# United Kingdom

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## 1. Overview of the legal and regulatory regime for advertising

The UK advertising industry operates a self-regulatory regime. For non-broadcast advertising, the Committee of Advertising Practice (CAP) writes, reviews and enforces a code to which non-broadcast advertisements must adhere.[1] CAP is made up of trade and professional bodies of the advertising industry. The Advertising Standards Authority (ASA) is a body, independent of both the UK Government and the advertising industry, that adjudicates on complaints about advertisements alleged to breach the CAP Code.

The Broadcast Committee of Advertising Practice (BCAP) regulates broadcast advertising in the United Kingdom. BCAP (in a similar way to CAP) is made up of advertising industry stakeholders who enforce The UK Code of Broadcast Advertising (the BCAP Code). The role of the ASA also includes adjudicating on complaints about broadcast advertisements alleged to breach the BCAP Code. Therefore, UK consumers can make complaints to the ASA in respect of advertising in any media.

The overarching principles of the CAP and BCAP Codes are that advertisements should be legal, decent, honest and truthful, and not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable. Arguably the most important and fundamental aspect of both codes is the requirement that advertising must not mislead consumers.

A prohibition on misleading advertising is also contained within UK legislation: the Consumer Protection from Unfair Trading Regulations 2008 (hereinafter the Consumer Protection Regulations). These regulations implement EU Directive 2005/29/EC concerning unfair business-to-consumer commercial practices. They prohibit commercial practices (including advertising) which constitute misleading actions or omissions that are likely to cause a consumer to take a transactional decision he would not otherwise have taken. The regulations do not give consumers a right of action for themselves: enforcement of the Consumer Protection Regulations is undertaken by either local authority trading standards services and/or the Competition and Markets Authority (CMA), who took on some of the functions previously undertaken by the Office of Fair Trading on April 1 2014. The penalty for breaching the regulations is either a fine or, in particularly serious cases, imprisonment. Where offences have been committed by a company, the regulations provide for the prosecution of an officer (eg, a director, manager or secretary) as well as the company itself.

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1 The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, or CAP Code.

TV and radio broadcasters are responsible for ensuring that the advertisements they transmit comply with the BCAP Code. Unlike non-broadcast advertising, all broadcast advertisements must go through a clearance process before they are aired. TV advertising requires clearance from Clearcast, while radio advertising requires clearance from the Radio Advertising Clearance Centre (RACC). It should be noted, however, that clearance by Clearcast or RACC provides no guarantee of an advertisement's compliance with the BCAP Code and the ASA might still rule that the advertisement breaches the BCAP Code.

If an advertiser fails, when asked, to amend or withdraw an advertisement that breaches the CAP/BCAP Code, CAP/BCAP and the ASA have a number of sanctions at their disposal to attempt to ensure compliance. One of the most effective of these sanctions, and probably the easiest for the ASA/CAP to use, is adverse publicity. When the ASA formally investigates a complaint made about an advertisement and finds the advertisement to breach the CAP/BCAP Code, it will publish its decision on the ASA website. In addition, the ASA will provide details of its decisions to media outlets.

Other sanctions at CAP/BCAP's disposal include: denial of media space to non-compliant advertisers, withdrawal of trading privileges and recognition by trade associations or professional bodies, and requiring all marketing communications to be approved by CAP and the ASA prior to publication.

Advertisers who persistently breach the CAP or BCAP Code and produce misleading marketing communications, or communications containing unlawful comparisons (see section 2 below), may be referred to Trading Standards . In the most extreme cases, the CMA has the power to bring criminal proceedings against advertisers, with the possibility of fines being imposed or even prison sentences being handed out to company directors.

Advertisers should also be wary of the risk of infringing the intellectual property (IP) rights of other businesses. If advertisements or individual logos are confusingly similar, or even copied, from another business, then the advertiser may find itself subject to a claim for copyright infringement under the Copyright, Designs and Patents Act 1988, trademark infringement under the Trade Marks Act 1994 or through the tort of passing off.[2] Unscrupulous advertisers who make false claims about competitors, with malicious intent, may be liable to a claim in 'malicious falsehood' if the claims cause financial damage to the competitor.

## 2. Comparative advertising

In the United Kingdom, comparative advertising is regulated by the Business Protection from Misleading Marketing Regulations 2008 (hereinafter the Business Protection Regulations). These regulations implement EU Directive 2006/114/EC concerning misleading and comparative advertising (the Comparative Advertising Directive).

Under the Business Protection Regulations, 'comparative advertising' is defined as "advertising which in any way, either explicitly or by implication, identifies a

2 Details of these aspects are beyond the scope of this chapter.

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competitor or a product offered by a competitor". The regulations permit comparative advertising subject to the following conditions:

- it is not misleading;
- it compares products meeting the same needs or intended for the same purpose (including, where relevant, products with the same designation of origin);
- it objectively compares one or more material, relevant, verifiable and representative features of the products;
- it does not create confusion between the advertiser and a competitor, nor between any of their distinguishing products or features, such as trademarks;
- it does not discredit or denigrate a competitor's distinguishing activities, products or features, such as trademarks;
- it does not take unfair advantage of the reputation of a competitor's distinguishing marks, such as trademarks; and
- it does not present products as imitations/replicas of products bearing a protected trademark or name.

If a comparative advertisement does not comply with the Business Protection Regulations, as well as leaving itself open to a claim for trademark infringement the advertiser may also be liable to claims of passing off, malicious falsehood and/or copyright infringement.

In the United Kingdom, responsibility for ensuring the compliance of comparative advertising with the applicable regulations falls to the CMA. Under the Business Protection Regulations, the CMA is given the power to bring proceedings for an injunction against non-compliant comparative advertisers, with the breach of such an injunction being punishable by a fine or even imprisonment.

It should also be noted that the conditions to be fulfilled by lawful comparative advertising as laid down in the Business Protection Regulations are mirrored in the CAP and BCAP Codes. Thus, complaints about comparative advertisements can be made to the ASA, as indicated in section 1 above.

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## 3. Online behavioural advertising

There are two pieces of UK legislation in the areas of privacy and data protection that are most relevant to the tracking of internet users' online activity for the purposes of online behavioural advertising: the Privacy and Electronic Communications (EC Directive) Regulations 2003 (hereinafter the E-Privacy Regulations), which implement EU Directive 2002/58/EC on privacy and electronic communications (the E-Privacy Directive); and the Data Protection Act 1998, which implements EU Directive 95/46/EC (the Data Protection Directive).

Under Regulation 6 of the E-privacy Regulations (following an amendment that took effect on May 26 2011), it is prohibited to store information – for example, a cookie – on an internet user's device or gain access to information (such as a cookie) on an internet user's device unless:

- the user is provided with clear and comprehensive information about the purposes of the storage of, or access to, the information; and
- the user has given his consent.

Given that online behavioural advertising is often facilitated by the use of cookies, these provisions have been interpreted to require that information regarding cookies is made available to users (for example, in a cookie policy or notice) and some sort of consent mechanism is implemented. The nature of the appropriate consent mechanism has been the subject of much debate in the United Kingdom, and the UK data protection regulator (the Information Commissioner's Office; ICO) has indicated in guidance that implied consent may be acceptable in certain limited circumstances. However, a detailed discussion in this area is beyond the scope of this chapter.

The provisions of the Data Protection Act will only apply to data processing (eg, the accessing of cookies on a user's web browser) for the purposes of online behavioural advertising to the extent that the data collected constitutes 'personal data'. Broadly speaking, this would only be the case where the data collected could be used to identify an individual. If personal data is being collected for the purposes of online behavioural advertising, then the 'data controller' would need to comply with the requirements of the Data Protection Act, which include obligations regarding data security and to only process personal data fairly.

Until February 2013 the CAP Code did not include any specific rules relating to online behavioural advertising. However, on February 4 2013 a new Appendix 3 to the CAP Code, solely covering online behavioural advertising, came into effect. At the time of writing there are a number of exclusions from the application of the CAP Code for online behavioural advertising under Appendix 3, the two most important of which are the collection and use of data for online behavioural advertising by website operators on their own website(s) and the use of online behavioural advertising on mobile devices (although it is envisaged that the CAP Code will eventually cover such devices). The new rules in Appendix 3 are said to have the aim of securing "transparency and control for consumers in the use by any third party of [online behavioural advertising]", and 'third party' is defined as the party that collects and uses the behavioural data. Therefore, the CAP Code rules on online behavioural advertising apply to third parties such as advertising network providers.

The two most important provisions of the CAP Code in relation to online behavioural advertising are as follows:

- Those collecting and using data for online behavioural advertising must provide a clear and comprehensive notice that they are doing so, in or around the display advertisement delivered using online behavioural advertising. The notice should link to a relevant mechanism whereby a web user can opt out of the collection and use of web viewing behaviour data for online behavioural advertising purposes by that party.
- Those collecting and using data for online behavioural advertising must not create interest segments specifically designed for the purpose of targeting children aged 12 or under with online behavioural advertising.

Internet users who believe that the CAP Code requirements with regard to online behavioural advertising have been breached can complain to the ASA in the normal way (see section 1 of this chapter).

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It is also important to note that the apparent conflict between the opt-in regime in respect of cookies used for online behavioural advertising, implied by the E-Privacy Regulations, and the opt-out regime contained in Appendix 3 of the CAP Code has been the subject of much industry debate – which, at the time of writing, has not be resolved.

## 4. Sales promotions

Section 8 of the CAP Code contains detailed and extensive rules on sales promotions. The Code defines a sales promotion as providing "an incentive for the consumer to buy by using a range of added direct or indirect benefits, usually on a temporary basis, to make the product more attractive." A non-exhaustive list of offers/ mechanisms which fall within the definition is provided: 'two for the price of one' offers, money-off offers, text-to-wins, instant wins, competitions and prize draws. The CAP Code also sets out that the rules do not apply to the "routine, non-promotional, distribution of products or product extensions, for example one-off editorial supplements (in printed or electronic form) to newspapers or magazines."

While the Cap Code's rules on sales promotions are detailed, there are a number of basic and fundamental principles within the rules that any advertiser should bear in mind when producing marketing communications about a sales promotion in the United Kingdom. First of all, advertising copy about a sales promotion in which there is limited time or space to give details of the promotion must include as much information as practicable about 'significant' conditions; full terms and conditions can then be made available at an alternative source (a website, for example).[3] Under Rule 8.17 of the CAP Code, before purchase or, if no purchase is required, before or at the time of entry or application, promoters must communicate all applicable 'significant' conditions. 'Significant' conditions include how to participate, the start date (if applicable) and closing date, any proof of purchase required, the nature and number of any prizes, and any restrictions or limitations that apply (for example, age restrictions). Under Rule 8.17.9 of the CAP Code, unless it is obvious from the context or if entry into an advertised promotion is only through a dedicated website containing that information in an easily found format, the promoter's full name and correspondence address must be stated.

Rule 8.2 of the CAP Code contains another fundamental principle of the marketing of sales promotions: promoters must avoid causing unnecessary disappointment to consumers. This rule could be breached in a number of ways, for example failing to make clear that a particular group of consumers is not eligible for the promotion. Rule 8.2 also states that "Promoters must conduct their promotions equitably, promptly and efficiently and be seen to deal fairly and honourably with participants and potential participants". This means, for example, that promoters cannot create and enforce terms and conditions retrospectively – a principle brought out in an adjudication against *The Sun* newspaper published on June 12 2013, where *The Sun* was running a competition to win a "family holiday". When the newspaper contacted a potential winner to confirm that she complied with the competition's

3 Rule 8.18 of the CAP Code.

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terms and conditions, the winner asked whether she could take her sister's children with her on the holiday, as she did not have children of her own. *The Sun* did not allow this, pointing to the 'family holiday' description of the prize. However, the ASA considered that if the winner was required to have parental responsibility for the children taken on the holiday, the terms and conditions should have made this clear.

One other core principle to bear in mind when producing marketing communications about a UK sales promotion is contained not in Section 8 of the CAP Code but within Section 3 on misleading advertising. This principle[4] concerns use of the word 'free' and similar:

> *Marketing communications must not describe a product as 'free', 'gratis', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item.*

The principle is particularly relevant in the context of sales promotions, for example where consumers are encouraged to buy a magazine because a particular item can be obtained "free with" a particular issue of the magazine. In such a scenario, the cost of the magazine must not be inflated to cover the cost of the 'free' item, and if the item must be delivered separately to the consumer then the postage cost must not be inflated. The wording in the CAP Code is equivalent to a prohibition in Schedule 1 of the Consumer Protection Regulations, which lists various commercial practices that are in all circumstances considered unfair.

The rules concerning use of the word 'free' to describe a promotional item should not be confused with the rules applicable to delivering prizes to the winners of prize draws or competitions. The judgment of the Court of Justice of the European Union (CJEU) in October 2012 in the *Purely Creative* case (a reference to the CJEU from an action brought in the UK High Court by the OFT)[5] made clear that when a consumer is told he has won or may have won a prize, the consumer cannot be required to incur any cost at all in claiming, enquiring about or receiving his prize; he cannot even be required to pay for a postage stamp.

The CAP Code definition of a sales promotion expressly includes prize draws and competitions. In certain situations, a prize draw could constitute a lottery under UK legislation, the operation of which requires a licence. In light of this, promoters must take special care to ensure that any prize draw they operate could not be deemed an unlicensed, and therefore unlawful, lottery. Competitions requiring a genuine element of skill to be demonstrated by their entrants will not fall within the definition of a lottery. However, a random prize draw in which a premium is charged for entry (for example a charge in excess of an entrant's standard text message rate) may be considered a lottery.

If a promoter wishes to charge a premium for entry to a prize draw, then it should also offer a free entry route (for example via mail, rather than via a premium-rate text message) that is equally well publicised and that does not place entrants at any disadvantage in comparison with the premium-charging route. The rules in Northern Ireland are even stricter: if a promoter simply wishes to require entrants to

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4 See Rules 3.23–3.26 of the CAP Code.

5 Case C-428/11: *Purely Creative v Office of Fair Trading.*

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make a purchase to enter a prize draw, even if no premium is added to the normal price of the promotional product, then a free entry route must also be provided to prevent the prize draw constituting an unlawful lottery.[6]

A common form of sales promotion in the United Kingdom is the offer of a discount on the trader's own previous price. The Pricing Practices Guide, which is published by the Department for Business, Innovation and Skills of the UK Government, suggests that a price used as a basis for comparison should be the most recent price charged for a period of at least 28 consecutive days. If a quoted comparison price does not fulfil this criterion, the promotion is more likely to constitute a misleading action under the Consumer Protection Regulations, potentially carrying criminal liability.

## 5. Ambush marketing

A variety of UK laws, rules and rights may be infringed through ambush marketing, depending on the event that is targeted and the execution of the ambush. Where the name/logos/emblems of the ambushed event have been registered as trademarks, any unauthorised use of such intellectual property by an ambusher in the course of trade may constitute trademark infringement. Where the event organiser has not registered its name or other distinctive features as trademarks, the law of passing off may still enable that organising body to prevent ambushers using its intellectual property without permission. Sponsorship agreements between brands and event organisers typically contain a trademark licence that expressly permits the official sponsor to use the trademarks, logos and emblems of the event in promotional materials.

In addition to the protection offered by registered and unregistered trademark rights, discussed above, copyright enables creators of original works to prevent those works being copied or adapted by ambush marketers without permission. In the UK, organisers of the types of events targeted by ambush marketers often spend significant time, effort and money developing characters, logos and other graphic elements to promote their event. Copyright will also protect event organisers' exclusive right to use photographs they own, taken at past events, in promotion of current and forthcoming events.

In the United Kingdom, ticket terms and conditions for major events are often extensive and restrictive. Therefore, an ambush marketer who pays or otherwise persuades attendees to take banners or other unofficial marketing materials into a sporting event or festival may find those attendees are refused entry or ejected from the venue on the grounds of a breach of the terms and conditions of ticket purchase. In addition, ticket terms and conditions often prohibit the transfer of tickets and the use of tickets as competition prizes, meaning that only official sponsors are able to use event tickets in promotional activities.

During the London 2012 Olympic Games, three pieces of legislation were in force to deter ambush marketers and protect the investment of official sponsors. During the period of the Games, the Olympic Symbol etc (Protection) Act 1995 and the

6 Article 130(1)(c) of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985.

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London Olympic Games and Paralympic Games Act 2006 prohibited:

- unauthorised use of any of the Olympic symbols, words or mottos; and
- unauthorised use, subject to certain defences and exceptions, of any representation in the course of trade where such use was likely to suggest an association with the London Olympics.

The London Olympic Games and Paralympic Games (Advertising and Trading) Regulations protected the exclusive presence of official sponsor branding within 'event zones' during 'event periods' by prohibiting unauthorised outdoor advertising and street trading activity.

It should be noted that, in the United Kingdom, not all forms of ambush marketing are against the law. A form of marketing that is often employed in the UK to great effect in the lead-up to major sporting events is the sponsorship of individual athletes/players. In the minds of consumers, certain high-profile individuals might be inextricably linked to the forthcoming event because of the expectations surrounding their performance at the event. Thus, advertising featuring these individuals will associate the relevant brand with the forthcoming event without any mention of the event being necessary.

## 6. Direct marketing

In the United Kingdom, all direct marketing must comply with both the Data Protection Act and the E-Privacy Regulations. In addition, the Direct Marketing Association (DMA) (a national trade association) has its own Code of Practice with which members must comply, and the CAP Code also contains rules that broadly reflect the legislation just referred to.

The key principle of the Data Protection Act is that all processing of personal data must be both fair and lawful. In the context of direct marketing, this means that marketers must ensure, amongst other things, that:

- individuals understand that their personal data is being collected for marketing purposes;
- individuals are given the opportunity to opt out of receiving direct marketing material;
- personal data is stored in a secure manner; and
- personal data is not used for a purpose beyond the purpose notified to the relevant individual.

Under the E-Privacy Regulations, direct marketing by electronic means requires opt-in consent. The regulations govern communications made by telephone, fax, e-mail and text message, and apply to communications sent by not-for-profit organisations, charities and political parties as well as commercial organisations. For direct marketing sent by e-mail or text message, the regulations allow for limited exceptions to the general requirement for opt-in consent; this is known as 'soft opt-in'. Soft opt-in consent applies where the marketer:

- has obtained the recipient's contact details in the course of the sale of a product of service;

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- carries out direct marketing in respect of its own similar goods and services;
- gives the recipient a simple means, without charge, at the initial point of collection, to opt out of the use of his contact details for direct marketing purposes; and
- includes in each subsequent email or text message a means by which the recipient can opt out of future direct marketing.

The Consumer Protection Regulations also address direct marketing. They specifically list the making of persistent and unwanted solicitations by telephone, fax, e-mail or other remote media as a commercial practice automatically considered to be unfair, and therefore prohibited.[7]

As mentioned above, direct marketing is also subject to self-regulation by the advertising industry, with both CAP and the DMA publishing relevant guidance. The sections of the CAP Code that are of particular relevance are Section 9 (on distance selling) and Section 10 (on database practice). Both the CAP Code and the DMA's Code of Practice provide clear guidance on the type of consent that must be obtained before particular methods of direct marketing are undertaken. The DMA Code also contains guidance on marketing in specific fields (such as financial services) and to particular categories of individual (such as children and other vulnerable consumers).

## 7. Product placement

In April 2010 the Audiovisual Media Services (Product Placement) Regulations 2010 (the AVMS Regulations) came into force. The AVMS Regulations implement the EU Audiovisual Media Services Directive (2007/65/EC). Under the AVMS Regulations, product placement, which had previously been prohibited, is now permitted in programmes made or commissioned by UK broadcasters.

The AVMS Regulations made a number of changes to the Communications Act 2003. In turn, these changes were introduced to Section 9 of the Ofcom Broadcasting Code. Ofcom licenses all UK commercial television and radio services, and the Ofcom Broadcasting Code sets out the rules that television and radio broadcasters must follow in order to retain their licence to broadcast. Section 9 of the Ofcom Broadcasting Code is entitled "Commercial References in Television Programming" and includes a dedicated subsection on product placement.

'Product placement' is defined in the AVMS Regulations as "the inclusion in a television programme of, or of a reference to, a product, service or trade mark where the inclusion is for a commercial purpose and is in return for valuable consideration paid to the broadcaster or the programme's producer (or a person connected to either of those entities), and is not prop placement".[8] 'Prop placement' is "the inclusion in a television programme of, or of a reference to, a product, service or trade mark where:

7 Schedule 1, paragraph 26 of the Consumer Protection from Unfair Trading Regulations 2008.

8 Regulation 9 of the Audiovisual Media Services (Product Placement) Regulations 2010, and Schedule 11A para 1(1) of the Communications Act 2003.

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