



The Global Voice of Mobile Entertainment

CAP Code Review

MEF's response to the CAP Consultation document

MEF RESPONSE | JUNE 2009

Introduction

Formed in 2000, the Mobile Entertainment Forum (MEF) is the global trade association of the mobile media industry, working on behalf of its diverse membership to drive mobile entertainment adoption, shape regulation and deliver competitive advantage to its members. MEF's membership base spans the entire range of mobile entertainment activities, including music, film, TV and video companies who create and package content; publishers, retailers, service providers and technologists who sell and deliver content and network operators who get the content to the end users.

With global headquarters and an EMEA branch in London, a Hollywood-based Americas secretariat and an Asian chapter in Hong Kong, MEF's member network encapsulates a comprehensive list of leading mobile entertainment businesses and entrepreneurs from across the value chain. For more information and a full list of members please visit: www.m-e-f.org.

General Overview

MEF welcomes the opportunity to respond to the CAP Code Review Consultation and agrees that it is timely to conduct a major review of its Code to ensure the rules for non-broadcast advertisements, sales promotion and direct marketing communications are up to date and fit for purpose.

MEF agrees with:

- CAP's general policy objective to ensure that all non-broadcast marketing communications covered by the CAP Code are legal, decent, honest and truthful and prepared with a due sense of social and professional responsibility and with
- CAP's intention that its Code be based on the enduring principles that marketing communications should not mislead, harm or offend.

In particular, MEF supports CAP's objective to ensure that the Code adequately protects children and others whose circumstances seem to CAP to put them in need of special protection, yet retains an environment in which responsible advertising can flourish.

We support the need for all regulatory Codes to be in keeping with the five principles of good regulation. The principles state that any regulation should be:

- transparent
- accountable
- proportionate
- consistent
- targeted – only at cases where action is needed

General Response

We would like to congratulate and commend the CAP review team on doing such a thorough job of reviewing the Code of Practice. We have provided responses to only those questions and sections of the consultation that have a direct bearing on our members.

The CAP Code review has highlighted several potential conflicts with other regulatory Codes of Practice and also inconsistencies with the BCAP Code. MEF believes that CAP must consider other regulatory Codes that exist and developments that have either recently taken place or are currently being consulted on. Without taking into account the regulatory overlap which occurs, the regulatory burden on MEF members runs the serious risk of becoming disproportionate and contrary to the goals of the five principles of good regulation. We believe that the key developments that CAP should take full account of are:

- Prior permission requirements for certain mobile services from PhonepayPlus¹
- The Ofcom Scope Review² which is seeking to ensure the current PRS regulatory regime meets the needs of consumers, affords an appropriate level of consumer protection and, at the same time, supports an innovative and changing PRS industry.
- The process of forming a new regulator in the UK for video on demand services³. This is being led by the DCMS and Ofcom.

All the above issues have specific impacts on the content and promotion of mobile media services. MEF would urge CAP to ensure it is engaging fully in discussions with Ofcom, the DCMS and PhonepayPlus to ensure proposals considered and implemented will not cause a direct conflict between Codes and/or create any unnecessary overlap of provisions and responsibilities. There is a real need for a clear demarcation of responsibilities between regulators and now is a perfect time to explore the opportunities as part of the Ofcom Scope Review. Ultimately, such a clear demarcation will benefit the consumer who will be able to clearly identify the regulator they need to approach or be referred to the most appropriate regulator.

Specific Response to Questions

- **Part 2 - Section 1 (Compliance)**

Question 1

- i) Taking into account CAP's general policy objectives, do you agree that CAP's rules, included in the proposed Compliance Section are necessary and easily understandable? If your answer is no, please explain why.

¹ This rule came into effect on 22 January 2009: <http://www.phonepayplus.org.uk/upload/SPPNOTICE.pdf>

² http://www.ofcom.org.uk/consult/condocs/prs_scope/

³ http://www.culture.gov.uk/reference_library/consultations/5309.aspx/

MEF Response:

We agree. However, as you will see in our responses below, there is a desperate need for clear guidance to be provided by CAP that supplements the Code provisions which indicate to the stakeholder how the rules will be applied in practice. The provision of examples that do not form part of the Code would be of considerable use to MEF members and can be adapted quickly without the need for considerable consultation with the industry.

Part 2 – Section 2 (Recognition of Marketing Communications)**General comment:**

Whilst the OFT formally recognises the ASA as a first line of control in protecting consumers from unfair advertising; advertising that misleads, is aggressive or otherwise unfair, there needs to be a recognition that other regulators also assert their authority over the same areas. Particularly, PhonepayPlus as an agency of Ofcom is tasked with the regulation of premium rate services which includes both their content and promotion. There are provisions in the CAP (and BCAP) Codes that specifically cover promotions advertising premium rate services. In order to ensure regulatory certainty, we would like the ASA to refer all complaints about the advertising of premium rate services to PpP in the first instance unless the issue is one purely of advertising.

- **Part 2 – Section 3 (Misleading)**

Question 3

Do you agree that rule 3.10 should be included in the Code? If your answer is no, please explain why.

MEF Response:

We agree that qualifications must be clear to consumers who see or hear the marketing communication. The provision seems to apply to those qualifications which can only be heard or seen once or are only allowed to be seen or heard once. As such, the provision as drafted needs to reflect this and should not apply to non-broadcast advertising media that allows a consumer to view or see the marketing communication again.

Question 4

Do you agree that rule 3.11 should be included in the Code? If your answer is no, please explain why.

MEF Response:

We agree that marketing communications must not exaggerate the capability or performance of a product and that claims must be based on normal use. However, this would fall under the general duty to not mislead – any exaggeration will be misleading by act or omission. As such, we would query the need to have this provision included.

The general duty to not mislead consumers can cover a number of provisions including so it may be feasible to incorporate these in supplementary guidance rather than as Code provisions:

Para 3.28

Marketing communications that quote a price for a featured product must state any reasonable grounds the marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the advertised price within a reasonable period and in reasonable quantities. In particular:

Para 3.28.3

marketing communications must state restrictions on the availability of products, for example, geographical restrictions or age limits.

Para 3.45

Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is obviously fictitious, and hold contact details for the person who, or organisation that, gives it.

We would recommend that the Code contain a general duty to not mislead by act or omission which is then supplemented with clear practical examples of what would be considered to be misleading.

Question 8

Given CAP's policy consideration, do you agree that marketing communications should not describe items as "free" if the consumer has to pay for packaging? If your answer is no, please explain why.

MEF Response:

While we agree with the sentiment of this provision, there is the possibility of conflict and confusion if the promotion relates to a product or services obtained by engaging a premium rate number.

The PhonepayPlus Code states:

5.11 Use of the word 'free'

"No premium rate service or product obtained through it may be promoted as being free unless:

- a. a product or service has been purchased by the consumer using a premium rate service and a second product or service of an equal or greater value is provided at no extra charge, or
- b. a product is provided through the premium rate service and the cost to the user does not exceed the delivery costs of the product and the promotional material states the maximum cost of the call."

As can be seen, the above PpP provision differs from the proposed provision in the CAP Code. This is likely to cause confusion and multiple rules for similar services paid for with different

mechanisms. Where services are paid for using a premium rate mechanism, only one set of rules should apply to avoid any confusion and double jeopardy.

Question 9

- i) Taking into account CAP's general policy objectives, do you agree that CAP's rules on misleading are necessary and easily understandable? If your answer is no, please explain why.
- ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed rules that are likely to amount to a significant change in advertising policy and practice, are not reflected here and that should be retained or otherwise be given dedicated consideration?
- iii) Do you have other comments on this section?

MEF Answer:

We would like to reiterate that there is a general duty to not mislead consumers which can cover a number of provisions including so it may be feasible to incorporate these as supplementary guidance notes rather than as Code provisions.

So, a practice is unfair if:

- The conduct itself is not professionally diligent; and
- The practice materially distorts – or is likely to materially distort, the economic behaviour of average consumers in relation to the products concerned.

This can be followed by examples of how this works in practice.

• Part 2- Section 4 (Harm and Offence)

The Consumer Protection from Unfair Trading Regulations 2008 implement in the UK the EU Unfair Commercial Practices Directive 2005/29/EC. To give consumers greater confidence to shop, the Directive aims to harmonise consumer protection legislation to a high common standard across the EU. The Directive should also make it easier for businesses to market and sell their products to consumers across the EU. The Regulations introduce, for the first time, not only a general prohibition against unfair commercial practices, but also specific prohibitions against misleading and aggressive practices. It also introduces a blacklist of 31 specific practices that will always be banned as they are inherently unfair.

The OFT and local authority Trading Standards are the main enforcers of the Regulations. They have extensive investigatory powers in addition to their powers to take civil and criminal enforcement action. The OFT can use a range of tools to get traders to comply, including through education, advice, guidance, codes of conduct and alternative means, such as self-regulation.

The OFT may, for example, refer practices concerning the phone-paid services market, to be dealt with under the PhonepayPlus code of practice. Equally, matters falling within its area of expertise may be referred to the Advertising Standards Authority. Where remits overlap, and

two or more enforcers can take action, they are expected to work together with a view to bringing one coordinated action.

MEF requires, as a matter of urgency, that CAP/ASA liaise with PpP to set out very clearly for the industry their respective jurisdictions and under which circumstances they intend to take action.

All enforcement bodies must have regard to the principles of transparency, proportionality, accountability and consistency and with the changes proposed (see below) this will no longer hold true.

Question 12

Given CAP's policy consideration, do you agree that rule 5.7 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

Rule 5.7 states that "Promotions that contain a direct exhortation to buy a product must not be addressed to or targeted at children."

At Paragraph 5.11, the consultation document states that "...its proposal would not amount to a change in advertising policy or practice but would provide clarification that promotions that require a purchase to participate, and include a direct exhortation to make a purchase, must not be addressed to or targeted at children."

This is not true. The inclusion of Rule 5.7 is a significant departure from the previous provision which stated:

"47.5a

Promotions addressed to or targeted at children should not encourage excessive purchase

47.5c

Promotions addressed to or targeted at children should clearly explain the number and type of any proofs of purchase needed to participate."

The new provision seems to state that you cannot target children if you are asking them to purchase any products or services regardless of price points.

The inclusion of the new rule is also in direct conflict with the current PpP Code of Practice which states:

"7.5.1 Definition of children's services

Children's services are services which, either wholly or in part, are aimed at or should have been expected to be particularly attractive to children, who are defined for the purposes of this Code

as people under 16 years of age.”

The PpP Code goes on to state that:

“7.5.2 Promotional material for children’s services must clearly state:

- a. the usual cost of the service,
- b. that the service should only be used with the agreement of the person responsible for paying the phone bill.

7.5.3 Children’s services, and any associated promotional material, must not:

- a. contain anything which is likely to result in harm to children or others or which exploits their credulity, lack of experience or sense of loyalty,
- b. include anything which a reasonable parent would not wish their child to hear or learn about in this way,
- c. make direct appeals to children to buy or donate, unless the product, service or donation is one which they could reasonably be expected to afford for themselves,
- d. encourage children to use other premium rate services or the same service again.

7.5.4 Children’s services must not:

- a. generally cost more than £3, or in the case of subscription services (see paragraph 7.12), more than £3per month,
- b. involve competitions that offer cash prizes or prizes readily converted to cash.”

These paragraphs are seemingly incompatible with the new wording set out in the CAP Code and create a conflict between rules applicable to the advertising for the services falling under the jurisdiction of the two regulatory bodies. This is, in our opinion, unacceptable and creates serious regulatory uncertainty.

There is also general uncertainty as to what the practical implications of the proposed rule in 5.7 would mean. Does it mean, for example, that you can sponsor products targeted at children but not ask them to purchase? What about editorials for certain products or services? At what point is an advertisement considered to be a ‘direct exhortation’?

MEF would urge the CAP and PpP to discuss the inclusion of rule 5.7 with the industry further and consider carefully how the services and promotions for premium rate services should be regulated to avoid uncertainty and multiple rules. We would strongly request that CAP provide clear guidance as to how rule 5.7 will be interpreted and might be enforced in practice.

Question 13

Given CAP’s policy consideration, do you agree that rule 5.5 should be included in the Code? If your answer is no, please explain why.

Our response to this question replicates the concerns listed above.

Question 14

i) Taking into account its general policy objectives, do you agree that CAP's rules, included in the proposed Children section, are necessary and easily understandable? If your answer is no, please explain why.

ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Children rules that are likely to amount to a significant change in advertising policy and practice, which are not reflected here and that you believe should be retained or otherwise given dedicated consideration?

ii) Do you have other comments on this section?

MEF Answer:

The proposed rules need to be clearly set out with example provided in supplementary guidance.

- **Part 2 – Section 8 (Sales Promotions)**

Question 17

Given CAP's policy consideration, do you agree that rule 8.27 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

Agreed.

Question 18

Given CAP's policy consideration, do you agree that rule 8.17.4.b should be included in the Code? If your answer is no, please explain why?

MEF Answer:

Agreed - Unless the promotional pack includes the promotional item or prize and the only limit is the availability of that pack, prize promotions and promotions addressed to or targeted at children always need a closing date.

Question 19

Given CAP's policy consideration, do you agree that rule 8.17.6 should be included in the Code? If your answer is no, please explain why.

Question 20

Given CAP's policy consideration, do you agree that rule 8.17.6.a should be included in the Code? If your answer is no, please explain why.

Question 21

Given CAP's policy consideration, do you agree that rule 8.18 should be included in the Code? If your answer is no, please explain why.

Question 22

Do you agree that rule 8.19 should be included in the CAP Code? If your answer is no, please explain why.

Question 23

Given CAP's policy consideration, do you agree that rule 8.24 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

Agree with above– though this is again a good example of where a general duty to not mislead consumers could be applied rather than having specific and prescriptive provisions in the CAP Code.

Question 24

i) Do you agree that the present requirement, in CAP rule 35.8, for a promoter to obtain an independently audited statement that all prizes have been distributed, or made available for distribution on a fair and random basis is disproportionate and should not therefore be included in the Code? If your answer is no, please explain why?

ii) Given CAP's policy consideration, do you agree that rule 8.25 should be included in the Code? If your answer is no, please explain why.

Question 25

Given CAP's policy consideration, do you agree that rule 8.26 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

The remit of the CAP Code relates to regulating the content of advertisements in print, on posters, in new media and the cinema. It covers all sales promotions, the use of personal data for direct marketing and the delivery of mail order goods or refunds. The provisions relating to question 24 and 25 seem outside the remit of the CAP Code and relate more to substantiation.

Question 26

Given CAP's policy consideration, do you agree that rule 8.23.3 should be included in the Code? If your answer is no, please explain why.

MEF Answer:

Agreed.

Question 27

Given CAP's policy consideration, do you agree that rules 8.33 and 8.33.9 correctly updates present rule 37.1(i) to reflect the CPRs? If your answer is no, please explain why.

MEF Answer:

Agreed. However, again, this leads to a conflict with the PpP Code of Practice that needs to be resolved.

- **Part 2 – Section 10 (Database practice)**

Question 32

Given CAP's policy consideration, do you agree that rules 10.15 and 10.16 should be included in the Code? If your answer is no, please explain why.

MEF Answer

Agreed. Marketers must not knowingly collect personal information for marketing purposes from children under 12 about themselves without first obtaining the consent of their parent or guardian. Marketers must not knowingly collect personal information about other people from children under 16.

The main question we have is how a marketer is likely to know. If the service is targeted specifically at children then it is clear (subject to limitations set out in the Code). However, if it is a general promotion (which is non adult) then how is a marketer to know that a child has 'subscribed' or taken part? What can the stakeholder do to ensure it has complied? MEF would like clear guidance on this matter.

Question 33

Given CAP's policy consideration, do you agree rules 10.13.3 and 10.6 should explicitly exempt marketing communications sent by Bluetooth technology? If your answer is no, please explain why.

MEF Response

We agree with CAP as consumers make an informed choice to potentially receive marketing communications broadcast via Bluetooth and it is, therefore, disproportionate to extend the 'explicit consent requirements' of PECR to Bluetooth marketers.

Conclusion

MEF seeks a meeting with CAP as soon as possible to discuss the proposals.

If you need any more information or have any questions, please do not hesitate to contact Suhail Bhat at Suhail@m-e-f.org

MEF

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