

Discussion Paper on Nutrition Claims and Functional Claims (SANCO/1341/2001)

Submission by the Advertising Standards Authority

Introduction

The Advertising Standards Authority (ASA) welcomes the opportunity to comment on the Discussion Paper on Nutrition Claims and Functional Claims (SANCO/1341/2001) issued by the Directorate General Health and Consumer Protection. The paper is primarily concerned with food labelling, but does make some reference to food advertising. The comments offered below are solely concerned with this latter area, as food labelling falls outside the remit of the ASA.

Background

The ASA was established in 1962 to supervise the self-regulation of non-broadcast advertising. The Authority administers the British Codes of Advertising and Sales Promotion (BCASP), drawn up by the Committee of Advertising Practice (CAP). The ASA investigates and adjudicates on complaints and carries out research to ensure compliance.

The ASA enjoys the confidence of consumers, industry and government. Customer service research shows that the ASA has a well-known and well-understood identity; the ASA is recognised by consumers as the most appropriate body to contact about misleading advertising. Industry support for self-regulation is strong. UK government confidence is shown in the recognition of the ASA as the 'effective means' for implementing the Control of Misleading Advertising Regulations. The UK government's continuing support for advertising self-regulation was proclaimed in the consumer policy White Paper *Modern Markets: Confident Consumers*.

The ASA is committed to transparent and accountable procedures. The ASA has introduced an Independent Reviewer of adjudications to consider appeals against ASA findings. The ASA's highly informative annual report is posted on our website. To put the consumer at the heart of regulation, the ASA holds Consumer Conferences (the most recent took place in Birmingham in June 2001) to discuss our approach with members of the public and to assess the extent to which the Authority is in touch with public opinion. We also conduct and commission research. The lay members of the ASA Council are appointed following public advertisement. It has been agreed that the next round of advertisements will particularly welcome applications from candidates with a background in consumer affairs.

The increasingly global nature of advertising requires co-operation between national self-regulatory bodies. This is achieved through the European Advertising Standards Alliance (EASA), an international federation of national self-regulatory bodies including those of most EU member states. The ASA is a leading member of EASA.

Self-Regulation

A description of the system of self-regulation in non-broadcast advertising is appended, together with a summary of the advantages that such an approach offers.

Briefly, advertising self-regulation is widely seen as

- Effective. ASA research shows that 97% of advertisements in non-broadcast media comply with the Codes
- Accessible, appropriately prompt and flexible
- Free to the public
- Independent of industry and government

In addition

- The onus is on advertisers to prove any factual claims they make, not on complainants to disprove them
- CAP Copy Advice helps prevent offensive and misleading advertisements from appearing in the first place

The self-regulatory approach has been endorsed by the UK Government's Better Regulation Task Force which identified the ASA/CAP system as a model of good practice in this field.

Commentary

The Discussion paper covers a range of issues which build upon the food labelling rules adopted by the European Community (notably Directive 2000/13/EC). In offering a variety of possible refinements to these rules, the discussion paper is concerned with harmonising the standards applied to nutrition and functional claims in the labelling, presentation and advertising of food products. In broad terms the ASA would expect any efforts in this area to aim towards the high standard set by its own widely respected role in the self-regulation of non-broadcast food advertising.

Specific points

The provision included in Directive 2000/13/EC that advertisements should not mislead consumers is a firmly established principle within the BCASP. The Codes state that '[a]dvertisers should not exploit the credulity, lack of knowledge or inexperience of consumers', and that '[n]o advertisement should mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise'.

Point 2 on page 3 of the discussion paper states that enforcement of these principles 'would go a long way to prevent abuse in this area'. The implication that enforcement is not currently effective is not borne out with regards to the self-regulation of non-broadcast advertisements in the UK. The ASA continues to be diligent in this area, as the following examples attest. In February 1999 the ASA upheld complaints from the Food Commission about two magazine advertisements for the Pact range of products. The complainant objected to the fact that the advertisements made medicinal claims for an unlicensed product, and that specific claims about the beneficial impact of folic acid and Omega-3 in Pact products were unsubstantiated and misleading. The ASA found in favour of the complainant on all counts, after exhaustive investigations drawing upon expert advice. The advertiser, MD Foods plc, promptly withdrew the advertisements and agreed to seek Copy Advice from CAP prior to launching future campaigns containing functional claims. This case was cited

by the Consumers' Association as a prime example of the self-regulatory system in action.¹

More recently, in July 2001, the ASA upheld a complaint by Van den Bergh Foods that a brochure and press advertisement for Benecol margarine contained misleading claims about its effect on LDL cholesterol reduction. The ASA has asked that in future the advertiser, McNeil Consumer Nutritionals, state their intended claims more clearly. The ASA has been assured that the advertisements subject to the adjudication will be withdrawn.

In each of the adjudications outlined above, the complaints were fully investigated by the ASA Executive. The BCASP state that '[b]efore submitting an advertisement for publication, advertisers must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation'. Advertisers are obliged to supply documentary evidence in support of the claims made, and are liable to be found in breach of the Codes if such evidence is inadequate for the purpose. The codes go on to state that '[t]he adequacy of evidence will be judged on whether it supports both the detailed claims and the overall impression created by the advertisement'.

Points 6 and 7 on pages 3 and 4 refer to different types of misleading claims as set out in Directive 2000/13/EC. There is a suggestion to extend this list to ensure that

- a. 'claims made on specific foods do not state or imply that a varied and adequate diet cannot provide sufficient quantities of nutrients'; and
- b. 'the presence of a nutrient or other substance or ingredient is not emphasised as a special characteristic when in fact it is common to all similar products'.

The ASA offers tacit support for the first suggestion (a) in as much as the BCASP already make provision for it. The Codes state that '[a] well-balanced diet should provide the vitamins and minerals needed each day by a normal, healthy individual. Advertisers may offer vitamin and mineral supplements to certain groups as a safeguard to help maintain good health but should not imply that they can be used to prevent or treat illness, elevate mood or enhance normal performance. Without well-established proof, no advertisement should suggest that there is widespread vitamin or mineral deficiency or that it is necessary or therapeutic to augment a well-balanced diet. Individuals should not be encouraged to swap a healthy diet for supplementation.'

The second suggestion (b) is covered in the Codes by the restriction on advertisements which are misleading by omission, and which exploit the lack of knowledge of consumers. Thus, an advertisement may be found in breach of the codes if it implies that the product advertised is special due to the presence (or absence) of a nutrient/substance/ingredient by omitting the fact that all similar products are able to make such a claim. In a similar vein, an advertisement making a claim based on the unique qualities of the product's nutrients/substances/ingredients, which are also found in all similar products, would be in breach of the Codes for exploiting consumers' ignorance of this fact.

¹ Consumers' Association, June 2000; 'Functional Foods: Health or Hype?'

Point 18 on page 5 makes the case for the further standardisation of nutrition claims, via the development of 'clear and simple rules'. If these rules are intended for the guidance of existing arrangements for self-regulation then they could be of use to the ASA. The Joint Health Claims Initiative (JHCI) issues such guidelines for health claims, although the scheme is still in its infancy. The ASA has close ties with the JHCI, whose voluntary code for health claims is intended to work alongside the self-regulation of non-broadcast advertising. The JHCI draws strength from the support of consumer groups, enforcement authorities and industry bodies. This could help to provide a flexible, efficient and effective model for the regulation of claims.

Point 23 on page 6 requires clarification. It is unclear whether the suggestion to give special consideration to comparative claims applies to advertisements, and whether reference to comparative claims follows the definition of comparative advertising contained in the Control of Misleading Advertisements (Amendment) Regulations 2000 (advertising which 'explicitly or by implication...identifies a competitor or goods or services offered by a competitor'). The BCASP contain an addendum covering the issue of comparative advertisements in accordance with the Regulations referred to above, although these stipulations make no reference to comparative claims *made between same brand products*.

Point 25 on page 6 refers to consumer ignorance of the difference between blood and dietary cholesterol and suggests that nutrition claims that fail to make this distinction clear are likely to mislead consumers. This is a conclusion shared by the ASA when investigating advertisements making claims in this area. In 1995 the ASA upheld a complaint from the National Food Alliance against a press advertisement issued by the Butter Council. The complainant objected to a number of statements in the advertisement, including the assertion that 'there is very little evidence that cholesterol in food translates into cholesterol in the body'. The ASA investigated this claim and determined that the statement was misleading as it implied that eating butter bore little relation to raised blood cholesterol levels. The advertisement was withdrawn as a result of the adjudication.

Point 28 on page 7 makes the case for an outright ban on the use of nutrition claims employing descriptive terms like "X% fat free". This is unnecessarily restrictive in an area subject to safeguards within the Codes administered by the ASA in relation to non-broadcast advertising. As has already been stated, the Codes demand that advertisers provide adequate evidence for claims which will be judged 'on whether [the evidence] supports both the detailed claims and the overall impression created by the advertisement'. Thus, an advertisement which states that the product is "80% fat free" may be found in breach of the Codes if there is a possibility that consumers will be misled into believing that the product is low in fat.

A more positive step towards addressing this issue might be to initiate a programme of consumer education designed to broaden understanding of specific nutrition claims. The self-regulation of non-broadcast advertising would certainly benefit from greater consumer awareness of the issues, as it would help to deter advertisers from making misleading claims in the first place (if they thought fewer consumers would take them seriously). The ASA has recently raised public awareness of misleading

functional food claims with the high profile publication of adjudications against advertisements for Flora Pro-Activ and Benecol margarines in July 2001.

Point 47 on page 10 suggests a number of conditions necessary for the substantiation of claims. These differ very little from the burden of proof demanded by the BCASP and quoted earlier. To reiterate, the Codes administered by the ASA demand that '[b]efore submitting an advertisement for publication, advertisers must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation'. Furthermore, the Codes state that '[r]elevant evidence should be sent without delay if requested by the ASA. The adequacy of evidence will be judged on whether it supports both the detailed claims and the overall impression created by the advertisement'.

Point 48 on page 10 proposes the establishment of a system of pre-marketing approval. If by 'pre-marketing approval' the suggestion is that all non-broadcast advertisements making nutrition or functional claims have to be submitted for pre-vetting then this would undermine the current system of self-regulation. Moreover, pre-marketing approval would be a cumbersome and disproportionate response to a situation in the UK where adequate safeguards exist. As noted in the introduction, advertising self-regulation has been endorsed by the Better Regulation Task Force and is supported in the UK Government's consumer policy White Paper *Modern Markets: Confident Consumers*. One relevant feature of the current system of self-regulation is the Copy Advice service offered by CAP. Advertisers wishing to make nutrition or functional claims are encouraged to contact the Copy Advice team prior to publication. This is to ensure that the claims are valid within the terms of the Codes administered by the ASA. This service is widely used by advertisers marketing food products in the UK. In 2000, the CAP Copy Advice service responded to over 12,000 requests for advice from advertisers.

The suggestion to implement a scheme of 'pre-marketing approval' also raises questions about the precise mechanism to be employed and the nature of the authorit(ies) charged with implementation. The current system of self-regulation works because collectively the advertising industry has a vested interest in ensuring that the system works to the benefit of consumers. Self-regulation guarantees freedom from government and industry intervention, and is free to consumers and taxpayers. It engenders a spirit of collective responsibility which marks a positive contribution to consumer protection.

Point 49 on page 10 makes reference to the possible introduction of a 'notification procedure, for food labels bearing a claim, to the competent authorities of Member States'. It is unclear whether the proposed notification procedure would also apply to advertising given the reference to 'food labels'. This uncertainty, and the fact that there is very little substantive detail in the proposal, makes it difficult for the ASA to comment on the suggestion put forward.

In summary

1. The Advertising Standards Authority operates a well-respected and widely understood system of self-regulation for non-broadcast advertising.

2. The British Codes of Advertising and Sales Promotion contain ample provisions to safeguard consumers against misleading nutrition and functional claims in non-broadcast advertisements. A number of high profile adjudications in favour of complainants have led to the withdrawal of advertisements which did not meet with the standards of honesty and truthfulness set out in the Codes.
3. Any further specification and standardisation of claims allowed in non-broadcast advertisements could undermine the current system of self-regulation. This arrangement requires the co-operation of advertisers and derives its strength from the delicate balancing of creative freedom and innovation against consumer protection. Any system of mandatory pre-market approval of claims would be incompatible with existing arrangements for self-regulation. The Copy Advice service offered by the Committee of Advertising Practice as part of the system of self-regulation provides a valuable safeguard against the abuse of nutrition and functional claims in non-broadcast advertising.
4. A more productive and proportionate response to the perceived need for action in this area would be to establish a programme of consumer education initiatives aimed at increasing awareness of nutrition and functional claims. This would serve the dual purpose of informing consumer choice in a positive manner, and it would support the system of self-regulation in deterring advertisers from making misleading claims in the first place.

SELF-REGULATION

The Advertising Standards Authority's control over non-broadcast advertising is self-regulatory - that is, the control is based on rules drawn up by the advertising industry itself.

INDUSTRY COMMITMENT

UK consumers have come to expect high standards in the advertising they see in the press, on posters, in magazines, in direct mail and sales promotions. This is due to the success of self-regulation in non-broadcast advertising, co-ordinated through the Committee of Advertising Practice (CAP), an umbrella-group for the advertising and media industries in the UK, and monitored by an independent body, the Advertising Standards Authority.

The Advertising Standards Authority is independent of both the advertising industry and the Government.

THE SANCTIONS OF SELF-REGULATION

Many advertisers are deterred from breaking the Codes by the negative publicity the ASA routinely generates for upheld complaints about advertisements, but the ASA can apply a number of sanctions to prevent the publication of misleading or offensive advertisements. The ASA cannot force companies to comply with its rulings but it can rely on members of the Committee of Advertising Practice to enforce its rulings.

Refusal of space

Publishers can be asked to invoke their terms and conditions of business, and refuse further advertising space for any advertisement that breaks the Codes.

Poster Pre-vetting

Any advertiser who has a complaint upheld against a poster on grounds of taste and decency or social responsibility may be required to pre-vet all posters through CAP for up to two years.

Removal of trade incentives

The trade and professional associations in CAP can remove an advertiser or agency from their association, which can result in the loss of trading and financial benefits.

Legal action

For the small minority of persistent or deliberately misleading advertisements, the ASA can ask the Director General of Fair Trading to seek an injunction through the courts to prevent them from being repeated, under The Control of Misleading Advertisements Regulations 1988.

ASPECTS OF SELF-REGULATION

The ASA is widely recognised by the general public as the most appropriate body to contact about offensive or misleading advertising and is considered by more than

three quarters of the population as an effective regulator. Fewer than one in seven people believe that regulation by a Government body would be preferable.

Accessible, speedy and flexible service

The ASA needs only one letter of complaint to start an investigation; with no complex legal procedures to go through, the ASA can secure the withdrawal of an advertisement within days or even hours. The Codes are flexible enough to deal with new issues as they arise and must be observed in the spirit as well as the letter. Unlike the law, they cannot be circumvented on a technicality.

Burden of proof

In contrast to the UK legal system, the onus is on advertisers to swiftly prove any factual claims they make in an advertisement, not on anyone else to disprove them.

Free to the public

The system is financed by a self-imposed levy on the advertising industry collected by a separate company to ensure the ASA remains independent from the industry.

Independent

The majority of the ASA's 12-member Council are independent of the industry; all members serve in their individual capacities and do not represent any sector or interest. The ASA Council has the final say on whether or not an advertisement breaks the Codes.

Advice service

The Committee of Advertising Practice offers a free and confidential pre-publication advice service to help prevent offensive and misleading advertisements from appearing. Over 11,000 requests for advice are dealt with every year.

Research

The Authority undertakes regular research to assess public opinion, the levels of compliance with the Codes, to identify advertising trends and to anticipate areas for action and guidance.

SELF-REGULATION AND THE LAW

While the ASA does not enforce the law, its procedures are subject to judicial review. During one such review in 1988, the courts concluded that the ASA 'is clearly exercising a public law function.' In 1979, the Office of Fair Trading investigated the work of the Authority to see whether 'transforming the ASA into a statutory authority would .. increase the protection of the public interest'. The report, published in 1980, concluded: 'We are inclined to believe that this objective may be better achieved in practice .. by a self-regulatory system'.