whom prior permission to be featured in an advertisement had not been obtained was not one of those from which political advertising was exempted. A complaint under Clause 3.1 (substantiation) against Labour's 'Same Old Tories, Same Old Lies' ad, also in 1996, on the other hand, would have been ruled outside remit since a Labour claim about the Conservatives' veracity was not a claim requiring substantiation. In fact, the complaints that were made at the time fell under Clause 5.1 (causing offence), which did apply, rather than 3.1 which did not. Complaints about offence were not upheld. Nevertheless, the Authority found itself in the uncomfortable position of having ruled against the Conservatives but not against Labour.

Following these events, it was felt that it could do damage to the industry's self-regulatory system if it were to be seen to have been deployed against one political party but not another, and that the ASA could not, in any case, be expected to rule with sufficient speed and effectiveness during a brief election campaign in which the contestants were not regular advertisers with an interest in the long term success of the self-regulatory system.

In 1998, the Committee of Advertising Practice referred this unsatisfactory half way house position to the Neill Committee on Standards in Public Life, which was conducting an inquiry on the funding of political parties. CAP proposed that party political advertisements should come within the remit of the proposed Electoral Commission rather than be subject to the Codes. In its evidence, CAP made clear that the ASA could not be expected to police political claim and counter-claim in the heat of electoral battle.

A new and complicating factor was the advent of Human Rights legislation and the fear that any restraint on non-commercial communications might be struck down under the freedom of speech provisions of Article 10.

The Neill Committee was not persuaded that advertising should be a matter for the Electoral Commission, but recommended that the political parties should seek to agree, in association with the advertising industry, a code of best practice for political advertising in the non-broadcast media. Despite CAP's offer to help draft such a code, no progress has been made and neither do the political parties seem likely to agree one.

We understand that the Committee on Standards in Public Life will shortly be reviewing progress in response to the recommendations contained in their first six reports, including that on the funding of political parties. This will presumably record the failure of the political parties to establish an appropriate code of practice.

The 10th edition of the Codes reflected the industry's advice to Neill and now includes a general exemption for party political advertising from all provisions of the Codes.

A new Clause 12.1 (10th edition) replaces the previous version and also incorporates the old 12.2. New 12.2 is the previous 12.3:

Political advertising

- 12.1 Any advertisement, whenever published, whose principal function is to influence voters in local, regional, national or international elections or referendums is exempt from the Codes but advertisers are urged to make their identity clear.
- 12.2 There is a formal distinction between government policy and that of political parties. Advertisements by central or local government, or those concerning government policy as distinct from party policy, are subject to all the Codes' rules.

You might be interested to see the terms in which we drew attention, in our bimonthly report in January 2001, to the change that had taken effect a year earlier.

General Election 2001

Our initial assessment of election advertising in preparation for and during the 2001 election campaign is that we did not see anything that so blatantly breached the 'legal, decent, honest and truthful' principle that we were embarrassed not to be able intervene.

Between 1 January and 7 June, we received a total of 46 complaints about 25 advertisements meeting the criteria set out in clause 12.1. These included advertisements placed both by political parties and by others such as trade unions. Of these, 19 complaints about 13 advertisements were received after 31 March, ie in the period of intensive pre-campaign and campaign activity. We informed all complainants that we judged the ads to be covered by the 12.1 exemption. We received only one protest in response to such an 'out of remit' ruling. A further explanation from one of our complaints managers appeared to satisfy the complainant. The comparatively small number of complaints and the lack of

reaction from complainants when informed of the Authority's stance suggest that our assessment was supported by consumers.

We did not see any ads that, had the former clause 12.1 still been in place, would have been likely to have resulted in complaints being upheld. A defence of fair comment or of public expectation and understanding would have been likely to lead to such complaints being rejected.

For these reasons, we do not consider that the change in the Codes influenced the approach of advertisers or the sort of creative work that was developed.

The Self-regulatory system

In our view, the self-regulatory system in general and the ASA and CAP in particular benefited from avoiding what would have been likely to be fruitless investigations into 'problematic' election ads. We were not drawn into political controversy and we got on with the business of protecting consumers and businesses from real threats of detriment from misleading or offensive content in commercial advertisements.

Initially, there had been some criticism of the ASA. When the change in the Codes was publicised, some political observers accused the ASA of cowardice, fearing that the election would be particularly 'dirty' as a result of the change. Some in the advertising industry felt the parties were being let off the hook and should be subject to the same rules the politicians insist should apply to everybody else. In fact, the issue was hardly raised during the election campaign.

Consumers

The small number of complaints received suggests that consumers in general did not feel either let down by CAP's decision or abandoned by the ASA. Consumers benefited from the ASA not being distracted for a purpose to which it is ill-suited.

I hope this is helpful. Please let me know if anything is not clear or if you require any further information at this stage.

Christopher Graham
Director General