



House of Commons

Digital, Culture, Media and
Sport Committee

**Influencer Culture:
Lights, camera, inaction?:
ASA System and CMA
Responses to the
Committee's Twelfth
Report of Session 2021-22**

**Second Special Report of
Session 2022–23**

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The Digital, Culture, Media and Sport Committee

The Digital, Culture, Media and Sport Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Digital, Culture, Media and Sport and its associated public bodies.

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Second Special Report

The Digital, Culture, Media and Sport Committee published its Twelfth Report of Session 2021–22, *Influencer Culture: Lights, camera, inaction?* (HC 258), on 9 May 2022. The ASA System response was received on 8 July and the CMA response was received on 11 July, and both are appended below.

Appendix: ASA System Response

Background and Introduction

1. This response to the recommendations in the Digital, Culture, Media and Sport Committee's report on influencer culture is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'
2. The ASA is the UK's independent advertising regulator. We have been administering the non- broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.
3. We are responsible for ensuring that advertising is legal, decent, honest, and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for- purpose.
4. As the UK's frontline advertising regulator, the ASA brings together different statutory, co- regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.
5. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.
6. We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees' development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These

include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System's processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.

7. The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

8. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 850,000 pieces of advice and training in 2021.

Committee Recommendation 4:

- **“We recommend that the Advertising Standards Authority introduce a requirement to the UK Code of Non-broadcast Advertising (CAP Code) for virtual influencers to be watermarked.”** (Paragraph 32)

ASA System response

1. We understand 'virtual influencers' are fictional, sometimes computer-generated people who typically have realistic characteristics, features and personalities of humans. The content they deliver is created by individuals, brands, agencies etc, who remain anonymous and faceless to the web-user.

2. The ASA has not received any complaints relating to virtual influencers. We are not aware of research that suggests that virtual influencers are causing advertising-related harm.

3. We understand the recommendation is for the ASA system to require the account of virtual influencers to be watermarked when the account is being used to advertise to web users. A recommendation to watermark the account of virtual influencers for purposes other than advertising would fall outside the advertising remit of the ASA system.

4. We understand two theoretical concerns are raised: i) the anonymous controller of the virtual influencer account is less likely to be deterred from non-compliance by ASA name-and-shame sanctions or other self-regulatory and statutory sanctions; and ii) a web user has the right to know the controller of the virtual influencer account.

5. On i) an advantage of the ASA system is that it can tackle non-compliance via the influencer and/or the brand being marketed and/or the platform; it is not reliant on remedying non-compliance via the influencer only or, in this case, via the controller of the virtual influencer account. If it considers it necessary to do so, the ASA system can work with third parties, including platforms, to seek to identify the contact details for the controller of the influencer account.

6. On ii) The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) requires ads, including influencer ads, to be obviously identifiable as such. This helps to ensure the consumer knows when they are being marketed to. If the presentation of an ad meets this test, for example, by use of an upfront and prominent ‘#ad’ label, it is not clear whether and, if so, how a consumer could be misled *in all circumstances* by the fact that the ad was communicated in a post by a virtual influencer; our rules allow us to assess whether it would be misleading in individual cases, however. The ASA system undertakes to consider any evidence presented to it of advertising-related harm arising from virtual influencers against the criteria set out in its Evidence-based Policy Making guidance (<https://www.asa.org.uk/static/uploaded/cb20c00f-b559-40a2-8b5677188511b45b.pdf>). In the absence of such evidence, we do not have the basis to consider further, at this stage, the recommendation that virtual influencers should be watermarked when the account is being used to advertise to online users.

7. On ii) we also understand the Online Safety Bill may give Ofcom powers to consider the circumstances in which the use of virtual social media accounts (used by people, organisations etc. which conceal their identities) may lead to harm and, in such circumstances, the duty of care that may apply to the platform in scope of the Bill.

Committee Recommendation 8:

- **“We recommend that the remit of the CAP code be extended by removing the requirement for editorial ‘control’ to determine whether content constitutes an advertisement.”** (Paragraph 69)

ASA System response

1. The ASA system ‘payment’ and ‘control’ tests have, for approximately 60 years, determined advertorial/native advertising that falls within the remit of the ASA system, and they help to ensure we—the advertising regulator—do not inappropriately extend our regulation to editorial or sponsorship matters.

2. The ASA adopts a broad interpretation of the payment and control tests, which means that, in practice, most influencer posts that involve the endorsement of a product or service fall within the remit of the ASA. For example, regarding the interpretation of brand ‘control’, as a rule of thumb, if influencers are not completely free to do and say whatever they want, whenever they want, about a product for which they have received payment or payment in kind, the ASA is likely to consider the brand exercises a critical level of control over the marketing communication and the remit test has been met. In practice, this means there are very few cases of influencer advertising that we reject or refer to other bodies because the control test has not been met.

3. In line with consumer protection law and to ensure consistency with the CMA, the ASA system takes every opportunity to confirm that ‘payment’ alone necessitates disclosure requirements (see p.3: <https://www.asa.org.uk/static/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf>) irrespective of whether the post is ‘controlled’ by the brand.

4. We will commit to exploring how we can clarify further that payment alone invokes advertising disclosure requirements and we will explore whether there is a case for reconsidering the ASA system payment and control tests as they apply to certain categories of native advertising, including influencer advertising, whilst ensuring our regulation does not restrict freedom of speech by extending unduly to areas it should not, for example, editorial and sponsorship matters.

Committee Recommendation 10:

- **“We recommend that the ASA be given statutory powers to enforce the CAP Code. These powers should be considered as part of the Government’s upcoming Online Advertising Programme. Appropriate funding arrangements should also be considered to ensure that the ASA is able to act effectively on these enforcement powers.”** (Paragraph 89)

ASA System response

1. We acknowledge this recommendation is directed at the Government Online Advertising Programme.
2. We welcome the Committee’s support for the CMA to receive greater powers to enforce consumer protection law. We would highlight also that Ofcom has new powers applying to UK established video-sharing platforms, which place requirements on these platforms to provide their users with the means to help them disclose the advertising nature of their uploaded content.
3. We consider the combination of enhanced statutory and self-regulatory enforcement powers (the latter including ASA Online Platform Targeted Ad sanctions, which bring to the attention of ‘followers’ the fact of the influencers non-compliance), combined with new and impactful use of data science to monitor influencer ads at pace and scale, will prove effective in improving compliance outcomes in this aspect of regulation. To date, the ASA system has not had the need to refer an influencer or a brand to a legal backstop for repeated non-compliance, but we will work with the appropriate statutory regulatory where we consider it is necessary to do so.
4. The ASA system has submitted a response to the Government Online Advertising Programme, to which this Committee recommendation is directed. The response clarifies that the ASA system is committed to significantly enlarging its budget to respond to the capacity, technology and expertise challenges that all digital regulators are facing. Through an enhanced financial plan (2022-2025), the ASA system is committed to above-inflation investment to expand our workforce and deliver the expertise and technology to maximise our data science capability, in particular.

Committee Recommendation 11:

- **“The influencer marketing ecosystem is rapidly changing and presents unique problems in monitoring compliance with UK advertising regulations. We have heard that new sanctions and undertakings are an important and positive step but have not seen evidence to this effect. We therefore recommend that ASA conducts yearly monitoring exercises to better understand how compliance rates change over time and in response to policy and technological developments.”** (Paragraph 90)

ASA System response

1. The ASA system is committed to its strategic objective to have More Impact Online. This strategic focus has propelled our regulation of influencer advertising and led us to develop machine-learning monitoring tools; new sanctions; and develop partnership working with CMA, Ofcom and industry representative organisations.
2. Targeted monitoring will continue to remain an invaluable tool in securing transparency and accountability in our regulation of influencer advertising, and we remain committed to its use in areas of greatest detriment to consumers, particularly children and other vulnerable groups. This targeted monitoring currently happens on a continuous, ongoing basis and we plan to scale it up to cover more influencers and communicate our work accordingly, in line with the Committee recommendation. Examples of communications on our monitoring and enforcement work can be found [here](#), [here](#), and [here](#).
3. Whilst the scale and heterogeneity of the influencer marketing ecosystem make it impractical to determine a reliable overall compliance rate, we agree that it is important to use quantitative and qualitative measures to indicate the changing rates of compliance in relation to the influencer sectors targeted for monitoring. We are always striving to improve the communication of the impact of our regulation.
4. The ASA system considers it is meeting and, in certain aspects, exceeding this recommendation.

Committee Recommendation 12:

- **“There are risks as well as benefits in the use of machine learning technology. We recommend that the ASA and CMA report yearly to Government outlining the scope, capabilities, and risk management protocol for their monitoring technology as it develops.”** (Paragraph 93)

ASA System response

1. The ASA is committed to ethical development of AI, which includes how we responsibly design and implement AI systems in the public sector in line with guidance produced by the Alan Turing Institute (<https://www.turing.ac.uk/research/publications/understanding-artificial-intelligence-ethics-and-safety>), for example.
2. The CMA is a full member, and the ASA system is an associate member, of the Digital Regulation Cooperation Forum, which is driving regulatory best practice in the use of AI and machine learning. (<https://www.gov.uk/government/publications/findings-from-the-drcf-algorithmic-processing-workstream-spring-2022>)
3. As regulators that are necessarily independent of government, the ASA, CMA, Ofcom and ICO will develop the scope, capabilities and risk management protocol of their AI and monitoring technology subject to appropriate transparency and accountability constraints. The ASA is committed to using opportunities, both proactive and reactive, to share our work with government in this important and developing area of our regulation.

Committee Recommendation 15:

- **“We strongly recommend that the Advertising Standards Authority update the CAP Code to include mandatory enhanced disclosure standards for advertisements targeted to children or an audience composed predominantly of children. Any updates should be supported by robust research into children’s particular information processing requirements and ensure that children are able to critically evaluate, as well as identify, advertisements.”**
(Paragraph 116)

ASA System response

1. We will explore to what extent the advice we already provide to advertisers in relation to enhanced disclosure for ads targeted at younger children can be more effectively communicated to influencers and their agencies that target a child audience. We will also consider whether and, if so, how we might monitor a selection of influencers, who target a younger child audience, to assess the influencers’ disclosure practices and, as appropriate, to effect changes if we consider the disclosure inadequate.

2. As recently as June 2022 we updated ASA system guidance on ‘Recognising Ads: Children’ (https://www.asa.org.uk/news/children-s-recognition-of-online-ads.html?dm_i=4PDW,OZ4C,4FAE63,32ABR,1), which acknowledges that the cognitive development of children, particularly those aged 11 or younger, may limit their ability to recognise marketing communications and their understanding of the commercial intent underlying them. The evidence suggests that children’s abilities in these areas are further compromised when they engage in highly immersive or significantly integrated online environments where the distinctions between advertising and editorial may be less clear.

3. The ASA continues to actively enforce breaches of disclosure requirements, including where the advertiser or publisher has failed to provide ‘enhanced’ disclosure to younger children (<https://www.decisionmarketing.co.uk/news/firms-fingered-for-targeting-kids-with-hidden-marketing>).

4. We consider that the CAP Code already includes mandatory enhanced disclosure standards for ads targeted to children or an audience composed predominantly of children. This is because the underlying consumer protection legislation (reflected in our Codes and enforced by our backstops) means that we must take into account any vulnerabilities in the audience of ads. Regulation 2(5) of the Consumer Protection from Unfair Trading Regulations 2008 includes the following:

(5) In determining the effect of a commercial practice on the average consumer—(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and (b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

5. Our guidance on children’s understanding (above) combined with our consideration of this legal provision in applying our mandatory rules means that we already apply mandatory enhanced disclosure rules, As evidenced by the rulings referred to, we require

enhanced disclosure of advertisements in circumstances when that is necessary.

Committee Recommendation 16

- **“The online advertising environment has changed significantly since 2012 when CAP conducted their review of the use of under-16s as brand ambassadors and in peer-to-peer marketing. During this time, the market for child influencers has expanded and there are considerable safeguarding concerns from industry experts. We, therefore, recommend that CAP conducts another review of the use of under-16s in marketing, ensuring that special focus is given to the use and impact of child influencers. This review should take place before the end of 2022.”** (Paragraph 127)

ASA System response

1. The preamble to the Committee recommendation suggests incorrectly that CAP had the means, in 2012, to ban the use of under-16s as brand ambassadors or as peer-to-peer marketers.
2. In 2012, we clarified the Advertising Codes do not cover the relationship (employment or otherwise) between the marketer and the child. Rather, the CAP Code applies to marketing communications that result from a reciprocal relationship between the marketer and a child and where editorial control rests with the marketer. Accordingly, the guidance we produced (<https://www.asa.org.uk/static/523b0b12-29f7-4bc4-b1cd678e2e8ae0d9/brand-ambassadors-and-peer-to-peer-marketing.pdf>) highlighted rules that we considered to be most pertinent to marketing communications that result from such a reciprocal arrangement.
3. The limits of the ASA system’s role in relation to the use of under-16s as brand ambassadors and peer-to-peer marketing remain. We agree that the market for child influencers has expanded since 2012. The safeguarding concerns raised by the Committee, however, are not matters that fall within the remit of the ASA system given the Advertising Codes do not cover the relationship (employment or otherwise) between the marketer and the child or, indeed, the child and other parties, for example, parents, guardians etc.
4. We will, however, commit to review by the end of 2022 and, if necessary, update the guidance to ensure it remains fit and relevant to marketing communications that result from a reciprocal relationship between the marketer and a child, especially in relation to influencer marketing.

Appendix 2: CMA Response

Introduction

1. On 9 May 2022, the DCMS Select Committee published its report on influencer culture. The report highlights the rapid expansion in influencer culture, where content creators build relationships with audiences on platforms such as YouTube, TikTok and Instagram, exerting both commercial and non-commercial influence.

2. The Committee concludes that the growth in the market has exposed a number of regulatory gaps and has made recommendations for the Competition and Markets Authority ('CMA'). More specifically, at Paragraphs 93 and 97 of the report:

93. There are risks as well as benefits in the use of machine learning technology. We recommend that the ASA and CMA report yearly to Government outlining the scope, capabilities, and risk management protocol for their monitoring technology as it develops. (Recommendation 1)

97. We recommend that the CMA report to our Committee on the progress, costs, and results of their 2020 Facebook Ireland Ltd. undertakings. In doing so they should also provide updates on their progress securing undertakings from other social media platforms. (Recommendation 2)

3. In response to the recommendations, the CMA provides the following submission. The submission begins with a background on the CMA's work relating to influencers and social media platforms to date, followed by specific responses to each of the recommendations set out above.

Background

4. The CMA is a non-ministerial government department which has statutory powers to enforce consumer protection legislation. The CMA has used these powers to initiate enforcement action in relation to illegal influencer endorsements on several occasions¹. In initiating these investigations, the CMA has relied on one or more parties having breached the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs').

5. In **August 2018**, the CMA launched a consumer enforcement [investigation](#) into concerns that social media influencers may not have declared when they have been paid, or rewarded, to endorse goods or services.² As a result of this investigation, in **January 2019**, sixteen influencers provided undertakings to improve disclosures in their social media posts, to make it clear when they have been paid or otherwise incentivised to endorse a product or service.³

6. Also in **January 2019**, the CMA published a [guide](#) to influencers on how they could ensure compliance with consumer law,⁴ and co-published a second [guide](#) with the Advertising Standards Authority in **February 2020**.⁵

1 <https://committees.parliament.uk/writtenevidence/35433/pdf/> - see pages 2-4

2 CMA, *Social Media Endorsements*, last updated 16 October 2020, Available [here](#).

3 For undertakings, see CMA, *Summary of undertakings*, Available [here](#).

4 CMA, *Social media endorsements: guide for influencers*, 23 January 2019, Available [here](#).

5 CAP and CMA, *Influencers' guide to making clear that ads are ads*, February 2020, Available [here](#).

Recommendation at paragraph 93

There are risks as well as benefits in the use of machine learning technology. We recommend that the ASA and CMA report yearly to Government outlining the scope, capabilities, and risk management protocol for their monitoring technology as it develops

7. The CMA's consumer protection team has been working with its Data, Technology and Analytics (DaTA) unit to develop innovative approaches to capturing evidence from digital platforms. These approaches use web-scraping combined with statistical screens to identify problematic content. To date, the CMA's work in this area has focused on particular live investigations—Social Media Endorsements and Fake Reviews. We ensure that our work in this area is proportionate and compliant with relevant legislation, for example the Regulation of Investigatory Powers Act.

8. The CMA is a full member, and the ASA is an associate member, of the Digital Regulation Cooperation Forum, which is driving regulatory best practice in the use of AI and machine learning. In 2021 the DRCF established an Algorithmic Processing workstream to explore the impact of algorithms across our industries and regulatory remits.

9. As part of this workstream, it launched two separate research projects - one looking at the harms and benefits posed by algorithmic processing (including the use of artificial intelligence), and another looking at the merits of algorithmic auditing, as a way of documenting risks and assuring stakeholders that an algorithmic system behaves and is governed as intended. It published these papers in April 2022 and alongside them launched a call for input to help shape the DRCF's agenda.

10. The CMA is committed to sharing both with the Government and with Parliament our work in this important and developing area and, in liaison with the ASA, will take opportunities to do so on regular basis.

Recommendation at paragraph 97

We recommend that the CMA report to our Committee on the progress, costs, and results of their 2020 Facebook Ireland Ltd. undertakings. In doing so they should also provide updates on their progress securing undertakings from other social media platforms.

The Facebook Undertakings

11. The CMA has been [investigating](#) the role that platforms play in social media endorsements.⁶ As a result of this investigation, in **October 2020**, Facebook provided [undertakings](#) relating to its Instagram platform to tackle this issue.⁷

12. The undertakings included:

- making available to all users (subject to reasonable exemptions) a Branded Content Tool which enables creators to disclose when a commercial relationship

6 CMA, *Social Media Endorsements*, last updated 16 October 2020, Available [here](#).

7 See *Undertakings from Facebook Ireland Limited*, 16 October 2020, Available [here](#).

exists between a creator and a brand;

- prompting influencers to confirm before posting if they have been ‘paid’⁸ for the post;
- implementing technology designed to help identify posts containing adverts that have not been clearly and prominently disclosed as adverts;⁹
- enabling businesses to detect posts which promote their products so that they can check proper disclosures have been made;¹⁰ and
- revising and making clearer its policies governing the publication of incentivised endorsements.¹¹

13. The CMA continues to work closely with Meta Platforms Ireland Limited (formerly known as Facebook Ireland Limited) to oversee its adherence with the undertakings provided and we are satisfied that it is making appropriate progress. The undertakings were to be implemented in various stages and by the end of June 2021. However, as some measures required the development and testing of new functionality, additional time has been agreed and full implementation is expected by the end of 2022.

14. The CMA publishes an overall impact assessment for the CMA which is laid before Parliament together with the CMA Annual Report. We report regularly across the CMA’s enforcement portfolio about direct financial impact that flows from our work, and this is subject to external QA.

15. The CMA announced on its [case page](#) that it would continue investigating the practices of other social media platforms to ensure that comparable changes are made where necessary.

16. The CMA has looked at a variety of social media platforms in the UK and is developing some key compliance principles (the ‘**Principles**’) which the CMA considers will help social media platforms comply with consumer protection law in relation to influencer endorsements. The CMA has shared the draft Principles with several social media platforms and other key stakeholders, and expects to publish a final version in due course.

17. The CMA has also expressed its view on what platforms need to do in order to comply with consumer law in its oral submission to the [DCMS Select Committee Influencer culture inquiry](#), its submissions to the [DCMS Select Committee on influencer culture in May 2021](#) and the [Joint Committee on the Draft Online Safety Bill in September 2021](#), in our ongoing dialogue with Government in relation to consumer reform and most recently, in our response to the Government’s consultation on the [Online Advertising Programme](#).

18. The Principles are based on the undertakings provided by Facebook Ireland Limited in respect of its Instagram platform in October 2020 and the CMA’s interpretation of consumer protection law, and in particular what the CMA considers is required for a social

8 Includes any form of monetary payment, a gift of a product, a loan of a product, any incentive and/ or commission. A gift or loan of a product includes circumstances where there is no existing commercial relationship between the parties.

9 See *Undertakings from Facebook Ireland Limited*, Undertaking 17, 16 October 2020, Available [here](#).

10 See *Undertakings from Facebook Ireland Limited*, Undertaking 20, 16 October 2020, Available [here](#).

11 See *Undertakings from Facebook Ireland Limited*, Undertaking 1(b), 16 October 2020, Available [here](#).

media platform to be professionally diligent and avoid misleading consumers. Platforms may also choose to take additional steps to protect users. Ultimately only a court is able to decide whether a platform is breaking the law, and platforms should keep their practices under review as the law continues to develop.

19. The Principles have been shared with some social media platforms and are designed to provide illustrative examples of the steps social media platforms can take to help ensure compliance with consumer protection law and reduce the risk of facing enforcement action. There are six main principles:

- inform users that incentivised endorsements are required to be clearly identified as advertising and clearly distinguishable from other posts;
- provide influencers with tools so they are easily and effectively able to label any post as advertising;
- take appropriate, proactive steps and use available technology to prevent hidden advertising from appearing on their platform;
- make it simple for users to report suspected hidden advertising easily and effectively;
- facilitate legal compliance by brands; and
- enforce terms and conditions and deal with violations so that material is taken down quickly.

20. We are continuing to engage with social media platforms and will update the Committee when we have reached an outcome in due course.

CMA consumer powers

21. We welcome the Committee's support, at Paragraph 85 of the report, for the CMA's request for greater powers to enforce consumer protection law. We will keep the Committee updated on developments in this area.