

Embargo 19th November 2012



ASAI announces an extension of its digital remit

The ASAI today announced it will extend its current digital remit to include marketing communications on advertisers' profile pages and other non-paid-for space online, under advertisers' control, which is currently outside of remit.

Introduction

The Advertising Standards Authority for Ireland is the independent self-regulatory body set up and financed by the advertising industry and committed, in the public interest, to promoting the highest standards of marketing communications, that is, advertising, promotional marketing and direct marketing. Its objective is to ensure that all commercial marketing communications are 'legal, decent, honest and truthful'. The rules are set out in the Code of Standards for Advertising, Promotional and Direct Marketing, drawn up by the Board of ASAI following detailed consultation with all relevant interests including the public, advertisers, agencies and media, consumer representatives and Government Departments.

The Code applies to commercial marketing communications and to sales promotions that promote the sale of goods or services. Non-commercial marketing communications, i.e. those which express the advertiser's position on a political, religious, industrial relations, social or aesthetic matter or an issue of public concern, are not subject to the Code.

ASAI's work involves the investigation of complaints concerning marketing communications considered to be in breach of the Code, the monitoring of marketing communications on a proactive basis and the provision of copy advice on proposed marketing communications. Formal investigations lead to adjudication by the Complaints Committee, and marketing communications found to be in breach of the Code must be amended or withdrawn. In addition, Case Reports are published on the ASAI's website.

In relation to misleading advertising, the ASAI can refer cases to the National Consumer Agency where a particular advertiser does not comply with the ASAI adjudication.

Background to the extension of the Digital Remit

Digital remit of the Code prior to 2009: The Code applied to marketing communications in e-mails and in paid-for space online including for example, banner and pop-up advertisements, paid-for search listings and commercial classified. It also applied to sales promotions in paid-for and non-paid-for space online.

Extension of remit in 2009: Prior to 2009, the ASAI were increasingly receiving complaints about marketing communications material on advertisers' own websites which was outside the remit of the Code. In extending its remit to include marketing communications on advertisers' own websites, the ASAI recognised that the understanding of what constitutes marketing communications continues to evolve. Existing exclusions from remit continued to apply for example, editorial material, press releases, marketing communications whose principal purpose is to express the advertiser's position on a political, religious, industrial relations, social or aesthetic matter or on an issue of public interest or concern, etc.

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Current Position

The extension of remit to cover marketing communications on advertisers' own websites (one form of non-paid-for online space) has been successful with very high compliance rates with ASAI adjudications. In 2012, following a review of the ASAI's digital remit, a consultation process¹ was carried out on proposals for a further extension of remit into other non-paid-for space online under advertisers' control.

A range of responses were received. There was broad agreement with the proposals, although there were a number of areas where divergent views were held. In some cases, suggestions on areas to be included in an extension of remit would have had consequences for the offline remit of the Code. As this raised a wider issue, the ASAI consider that it should be dealt with as part of a full review of the Code, which is scheduled for 2013.

In addition to extending the digital remit of the Code to non-paid-for space online that is not currently in remit, the ASAI had made some amendments to the scope and application section of the Code to add additional clarity to the remit of the Code.

The Code remit in relation to non-paid-for-space online is now set out in a new Section, 1.4(i), and will be

The Code applies to marketing communications in non-paid-for space online, under the control of the advertiser or their agent, including but not limited to advertisers' own websites.

It will come into effect from 2nd January 2013; there will, however, be a three month grace period where the ASAI will investigate and resolve complaints informally, that is, they will not result in a formal decision from the independent Complaints Committee.

The extension of remit is framed so that it is in line with the existing remit. Section 1.1 of the Code clearly states that the primary objective of the Code is the "*regulation of commercial marketing communications*". In determining whether material in non-paid-for space online is within the remit of the Code, the ASAI will have regard to this section. It is not the intention of the ASAI to bring into remit material that would not be within remit offline, e.g. editorial material, press releases, marketing communications whose principal purpose is to express the advertiser's position on a political, religious, industrial relations, social or aesthetic matter or on an issue of public interest or concern, etc.

All the rules in the ASAI Code will apply to marketing communications that fall within the extended digital remit. The Code includes rules about misleading advertising, the protection of children, as well as rules for particular product sectors such as health products and alcohol products.

Compliance with the Code is, as always, assessed in the light of a marketing communication's probable impact when taken as a whole and in context.

Assessment criteria

Determining whether material constitutes an advertisement or other marketing communication coming within the remit of the Code involves a careful assessment of the specific content and the context in which it appears.

¹ The consultation process was announced publicly on 11th June 2012 and published on the ASAI website. In addition, key stakeholders such as Government Departments, industry associations and NGOs were invited to submit their views on the ASAI proposals.

In relation to material on advertisers' own websites, the ASAI has been guided by the EASA Best practice recommendation on Digital Marketing Communications which suggests the following criteria to establish whether or not the content, or part of the content of an advertiser's own website constitutes a marketing communication:

- Claims (implied, direct, written, spoken and visual) about products or marketers, where the claim is not made in the context of editorial content, annual reports, CSR reports, or similar;
- Where they pertain to the marketing communications, commercial practices covered by the Unfair Commercial Practices Directive (for example price promotions and invitations to purchase);
- Third-party UGC (see below) and/or viral marketing that has been distributed or endorsed by the marketer;
- Marketing communications that have previously appeared, in the same or comparable form, on other media platforms, including online media platforms.

In assessing whether material on other non-paid-for space online constitutes a marketing communication, the ASAI will draw on its experience to date. Key determinants will be whether the advertiser exercises control of the space, and whether the material in question had been adopted and incorporated by the advertiser.

User-generated content

User-generated content (UGC) is content created by individuals. In establishing whether UGC should be regarded as a marketing communication, and consequently fall within the remit of advertising self-regulation, the primary and preliminary areas of enquiry to be considered are:

- Did the advertiser originally solicit the submission of UGC from individuals, then adopt and incorporate it within their own marketing communications?
- Did an individual provide the advertiser, on an unsolicited basis, with material which the advertiser subsequently adopted and incorporated within their own marketing communications?

If the answer to either of these questions is yes and if the content of the material and the form in which it is used by the advertiser constitutes a marketing communication, then the UGC will be regarded as a marketing communication and within the remit of the Code.

Communications excluded from the extended online digital remit

Communications that do not constitute an advertisement or other marketing communication will obviously remain out of remit.

Existing exclusions

The extended digital remit will not apply to content already excluded in Section 1.5 of by the Code. The significant exclusions are:

- statutory, public, Garda and other official notices;
- material published as a matter of record only;
- marketing communications whose principal purpose is to express the advertiser's position on a political, religious, industrial relations, social or aesthetic matter or on an issue of public interest or concern;

- classified private advertisements, including those on-line;
- press releases and other public relations material;
- specialised marketing communications addressed to the medical, veterinary and allied professions;
- marketing communications in foreign media (complaints are normally dealt with by the self-regulatory authority in the country of origin of the media)².

New exclusions

In order to ensure that there is clarity about the extent of the extended ASAI Remit, there are three additional exclusions included in Section 1.5 of the Code as follows:

Investor Relations: This refers to advertisers' communications about their own company (including their goods or services) with the financial community, including shareholders and investors, as well as others who might be interested in their company's stock or financial stability;

Website content not covered by 1.4(e) and 1.4(i): For clarity, as the Code will now specify that marketing communications in non-paid-for space online is within remit, the ASAI considered that it was appropriate to clearly state the type of online material that will not be considered to be marketing communications. This is in line with the current remit, for example, that the Code does not apply to editorial content, annual reports, etc.;

Heritage advertising: ASAI considers it is appropriate to exclude heritage advertising from the extended digital remit because of the role that advertisements play in the Ireland's social history and because websites provide the facility to ensure heritage advertising is placed in an appropriate context. Amendments to the ASAI Code may result in past advertising campaigns being non-compliant. In some instances, such campaigns may be iconic material of value and relevance to the brand owner's website, and should therefore be permitted in an appropriately identified part of the website.

Changes to the Code and guidance on the ASAI Digital Remit

Appendix I

The revised Code Sections:

- 1.3 which sets out definitions relevant to the Code;
- 1.4 which sets out what is included in the remit of the Code;
- 1.5 which sets out what is excluded from the remit of the Code.

Appendix II

ASAI Guidance Note on the Digital Remit of the Code

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2. The ASAI is a founder member of the EASA, which brings together national advertising Self-Regulatory Organisations (SROs) and organisations representing the advertising industry in Europe. The EASA supervises the operation of the Cross-Border Complaints system (CBC). Under this system, a complaint received by the ASAI, or other national advertising self-regulatory body, concerning an advertisement published in another member country is referred to the appropriate national regulatory body for consideration under their Code. This ensures that a consumer can have redress in the case of misleading or offensive advertising originating anywhere in Europe.

Appendix I

Code of Standards for Advertising, Promotional and Direct Marketing

*Revised Sections 1.3, 1.4 and 1.5 of the Code, approved by the ASAI Board on 17th October 2012
(additions in bold print)*

- 1.3 The following definitions apply to the Code and to the procedures for its implementation:
- (a) the Authority means the Advertising Standards Authority for Ireland;
 - (b) a marketing communication includes but is not limited to advertising, as well as other techniques such as promotions, sponsorships and direct marketing, and should be interpreted broadly to mean any form of communication produced directly by or on behalf of advertisers intended primarily to promote products, to influence the behaviour of and/or to inform those to whom it is addressed;
 - (c) advertising or advertisement includes but is not limited to a form of marketing communication carried by the media, usually in return for payment or other valuable consideration;
 - (d) an advertiser includes anyone disseminating marketing communications, including promoters and direct marketers; references to advertisers should be interpreted as including intermediaries and agencies unless the context indicates otherwise;
 - (e) a product can encompass goods, services, facilities, opportunities, fundraising, prizes and gifts;
 - (f) a consumer is anyone who is likely to see or hear a particular marketing communication;
 - (g) a child is anyone under 18 years of age;
 - (h) a claim can be direct or implied, written, verbal or visual;
 - (i) promotional marketing practices, including sales promotions, are those marketing techniques which involve the provision of direct or indirect additional benefits, usually on a temporary basis, designed to make goods or services more attractive to purchasers;
 - (j) a promoter is any person or body by whom a sales promotion is initiated or commissioned;
 - (k) an intermediary is any person or body, other than the promoter, responsible for the implementation of any form of sales promotional activity.
 - (l) Viral advertising is an-email, text or other non-broadcast marketing communication designed to stimulate significant circulation by recipients to generate commercial or reputational benefit to the advertiser. (Viral advertisements are usually put into circulation (“seeded”) by the advertiser 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 organization (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.**

1.4 The Code applies to:

- (a) marketing communications in newspapers, magazines and other printed publications, including “free sheets”;
- (b) marketing communications in posters and other promotional media in public places, including moving images;
- (c) marketing communications in brochures, leaflets, circulars, mailings, fax transmissions, e-mails and text transmissions;
- (d) marketing communications broadcast on television or radio or screened in cinemas;
- (e) marketing communications carried on electronic storage materials and all other electronic media and computer systems; **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; 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.**
- (f) promotional marketing and sales promotions;
- (g) advertisement features;
- (i) marketing communications in non-paid for space online, under the control of the advertiser or their agent, including but not limited to advertisers’ own websites.**

1.5 The Code does not apply to:

- (a) statutory, public, Garda and other official notices;
- (b) material published as a matter of record only;
- (c) flyposting;
- (d) packages, wrappers, labels, tickets, timetables and menus, unless they advertise another product or a sales promotion or are recognisable in a marketing communication;
- (e) point-of-sale displays, except those covered by the promotional marketing rules or when part of a wider advertising campaign;
- (f) marketing communications whose principal purpose is to express the advertiser's position on a political, religious, industrial relations, social or aesthetic matter or on an issue of public interest or concern;
- (g) classified private advertisements, including those on-line;
- (h) press releases and other public relations material;
- (i) the content of books and editorial material in media;

(j) oral communications, including telephone calls;

(k) works of art;

(l) specialised marketing communications addressed to the medical, veterinary and allied professions;

(m) the content of premium rate services;

(n) marketing communications in foreign media (complaints are normally dealt with by the self-regulatory authority in the country of origin of the media);

(o) sponsorship (marketing communications that refer to a sponsorship are covered by the Code).

(p) investor relations and corporate material

(q) website content not covered by 1.4(e) and 1.4(i), 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;

(r) heritage advertising, where that advertising is not part of the advertisers' current promotional strategy and is published in an appropriate context. In the event that an advertisement or marketing communication is subject of a recent Complaints Committee adjudication, then Section 2.4 of the Code may be invoked to bring such heritage advertising or marketing communications within remit;

17th October 2012



Appendix II

ASAI Guidance Note on the Digital Remit of the Code

General

Section 1.1 states that

“The primary objective of the Code is the regulation of commercial marketing communications in the interest of consumers”.

Section 1.6 (b) states that

“The Code rules are indivisible; advertisers should comply, where appropriate, with all rules.”

Digital Remit of the Code

1. Section 1.4(e) states that the Code applies to *“marketing communications carried on electronic storage materials and all other electronic media and computer systems”.*

It lists a number of examples of such marketing communications but makes it clear that the list is not exhaustive. The examples given in the Code are:

- 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;
- 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.

In addition, the following would also be considered within remit

- Text ads
- MMS/SMS
- Digital outdoor

The digital area is continually evolving and the ASAI will continue to ensure that their remit remains as comprehensive as possible.

2. Section 1.4(i) states that the Code applies to *“marketing communications in non-paid-for space online, under the control of the advertiser or their agent, including but not limited to advertisers’ own websites.”*

Determining what constitutes a marketing communication on non-paid-for space online

Non-paid-for space online includes space under the control of an advertiser or their agents, such as advertisers’ own websites, advertisers’ profile pages on social media platforms, advertisers’ channels on video sharing platforms, etc.

Material that has been generated by the advertisers, which is not specifically excluded from the Code remit, is likely to be a marketing communication but this does depend on the context and content of the material. Material promoting the benefits of the product/service even if they are not soliciting a direct sale are likely to be considered a marketing communication.

Determining what is User Generated Content (UGC)

UGC content created by individuals would not generally be considered to be a marketing communication. For example, user posts on their own social media pages or on advertisers' pages which are not subsequently adopted and incorporated by advertisers on the advertisers' page. Other examples are blogs and reviews written by private individuals. If the reviewer/ blogger has not been paid or otherwise induced to write a review, then this material would not be considered marketing communications. If, however, a company has influenced the review either through direct payment or, for example, through the provision of free products, it is possible that the material would be considered a marketing communication. This is in line with the code requirement which states "*an advertisement feature, announcement or promotion published or electronically broadcast in exchange for a payment or other reciprocal arrangement where the content is controlled by the advertiser should comply with the Code. It should also be clearly identified and distinguished from editorial matter.*" (Section 2.58). In addition, the Code requires that "*A marketing communication should be designed and presented in such a way that it is clear that it is a marketing communication.*" (Section 2.57). Advertisers should ensure that if they have paid or offered an inducement (and influenced the content of a post, blog, review, tweet, etc.) that it is clear that they have done so, as if it is not clear, they could be found to be in breach of the Code.

Determining whether material that did not originate from the advertisers (e.g. UGC) is in fact marketing communications will involve assessing whether that material has been *adopted and incorporated* by the advertisers.

The primary and preliminary areas of enquiry to be considered are:

- Did the advertiser originally solicit the submission of UGC from individuals, then adopt and incorporate it within their own marketing communications?
- Did an individual provide the advertiser, on an unsolicited basis, with material which the advertiser subsequently adopted and incorporated within their own marketing communications?

If the answer to either of these questions is yes and if the content of the material and the form in which it is used by the advertiser constitutes a marketing communication, then the UGC will be regarded as a marketing communication and within the remit of the Code.

For example:

Not in remit:

- An individual posts a comment on an advertiser's profile page and there is no response from the advertiser.
- An individual posts a Brand's TVC on a video sharing site (e.g. YouTube) with additional footage / comments
- An individual posts footage on video sharing site using a brand or product but with no advertiser involvement
- A tweet from a brand re-tweeted with added offensive content
- User-generated comments to media platforms for use in editorial content

Within remit:

- An individual posts a comment on an advertiser's profile page and the advertiser responds or interacts with the post in a manner which adopts and incorporates the post. In such cases, the adoption and incorporation results in the user post becoming a marketing communication.
- An advertiser or their agent posts their latest TV commercial to their channel on YouTube or to their own profile page.
- An advertiser provides space for users to upload their own photographs, which the advertiser adopts and incorporates, for example, by sorting/organising into albums.
- An advertiser invites users to submit photographs for a particular purpose, e.g. a competition to find the best photograph.

Advergames

Advergames are typically video games that are used to promote a product or an organisation. Advergames in paid-for and non-paid-for space under the advertiser's control which amount to marketing communications fall within the digital remit.

Determining jurisdiction – online remit

Section 1.5n states that the Code does not apply to “*Marketing communications in foreign media (complaints are normally dealt with by the self-regulatory authority in the country of origin of the media).*”³

In determining the online remit of the Code in relation to websites, the ASAI will have regard to the following:

- 1) Advertisers own websites and 3rd Party websites
 - Irish registered companies (regardless of domain)
 - Websites that have an '.ie' domain
- 2) Other online space under the advertisers' control
 - Irish registered companies
 - Space that is identified as Irish for example, the company name (e.g. Company Ireland), or the location of the company.

Exclusions from the Digital Remit

Investor relations and corporate material

Advertisers' communications about their own company (including their goods or services) with the financial community, including shareholders and investors, as well as others who might be interested in their company's stock or financial stability, is not considered within the remit of the Code.

3

The ASAI is a founder member of the EASA, which brings together national advertising Self-Regulatory Organisations (SROs) and organisations representing the advertising industry in Europe. The EASA supervises the operation of the Cross-Border Complaints system (CBC). Under this system, a complaint received by the ASAI, or other national advertising self-regulatory body, concerning an advertisement published in another member country is referred to the appropriate national regulatory body for consideration under their Code. This ensures that a consumer can have redress in the case of misleading or offensive advertising originating anywhere in Europe.

Website content not covered by 1.4(e) and 1.4(i):

Website content, including for example, advertisers' own profile pages on social media platforms, will not be within the remit of the Code, unless specifically covered by 1.4(e) and 1.4(i). For example, editorial content, annual reports, corporate reports, etc, will not be considered to be marketing communications for the purposes of the Code.

Heritage advertising

Heritage advertising is advertising that is not part of the company's current promotional strategy will not generally be considered within remit of the Code.

In assessing whether marketing communications are within remit or out of remit because they constitute heritage advertising, the ASAI will have regard to whether

- a) the marketing communications has been the subject of a recent Complaints Committee adjudication and
- b) whether it is being used or incorporated in a current promotional strategy.

Additional Note:

There are a number of statutory requirements relating to the collection of personal data and attention is drawn to the following at the request of the Office of the Data Protection Commissioner.

- (1) The rules governing electronic marketing (phone, fax, text message, and email) which are contained in Regulation 13 of the Electronic Privacy Regulations (S.I. 336 of 2011); and
- (2) The impact of Regulation 5(3) of S.I. 336 of 2011 which requires consent to be obtained before information can be stored on or retrieved from a person's terminal equipment. This primarily relates to the use of cookies to track web users to allow for the serving of targeted advertising based on the websites that the user has visited.