

2012

EASA Best Practice Recommendation on Claims Substantiation

EASA

EASA – the European Advertising Standards Alliance is the single authoritative voice on advertising self-regulation. EASA promotes high ethical standards in commercial communications by means of effective self-regulation, for the benefit of consumers and business in Europe and beyond.

Effective advertising self-regulation helps ensure responsible advertising, meeting consumers' demand for honesty and transparency, regulators' demand for responsibility and engagement and businesses' demand for freedom to operate responsibly. EASA and its members have developed a robust and coherent system of advertising self-regulation that can respond effectively to new challenges.

EASA is not a Self-Regulatory Organisation (SRO) in itself, but acts as a co-ordination point for best practice in the implementation of self-regulation, as well as operational standards for its national SRO members. Part of EASA's role involves coordinating the cross-border complaint mechanism, EASA also collects and analyses top line statistical data on received and resolved complaints, as well as on copy advice requests and pre-clearance from its SRO members each year.

EASA was set up in 1992 to represent national self-regulatory organisations in Europe, in 2004 it developed into a partnership between national advertising SROs and organisations representing the advertising industry. Today, EASA is a network of 54 organisations committed to making sure advertising is legal, decent, honest and truthful. EASA's membership is made up of 38 SROs from Europe and beyond, and 16 advertising industry associations, including advertisers, agencies and the media. EASA is a not-for-profit organisation with a Brussels-based Secretariat. For further information please visit www.easa-alliance.org.

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1. What is an EASA Best Practice Recommendation?

EASA's Best Practice Recommendations (BPRs) are designed to provide support and advice to EASA's Self-Regulatory Organisations (SROs) and industry members on the practice of advertising self-regulation. They are based on EASA's Common Principles and Operating Standards of Best Practice and Best Practice Self-Regulatory Model.

EASA BPRs can be divided into two main categories: operational and blueprint BPRs. Operational BPRs give guidance on the operation, structure and procedures of SROs while blueprint BPRs provide guidance on the remit and codes of SROs. The content of blueprint BPRs, such as the present publication on Online Behavioural Advertising, needs to be agreed upon by the whole advertising eco-system and all SROs at European level.

EASA BPRs provide guidance and aim to achieve a coherence referring to remit and application throughout Europe for the benefit of European consumers and businesses, whilst recognising that the way to achieve this at national level may differ as a result of the national regulatory, cultural and societal context.

Best Practice Recommendations do not constitute a European code and are not formally binding. The implementation of a BPR at national level is the result of a negotiation process taking into account the existing (self) regulatory framework and the legal background to find an approach best suited to the national circumstances and needs. A national SRO may choose to adopt provisions in its advertising code that go beyond those recommended by EASA; some indeed, have already done so.

BPRs are designed to stimulate and assist national discussions on the development of effective self-regulation and are intended as a means for taking clear actions at both European and national level.

2. Best Practice Recommendation on Claims Substantiation

2.1 Introduction

Over the last years the annual EASA statistics reports have shown that misleading marketing communications are the biggest issue when it comes to complaints about advertising across Europe. Most complaints are related to claims made in advertisements, such as performance claims, green claims, availability claims or price claims.

It is evident that advertisers need to be able to substantiate claims related to verifiable facts in their marketing communications. The Consolidated ICC Code, furthermore, stipulates that such substantiation should be available so that evidence can be produced without delay and upon request to the self-regulatory organisation responsible for the implementation of the code (Art 8).

However, among the SROs, there is no common approach or procedure when investigating the veracity of objectively verifiable claims in advertisements. For example, while some SROs request and then evaluate the documentary evidence of advertisers in case of a complaint, others request and rely on a written statement of the advertiser that he holds the necessary evidence. This in turn can lead to a divergence in adjudications about the same advertisement: the SRO that evaluates the evidence can come to the conclusion that it is not sufficient to substantiate the claim made in the advertisement and will uphold the complaint. The SRO that requested the statement only, on the other hand, will have no means to judge the veracity of the claim and will trust the advertiser's declaration. The complaint would be dismissed. Not only could this divergence be a problem for advertisers, the lack of coherence also leaves advertising self-regulation open to criticism.

Therefore, the present best practice recommendation attempts to set up a common standard for the procedure regarding the substantiation of claims in advertising to try and ensure more coherence across Europe and beyond.

2.2 What is the Substantiation of Claims?

One of the fundamental principles of advertising self-regulatory systems is the reversal of the burden of proof. This requires the advertiser to prove that the claim he is making is truthful, rather than the complainant having to demonstrate that it is not. Therefore, before offering an advertisement for publication, advertisers should be able to provide documentary evidence to substantiate their direct or implied claims, which can be objectively judged. If requested by the self-regulatory organisation, e.g. in case of a complaint, the advertiser should produce the necessary evidence without delay to the SRO.

2.3 What Types of Claims need to be Substantiated?

Any advertising claim that the average consumer¹ is likely to regard as objective, i.e. a claim that can be objectively judged to be true or false, should be capable of being substantiated, regardless of the product

¹ The term "average consumer" means any person "who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors" (Directive 2005/29/EC).

involved or the means of communication. This includes claims about the price, the terms and conditions, the performance of a product, its availability or its impact on the environment. The name of the product can also constitute a claim, as well as an image.

Claims expressing a subjective opinion do not have to be substantiated by the advertisers provided they do not imply that the expression of opinion are objective claims and provided they are not materially misleading. The same is valid for obvious exaggerations (“puffery”) and claims that the average consumer who sees the advertisement is unlikely to take literally.

Examples: The claim that a car has ‘the best fuel economy in its class’ is a matter of objective fact. By contrast, the claim that a car is ‘the most elegant in its class’ is clearly a matter of subjective opinion, so the question of substantiation does not arise. Similarly, the claim that a car will provide ‘the most wonderful driving experience of your life’ is immediately recognisable as puffery.

2.4 When should SROs require Substantiation of Claims?

Substantiation may be required in various circumstances (e.g. copy advice, complaints investigation or during a monitoring exercise). An SRO will allow the use of claims, descriptions, statements, illustrations, testimonials, etc. whose truthfulness and accuracy the advertiser is able to demonstrate.

The reversal of the burden of proof allows SROs to ask advertisers, at any time, to supply documentary evidence proving the accuracy and truthfulness of claims, statements, testimonials, etc. Failure to comply with a request for evidence can be regarded as a breach of the Code and the advertiser will be required to withdraw or modify the claim.

It is advisable to always ask for the documentary evidence (and not rely on the advertiser’s verbal or written assertion that he holds the necessary evidence) or at a minimum ask for the documentary evidence in every case where the claim can materially mislead consumers, where the advertised products can affect the health and well-being of consumers or if the advertisements are addressed to children or other sensitive populations.

2.5 How do the Claims need to be Substantiated?

The type of substantiation needed to prove a claim will vary depending on the claim. Therefore, the SRO will need to decide on a case by case basis which type of substantiation is adequate.

The following list includes a non-comprehensive list of examples:

Market claims (or similar):

- Statistical research. This will need to include an appropriate robust sample using acceptable methods and models.
- Sales or stock figures.

Scientific claims:

- Scientific studies of a recent date, which have been properly controlled and where appropriate, carried out by an independent and competent institute (credibility of the data).

- Dependent on the nature of the research, the use of blind tests, the use of control groups (placebo) and/or a minimum number of participants, i.e. a statistically significant number of participants, have to be included.
- Studies should be evaluated using commonly applied criteria.

Testimonials:

- Testimonials alone do not constitute substantiation and the claims expressed in them must be supported, if necessary, with independent evidence of their accuracy.

Comparative claims:

- Evidence that relates both to the advertiser’s and the competitor’s products that are the implicit or explicit subject of comparison.

2.6 Sources and References

If the advertisers refer in their advertisements to sources, it is advisable that the existence of these sources can also be checked by consumers.

2.7 Evaluation of Evidence

2.7.1 Criteria

There is room for flexibility in the way self-regulatory bodies evaluate claim substantiation. For example, advertisers themselves may submit assessments or approvals issued by public or private bodies, or produce test/trial results of their own. What matters most is that evidence be consistent and based on generally accepted scientific data: claims should be supported by objective evidence with reproducible results, not on subjective self-certification.

2.7.2 The Role of Experts

It may be a value for an SRO to have access to relevant experts able to evaluate evidence in support of claims requiring scientific assessment.

For the assessment of simple, uncontroversial claims, SROs may find it useful to have an element of ‘in-house’ expertise, in order to save time and contain costs. This might be achieved by appointing to the Complaints Committee one or two members, with specialized knowledge (e.g. a physician, and/or a pharmacist).

2.7.3 Time Period for Providing Evidence

On the principle that advertisements should only make claims that can be proven to be accurate and truthful, it should not take the advertiser long to produce evidence when an SRO requests it. Ideally the evidence should be immediately available and should not need to be assembled in response to a request. In any case if advertisers require time to produce their evidence it should not be a long period, i.e. a matter of days rather than weeks.

2.7.4 Confidentiality

Some or all of the evidence provided by the advertisers may need to be treated confidentially by the SRO, especially in relation to business sensitive data or if the evidence relates to trade secrets. However, it might

be necessary to refer to details of the documentary evidence (e.g. the methodology or results of the study) when helping to inform the decision of the jury.

2.8 Adjudication

The SRO may regard claims as misleading or in extreme cases even as dishonest in the absence of adequate substantiation.

2.9 Appeals Procedure

Self-regulatory organisations are recommended to provide the possibility of appeal when new evidence can be offered. If it is the advertiser that has brought additional evidence to bear, it must provide an explanation as to why the evidence was not available during the investigation.

2.10 Regulation

With regard to specific products or issues national legislation or European regulation may require advertisers to comply with specific requirements with regard to claims made in advertisements. At European level it concerns mainly nutrition and health claims made on foods as well as claims made in cosmetics advertising.

2.10.1 Nutrition and Health Claims

The Regulation on nutrition and health claims made on foods was adopted by the Council and Parliament in December 2006. The Regulation lays down harmonised rules across the European Union for the use of nutrition claims such as “low fat”, “high fibre” or health claims such as “reducing blood cholesterol”.

In order to have a comprehensive overview of the permitted nutrition claims and of both permitted and rejected health claims, the Commission has established a Register which is regularly updated.

For complete information, you can consult the following official documents:

- Regulation on Nutrition and Health Claims made on foods
- Guidance on the implementation of Regulation (EC) N° 1924/2006

2.10.2 Cosmetics Claims

A Cosmetics Directive has been adopted as early as 1976, but has been revised seven times since. Its goal is to ensure the free circulation of cosmetic products in the internal market and to ensure the safety of cosmetic products placed on it.

Article 20 of the new regulation 1223/2009 stipulates that the European Commission must draw up a list of common criteria that would justify the use of claims in the labelling, making available on the market and advertising of cosmetics products.

The common criteria are supposed to come into force in July 2013. By 11 July 2016, the EC committed to submit a report to the European Parliament and the Council regarding the use of claims in cosmetics advertising on the basis of the adopted common criteria.

For complete information, you can consult the following official document:

- Regulation on cosmetics products (No 1223/2009)

2.10.3 Environmental Claims

There is so far no EU legislation specifically harmonising environmental marketing. Environmental claims are partly covered by specific community legislation regulating the environmental performance of a category of products and prohibiting the misleading use of the claim, logo or label used in reference to this specific legislation.

Outside those aspects covered by specific EU legislation, the general provisions of the Unfair Commercial Practices Directive are to be used when assessing environmental claims and establishing whether a claim is misleading either in its content or in the way it is presented to consumers.

DG Sanco is currently conducting a stakeholder dialogue into misleading environmental claims.

For complete information, you can consult the following official document:

- Directive 2005/29/EC on Unfair Commercial Practices
- Guidance Paper (including in section 2.5.2 an overview of specific EU legislation on environmental claims)
- General Q&A on the Guidance

2.11 Definitions

Blind tests: A blind or blinded experiment is a scientific experiment where some of the persons involved are prevented from knowing certain information that might lead to conscious or unconscious bias on their part, invalidating the results.

For example, when asking consumers to compare the tastes of different brands of a product, the identities of the latter should be concealed — otherwise consumers will generally tend to prefer the brand they are familiar with. Similarly, when evaluating the effectiveness of a medical drug, both the patients and the doctors who administer the drug may be kept in the dark about the dosage being applied in each case — to forestall any chance of a placebo effect, observer bias, or conscious deception.

Control group: Participants in a control group are used as a standard for comparison. For example, a particular study may divide participants into two groups - an "experimental group" and a "control group." The experimental group is given the experimental treatment under study, while the control group may be given either the standard treatment for the illness or a placebo. At the end of the study, the results of the two groups are compared.

Minimum number of participants: Depending on what the research sets out to prove a minimum number of participants may be required.

Neutrality: Research is supposed to be unbiased no matter where the funding comes from. The neutrality of research is another standard that tends to be checked in a peer review.

Peer Review: Evaluation of a person's work or performance by a group of people in the same occupation, profession, or industry.

3. Annex I: EASA's Advertising Self-Regulation Charter

Preamble

Advertising self-regulation is recognised as the prime example of business self-regulation and corporate social responsibility. It is found, in varying forms, in most European countries.

Advertising self-regulation, like advertising itself, is a grassroots activity that operates most effectively at national level. Two vital factors therefore determine the form that advertising self-regulation takes in any country. The first is tradition: each country's self-regulatory system must take account of its cultural, commercial and legal traditions. The second factor is opportunity: self-regulation's relationship with the law is a complementary one and self-regulation can flourish only insofar as the legislative landscape allows it sufficient scope.

However, these variations in structure and procedure are not reflected in the rules applied by national self-regulatory systems, where a remarkable degree of consistency is apparent. This is not surprising, since all these national rules are based on the International Chamber of Commerce's Codes of Marketing and Advertising Practice. They all set out to achieve the same result: a high standard of consumer protection based on the premise that advertising should be legal, decent, honest and truthful.

The European Advertising Standards Alliance and its members firmly support the creation of a Single Market for consumers and businesses and are committed to working together to deliver it. A coherent self-regulatory framework across the EU is the foundation for ensuring the appropriate balance between an effective Single Market, providing a level playing field for advertisers to operate in, and the equally important objective of maintaining a high level of consumer protection.

Advertising self-regulation thus reflects a rich and varied tapestry of systems for business responsibility, complementing the law. This Charter of Best Practice offers a goal for self-regulatory systems throughout the Single Market while recognising that the means of achieving it may differ. It is a practical example of 'unity through diversity'.

Charter

We, the undersigned, representatives of the advertising industry of Europe i.e. advertisers, agencies and media, and the European Advertising Standards Alliance (EASA), re-commit to effective self-regulation across the enlarged European Union as the best way to maximise confidence in responsible advertising – for consumers, competitors and society.

We recognise that effective advertising self-regulation demonstrates industry's ability and obligation to regulate itself responsibly, by actively promoting the highest ethical standards in all commercial communications and safeguarding the public and consumer interest. We further recognise that contractual relationships between advertisers, agencies and the media should recognise the need for responsible marketing communications.

We declare

- That effective self-regulation provides compelling evidence of business' commitment to Corporate Social Responsibility
- That effective self-regulation together with the statutory enforcement authorities can provide appropriate redress for consumers, a level playing field for advertisers, and a significant step towards completing the Single Market
- That legislation cannot achieve these aims on its own, but it can provide the essential legal backstop to make self-regulation effective and tackle rogue traders
- That the continued acceptance of self-regulation by European consumers, governments and society can best be assured by the application of common principles and standards of best practice in all self-regulatory systems across Europe.

To this end, recognising EASA's statement of Common Principles and Operating Standards of Best Practice² and EASA's Best Practice Self-Regulatory model³, we confirm our commitment to achieving in the practical operation of self-regulatory bodies⁴ and systems the following principles:

1. Comprehensive coverage by self-regulatory systems of all forms of advertising and all practitioners.
2. Adequate and sustained funding by the advertising industry proportionate to advertising expenditure in each country.
3. Comprehensive and effective codes of advertising practice:
 - based on the globally accepted codes of marketing and advertising practice of the International Chamber of Commerce (ICC);
 - applicable to all forms of advertising.
4. Broad consultation with interested parties during code development.
5. Due consideration of the involvement of independent, non-governmental lay persons in the complaint adjudication process.
6. Efficient and resourced administration of codes and handling of complaints thereon in an independent and impartial manner by a self-regulatory body set up for the purpose.
7. Prompt and efficient complaint handling at no cost to the consumer.
8. Provision of advice and training to industry practitioners in order to raise standards.
9. Effective sanctions and enforcement, including the publication of decisions, combined with efficient compliance work and monitoring of codes.
10. Effective awareness of the self-regulatory system by industry and consumers.

² Adopted at EASA's AGM on 31 May 2002 in Brussels, Belgium.

³ Adopted at EASA's AGM on 1 April 2004 in Istanbul, Turkey.

⁴ Self-Regulatory Organisations (SROs) are independent, national bodies, actively supported by the constituent parts of the local advertising industry. SROs are responsible for administering their respective self-regulatory systems and applying national codes of advertising practice.

4. Annex II: Overview of EASA BPR

The following EASA Best Practice Recommendations⁵ have been issued to-date:

- Advertising Monitoring
- Claims Substantiation
- Code Drafting and Consultation
- Complaints Handling
- Confidentiality of Identity of the Complainant
- Copy Advice
- Digital Marketing Communications
- Jury Composition
- Online Behavioural Advertising
- Publication of Decisions
- SRO Communications
- SRO Funding
- Standards of Services

⁵ For more information, please visit EASA website www.easa-alliance.org.

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