

Non-broadcast Complaint Handling Procedures

Introduction

1. This document outlines the procedures to be followed by the Advertising Standards Authority (ASA) when handling complaints about advertising, sales promotions and direct marketing (collectively marketing communications) in non-broadcast media. It was first published on 9 July 2007 and revised on 17 January 2008.

2. The Committee of Advertising Practice (CAP), an unincorporated association, is the self-regulatory body that creates, revises and enforces the non-broadcast British Code of Advertising, Sales Promotion and Direct Marketing (also known as the CAP (Non-broadcast) Code but henceforth the Code). The ASA adjudicates under the Code.

Receipt of complaints

3. If a complainant can satisfy the ASA that there is an issue for the marketer to answer, and assuming there is no other legitimate reason not to investigate (for example see paragraph 9), the ASA will investigate the complaint. There is no charge to the complainant.

4. Complainants should send to the ASA the marketing communication to which their complaint refers or a note of where and when it appeared.

5. The details of the complaint will be logged by the ASA Complaints Reception team.

Timely complaints

6. Complaints must be made within three months of the marketing communication's appearance, although in exceptional circumstances complaints about older marketing communications will be considered.

Acknowledging complaints

7. The ASA will acknowledge each complaint and give it a reference number. It will respond to all complainants, even if the complaint does not fall within the ASA's remit. The ASA is committed to acknowledging complaints within five days of receiving them.

Anonymity and identity disclosure

8. The ASA will not disclose the identity of individual members of the public who complain (public complainants) without their permission. In some circumstances public complainants might be asked for a formal, written assurance that they have no commercial or other interest in registering their complaints. Non-public complainants, for example competitor complainants and groups with an obvious interest in the outcome of the complaint (such as

consumer bodies and pressure groups), are required to: agree to the disclosure of their identity; endeavour to resolve their differences, wherever possible, direct with the marketer or through their trade or professional organization; and confirm that they are not engaged in simultaneous legal action on the point at issue.

Simultaneous legal action

9. The ASA will not normally pursue complaints if the point at issue is the subject of simultaneous legal action.

Confidentiality

10. The ASA will on request treat in confidence any genuinely private or secret material supplied unless legislation, the Courts or officials acting within their statutory powers compel its disclosure. The ASA might send confidential evidence to external consultants, who are obliged not to disclose it to anyone else. The ASA will on request make available to marketers and complainants the names of relevant external consultants. Copies of draft recommendations (see paragraph 26) are sent to marketers and complainants, who should treat the recommendations as confidential until the date that the adjudication is published. The ASA's published adjudications are publicly available and the ASA might circulate them to the media.

ASA- and CAP-initiated investigations

11. The ASA might itself initiate an investigation into what it believes are potential Code breaches on the back of complaints it receives. The procedures in a complaint-led investigation and an ASA-initiated investigation are broadly the same. Similarly, in the course of undertaking monitoring, CAP might raise with marketers issues about apparent Code breaches.

Assessment of complaints

12. An initial assessment of the complaint is made by the ASA Complaints team.

Withdrawal pending investigation

13. In exceptional circumstances, for example where public harm is likely to result from the continued appearance of a marketing communication, the ASA will direct the marketer to amend or withdraw a marketing communication pending investigation and adjudication by the Non-broadcast Council (henceforth Council) at a later date. The ASA will make such a direction only when it believes there is prima facie evidence of a serious breach of the Code. The ASA Chairman (or in his absence the senior independent Council member), in consultation with the Director General (or senior manager), one independent and one industry Council member, must have agreed to such a direction.

'No investigation' cases

14. The Complaints team does not submit to Council cases that it believes involve frivolous complaints or those that relate to marketing communications that clearly do not breach the Code. The team closes those cases directly by writing to the complainant explaining that there has been no breach of the Code.

Turnaround targets for 'no investigation' cases

15. The ASA's turnaround target for straightforward 'no investigation' cases is five working days from the receipt of the complaint to notification of the decision and 10 working days where preliminary work is required.

'No investigation after Council decision' cases

16. The Complaints team submits to Council those cases that it believes raise issues but that it considers, on balance and without needing formally to investigate, do not appear to breach the Code. If Council agrees with that assessment the team closes those cases, notifying the marketers so they are aware of the response to their marketing communications. If Council does not, the team passes them to the ASA Investigations team for further investigation.

Turnaround target for 'no investigation after Council decision' cases

17. The ASA's turnaround target for 'no investigation after Council decision' cases is 25 working days from the receipt of the complaint to notification of the decision.

Named investigation executive and keeping complainants informed

18. If a case is passed to the Investigations team, a named investigation executive will be in charge of the case and will act as the point of contact with complainants and marketers. Complainants should be kept informed of progress with the handling of their complaint at intervals of no longer than fifteen working days.

Informal investigations

19. The Complaints or Investigations teams might decide to resolve cases informally. Reasons for doing that include but are not limited to:

- if it considers an apparent breach is minor and clear cut and is unlikely to be of interest, in terms of indicating where the ASA draws the line, to other marketers. That includes most mail order and database cases, where investigation results in, for example, goods being supplied or personal details being removed from a direct marketing database and/or

- if a marketer has taken immediate and relevant action and remedied a minor problem before being contacted by the ASA.

20. The decision to resolve cases informally is solely at the discretion of the Complaints and Investigations teams and is likely to be taken only if there are few complaints.

21. When resolving cases informally the teams will, if necessary, request an assurance from the appropriate marketer that the marketing communication will be suitably amended or withdrawn, or some other action taken, and on receipt of that will close the case without producing a formal recommendation for Council. It will promptly notify Council of those cases that have been resolved informally and will publish the names of the marketers concerned on the ASA website. The website will not identify those cases as breaches.

Turnaround target for 'informal investigations'

22. The ASA's turnaround target for 'informal investigations' is 15 working days (if the Complaints team has resolved the case in the course of undertaking its initial assessment) or 35 working days (for mail order and database cases and if the Investigations team has resolved the case following an informal investigation) from the receipt of the complaint to notification of the decision.

Standard investigations

23. The Investigations team might decide to investigate cases formally. Reasons for doing that include but are not limited to:

- if it believes an apparent breach is not minor and/or
- if it believes it is not clear cut whether a breach of the Code has occurred and a Council decision is therefore required.

Marketer's response to the complaint

24. The investigation executive will send a summary of the complaint (normally without disclosing the complainant's identity) to the marketer and request a written response. The executive will explain in their correspondence which part of the Code is thought relevant and might also raise issues beyond those raised by the complainant (see paragraph 11). Marketers should normally respond to the ASA within five working days (for cases that involve taste and decency and/or social responsibility issues) or 10 working days (for all other cases). However, more time might be allowed for complicated investigations or in other exceptional circumstances. The grounds for an extension request should be set out in writing. An extension is unlikely to be for longer than five working days.

25. The Code requires marketers to produce documentary evidence to substantiate all claims that are capable of objective substantiation. All evidence submitted by marketers must be in English.

The draft recommendation

26. On receipt of the response and any further written comments or clarification, the investigation executive will analyse the case and prepare a draft recommendation. The draft recommendation consists of a summary of the marketing communication and complaint, the relevant Code clauses, a summary of the marketer's arguments in defence of the marketing communication, a draft assessment to uphold, uphold in part or not uphold the complaint, the rationale for that assessment and the action, if any, required to remedy the problem.

Marketer's response to the draft recommendation

27. The investigation executive will then send the draft recommendation to the marketer and complainant¹ for any comments on the factual accuracy of the recommendation. Marketers should normally respond within five working days and confine their comments to the factual accuracy of the draft recommendation; they should not normally repeat arguments already put to the ASA or try to present new substantiation or lines of defence. The recommendation will form the main part (together with, for example, a copy of the marketing communication and any guidance that might be relevant) of the submission to Council. Council might disagree with the ASA Executive's recommendation, so marketers wishing to defend the marketing communication fully should do so by this stage even if the draft recommendation is not to uphold the complaint.

Council's adjudication

28. The investigation executive will present the recommendation to Council, which adjudicates. No provision is made for oral hearings. Council might agree with the recommendation, adjudicate differently or suggest that further investigation is necessary.

29. If minor changes to the adjudication are needed after Council has deliberated, for example to explain better the rationale for the decision, the investigation executive might make those changes without re-presenting the case to the marketer or Council. If more significant but not substantial changes are necessary, the investigation executive might re-present the case to Council only. If substantial changes are necessary the investigation executive might re-present the case to the marketer, the complainant (if necessary) and then Council. It will be for the ASA to decide on the significance of changes; it will normally re-present the case to the marketer only if Council has introduced an important argument or point of view to which they have not yet had a reasonable opportunity to respond.

Closing the case

¹ In multi-complaint cases where ostensibly the same complainant is made by different complainants, only the first few and/or principal complainants are sent the draft recommendation. However, all complaints are logged, fully considered and assessed and all complainants are sent the final adjudication.

30. The investigation executive will send a letter of notification to the marketer and all complainants. That letter will inform them of Council's decision. If Council has not adopted the ASA Executive's recommendation, the letter will explain that and give reasons. The letter will also include a date for publication of the adjudication on the ASA website.

Remedial action

31. If the ASA adjudicates that a breach has occurred, the letter of notification to the marketer will inform them of the necessary remedial action (for example to amend or withdraw the marketing communication).

Publishing adjudications

32. The ASA will normally publish adjudications on the ASA website (www.asa.org.uk) within 12 working days of Council's decision. In exceptional circumstances, perhaps after the marketer or complainant has requested a review (see paragraph 38), the ASA might agree to withdraw an adjudication before publication because the case needs more consideration, for example there might be significant doubt about the accuracy or fairness of the adjudication or about the way the investigation was carried out. In such circumstances the investigation executive will write to the marketer and complainants to explain the postponement and ask them to keep confidential the adjudication and the status of the investigation until the final adjudication, in whatever form, is confirmed.

Turnaround target for 'standard investigations'

33. The ASA's turnaround target for 'standard investigations' is 85 working days from the receipt of the complaint to notification of the decision.

Complex investigations

34. 'Complex investigations' are those that require extended investigation, for example multi-media cases (such as those relating to claims that have appeared in the same form in marketing communications in both broadcast and non-broadcast media), those involving non-public complainants and those requiring specialist or technical knowledge, for which external consultants might have to be consulted. Although they follow the same process as above they typically take longer to resolve than standard investigations.

Turnaround target for 'complex investigations'

35. The ASA's turnaround target for 'complex investigations' is 140 working days from the receipt of the complaint to notification of the decision.

Fast Track cases

36. The ASA might, where circumstances warrant, depart from standard processes and deadlines and impose shorter response deadlines, forward the

summary of the complaint and the draft recommendation to marketers at the same time (forgoing the process described in paragraph 24) or forward draft recommendations direct to Council (forgoing the processes described in paragraphs 24 and 27).

The CAP Panels

37. The CAP Sales Promotion and Direct Response Panel and the CAP General Media Panel are each composed of industry experts together with one ASA Council member. They guide and help the ASA and CAP to produce advice for the industry and interpret the codes (both non-broadcast and broadcast) in individual cases and on general issues. They also provide a forum to reassess recommendations and advice given by the ASA and CAP. The Panels can be asked to look at an issue by the parties to a complaint before the Council has adjudicated; the Council will take account of the Panels' opinions but the decision of Council is final. The Panel Chairmen can reject requests and will do so if it appears that the Panels are being used to hamper the effective running of the self-regulatory system.

Requests for an Independent Review of an ASA adjudication

38. The Independent Reviewer of ASA Adjudications (Sir John Caines, KCB, a former Whitehall Permanent Secretary) will consider requests for a review of Council decisions against marketing communications.

Terms of reference

39. Requests for a review should contain a full statement of the grounds for review, be in writing and addressed to the Independent Reviewer of ASA Adjudications, 5th Floor, 21 Berners Street, London, W1T 3LP (fax: 020 7580 7057, e-mail: indrev@asbof.co.uk). They should be sent within 21 calendar days of the date on the ASA's letter of notification of the formal adjudication or the Council decision that a complaint requires no investigation. The Independent Reviewer might waive the 21-day time limit if he judges it fair and reasonable to do so.

40. Requests should come only from the complainant or the marketer (henceforth the parties to the review). Those from the marketer or from the non-public complainant should be signed by the Chairman, Chief Executive or equivalent office holder; requests made only by their solicitor or agency will not be accepted. All dealings with the Independent Reviewer must be in writing.

Grounds for a review

41. There are two grounds on which such a request can be made:

- where additional relevant evidence comes to light that was available at the time, or shortly after, the marketing communication appeared but

- could not reasonably have been submitted in the course of the investigation, and/or
- where it is alleged that there is a substantial flaw in Council's adjudication or in the process by which that adjudication was made.

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

43. During the review process, the original adjudication (and any subsequent remedial action or sanctions) will normally stand. 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 Assessors

44. Before deciding whether or not a request for a review merits inviting Council to reconsider an adjudication, the Independent Reviewer will consult two Assessors. The two Assessors are the Chairman of Asbof² (or nominee) and the Chairman of the ASA. The Independent Reviewer will not normally consult the two Assessors about requests for a review of a Council decision that a complaint requires no investigation.

The review process

45. If the Independent Reviewer decides that an adjudication does not merit reconsideration by Council because he concludes that the request does not meet either of the two grounds set out above, he will inform the person making the request accordingly and close his file on the case.

46. If he decides that an adjudication (in whole or in part) merits reconsideration by Council he will undertake, either by himself or with assistance from the ASA or any other source of help or advice, such further investigation as he thinks appropriate. He will also inform the other party to the case that a review is being undertaken and he will invite that other party's comments on the submission made by the party requesting the review.

47. If he decides that a Council decision that a complaint requires no investigation merits reconsideration by Council, he will recommend to Council that it asks the ASA Executive to conduct a formal investigation of the complaint.

48. If he decides that an adjudication (in whole or in part) merits reconsideration by Council and he believes that it would be desirable for the ASA Executive to re-open its investigation, he will make an interim report to Council making that recommendation. If Council decides to re-open the

² Asbof (the Advertising Standards Board of Finance) is responsible for funding the system through a levy on non-broadcast advertising.

investigation, he will notify all parties to the review of that decision. When the ASA Executive makes its recommendation to Council at the conclusion of the re-opened investigation, he will advise Council whether all the relevant issues raised in the review request have been satisfactorily resolved. He will inform all parties to the review of Council's final adjudication.

49. If he conducts the investigation himself he will, at its conclusion, make a recommendation to Council, stating whether the adjudication should be reversed, amended or confirmed.

50. Council must consider the Independent Reviewer's recommendation but is not obliged to accept it; Council's adjudication on reviewed cases is final

51. The Independent Reviewer will inform the parties to the review of the Council's final adjudication. Adjudications that are reversed or amended following a review will be published on www.asa.org.uk.

52. The Independent Reviewer contributes a report of his activities to the ASA Annual Report.

The CAP Copy Advice team

53. The CAP Copy Advice team gives pre-appearance advice to marketers, agencies and media on the likely conformity of marketing communications with the Code. In addition, it checks marketing communications produced by those marketers who have been instructed to vet their marketing communications. Copy advice is fast and confidential from competitors; there is no charge at the point of delivery of the service. It is a highly authoritative guide to what is likely to comply with the Code. Favourable pre-publication advice does not automatically protect marketers from complaints being investigated and upheld by the ASA, but the ASA will give due consideration to the fact that a marketer has acted in good faith and sought and followed advice from the team. The team liaises with Clearcast (formerly the Broadcast Advertising Clearance Centre), the Radio Advertising Clearance Centre and, where appropriate, other broadcasters' representatives to ensure consistency across media, where common advertising rules/interpretations, characteristics and contexts make such consistency appropriate.