

# ASA GUIDANCE:

## Marketing Claims

This document contains advice copied from the ASA website, and is accurate as at 23rd May 2017. The purpose is to help practitioners understand:

- when substantiation of claims made in their publicity might be necessary
- what types of comparisons are legitimate
- how they might use superlatives to describe their business
- the rules governing the use of testimonials

The CAP makes it clear that, before submitting marketing communications for publication, marketers must ensure that they hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation (rule 3.7).

The text below summarises advice by the CAP Executive about non-broadcast advertising, but it does not constitute legal advice. It does not bind CAP, CAP advisory panels or the Advertising Standards Authority. Further, The Academy of Physical Medicine accepts no responsibility for the guidance contained in this document.

Please note that the ASA website contains much more information on related subjects, and this excerpt should not be regarded as an exhaustive guide. For more detailed information, or to check for updated information, visit the ASA website at:

[www.asa.org.uk](http://www.asa.org.uk)

# **SUBSTANTIATION**

## **How do I know if my claim requires substantiation?**

If a claim is capable of objective substantiation, the marketer will be required to hold adequate supporting evidence. Marketers should be mindful of the fact that if the ASA considers a claim to be objective and capable of substantiation, they are likely to rule the claim misleading in the absence of adequate substantiation, even if the marketer's intention was to make a subjective claim.

See the section below on "Types of Claims: Subjective or Objective Superlative" for more guidance on how to distinguish between objective and subjective claims.

## **What about comparative claims?**

Marketers wanting to make objective comparative claims, such as "leading", "best", or "cheaper", for example, must hold evidence relating to both their own products and those of the competitor or competitors that are the subject of the comparison. Comparative claims can be both implicit and explicit and relate to both identifiable and non-identifiable competitors.

In April 2016, the ASA ruled against a claim that a facial cleansing product was the "UK's most effective anti-bacterial face wash", because while the marketer submitted evidence to support the claim, not only had the testing concerned only been carried out on leading competitors, rather than the whole market, they concluded that the evidence did not prove there would be a perceptible difference in effectiveness for users of the product (*Medichem International (Manufacturing) Ltd, 13 April 2016*).

## **Don't rely on testimonials alone**

Provided they are genuine, marketers may feature customer testimonials in their advertising, but these alone are unlikely to be considered sufficient to substantiate objective claims. Where they are likely to be interpreted as objective claims, the opinions expressed in testimonials must be supported by independent evidence of their accuracy (rules 3.45, 3.46, and 3.47). In February 2015, an advertiser submitted testimonials in support of efficacy claims for a copper bracelet in the treatment of restless leg syndrome and the ASA ruled that personal or customer endorsement alone did not constitute adequate substantiation (*Halcyon Bracelets, 18 February 2015*).

See the sections below on Testimonials.

## **Take particular care when referring to health and beauty products**

Medical and scientific claims made about health and beauty products, including weight control products, food supplements and cosmetics, should be backed by evidence, where relevant consisting of trials conducted on human subjects (see rule 12.1 (health and beauty products and therapies), 15.7 (vitamins, minerals and other food supplements),

12.22 (cosmetics), 12.23 (hair and scalp) and 13.1 (slimming)).

Marketers of health and beauty products wanting to make breakthrough claims about a product or treatment will need to hold a high level of robust evidence and should collate sound data to form a body of evidence. That body of evidence will usually need to include properly controlled human experimental studies.

### **Are there any exceptions?**

While claims capable of objective substantiation will, generally, require supporting evidence, obvious untruths or exaggerations ("puffery"), which are unlikely to be taken literally by the average consumer are likely to be considered acceptable, provided they do not mislead consumers materially (rule 3.2). In 2013, the ASA ruled that the claims "to achieve the unachievable" and "Comfort redefined" in trade magazine ads for a contact lens brand would be understood as puffery, rather than objective claims based on evidence (*Alcon Eye Care UK Ltd, 4 September 2013*).

Claims which are obviously a marketer's subjective opinion and are unlikely to be interpreted as objective claims will not usually require supporting evidence, provided it is clear that marketers are expressing their opinion, rather than stating a fact (rule 3.6). In 2014, for example, the ASA considered whether the claim "The most comfortable beds in the world", in an ad for Hypnos beds, was misleading and could be substantiated and they agreed with the advertiser's view that the claim was subjective, given the experienced comfort of mattress types would vary between consumers (*Hypnos Ltd, 26 November 2014*).

*Updated 9 June 2016*

## SUPERLATIVES: SUBJECTIVE & OBJECTIVE

If the basis of the comparison is stated, as in “widest range”, superlative claims are likely to be objective (Kenilworth Press, 5 May 2004). But merely stating it does not always make the basis of comparison obvious. In 1999, the ASA upheld a complaint against the claim “The UK’s Biggest PC Retailer” because the retailer did not sell the most PCs in the UK (*Time Computers*, October 1999).

The advertiser’s defence was that it had more stores than its competitors. The ASA considered that irrelevant because readers were unlikely to interpret the claim in that way. Similarly, in 2005 the ASA considered that a low-cost airline’s claim to be the “largest” could be judged on several criteria and asked the advertiser to qualify the basis of the claim (*easyJet Airline Co Ltd*, 29 June 2005).

Examples of superlative claims being judged to be subjective despite the basis of the claim having been stated include “the most enjoyable car buying experience you’ll ever have!” (*Stoneacre Motor Group car dealers*, 11 September 2002), “Top quality narrowboats” (*Reading Marine*, 13 April 2005), “first class service” (*Cresta Holidays Ltd*, 25 August 2004) and “friendliest nursery”.

“Biggest”, “best-selling”, “leading” and other, similar claims are generally treated as objective claims that require evidence of highest sales or highest market share (*American International Group*, 6 April 2005; *Kevin Nash Group plc*, 27 October 2004; *Howard Jackson*, 21 July 2004; *Emap Automotive Ltd*, 23 July 2003, and *Kinsbourne Cars*, 7 May 2003).

Depending on the context of the claim and on readers’ likely interpretation of the claim, the ASA might be satisfied with a sterling (£) justification or a unit, volume or weight justification for the claim; if the intended sterling basis or unit basis of the claim is unclear to the addressed audience, marketers should hold evidence of both or the ad should explain the intended basis. The evidence needs to relate to the subject of the claim and to a long enough period (usually a year) to constitute a genuine sales advantage and not reflect merely a brief surge in sales. In 1997, the ASA rejected turnover figures for one advertiser because they included all products, not merely the product that was the subject of the claim, and, in 1999, the ASA rejected audited retail market share figures that did not show a sustained advantage for the advertisers (*Friskies Petcare (UK) Ltd*, June 2000).

In the housing market, the ASA and CAP do not accept a count of “For Sale” boards as evidence of a market-leading position because not all vendors have a board outside their home (*Blakes Estate Agents*, May 1999).

If the basis of the claim is unstated, for example “Nowhere else makes you feel this good” and “Better Ingredients. Better Pizza”, and is unclear from the rest of the advertisement, the ASA is likely to regard the claim as the opinion of the advertiser (Clause 8.1).

Marketers should take care, however, that some claims might be regarded as a matter of opinion but nevertheless require substantiation. In 2005, for example, the ASA upheld a

complaint about the claim “the ultimate broadband experience”. Although it accepted the claim was the advertiser’s opinion, the ASA considered the incidence of severe customer dissatisfaction with the service was enough to make the claim misleading (*Bulldog Communications Ltd, 2 March 2005*).

# COMPARISONS

## General

Broadly speaking, the purpose of comparisons is usually to compare quality (“X is better than Y”), price (“X is cheaper than Y”), performance (“X goes faster than Y”) or market share (“X is better selling than Y”). Of course, not all comparisons fall into those categories and some marketers do not name the product or company they are comparing with. Some comparisons are with a marketer’s own product and some are with products or services that are in different sectors or with which they do not compete. The Code deals with comparisons with identifiable competitors and/or their products and all other

### Make fair comparisons against identifiable competitors

Comparisons with identifiable competitors should be between products meeting the same need or intended for the same purpose (the exception being products registered as having a “designation of origin” which can be compared only with other products with the same designation). They are allowed as long as they are based on objective criteria and are presented in a way that is unlikely to mislead.

The Code states that such comparisons must objectively compare one or more material, relevant, verifiable and representative feature of those products which may include price. Readers should have access to the information on which the comparison is made and the ad should signpost where they can get that information (*ASDA Stores Ltd, 14 January 2009*).

Marketers do not need to identify explicitly the competitor or product that they are comparing with to be subject to the rules on comparisons. If a market is small, highly specialised or is dominated by a few major players, arguably the intended competitor(s) are clear, especially if the ad is targeted at a trade, rather than public, audience. In 2011 the ASA upheld a complaint about an estate agent’s ad that denigrated a competitor. Although the advertiser objected that the competitor was not named and therefore unidentifiable, the ASA noted that it would not be difficult for interested readers to deduce the complainant's identity (*Imagine Estate Agents, 12 January 2011*).

Marketers of aggressive comparisons also risk breaching Rule 3.42. The Code instructs marketers who use comparisons with identifiable competitors or their products not to discredit or denigrate.

### Ensure price comparisons are clear

The basis of price comparisons must always be made clear. Ads for non promotional prices may make price comparisons against competitors promotional prices, however if this type of comparison is made the ad must make it clear that the comparison is made against a promotional price. (*ASDA Stores Ltd, 21 May 2008*). If relevant, marketers should include closing dates for promotional prices (*Specsavers Hearcare Group Ltd, 16 January 2008*).

## **Take care when comparing different types of products**

If the competitor's product differs significantly from the marketer's product and that difference is likely to influence a consumer's understanding of the advertised comparison, marketers should acknowledge the difference in the marketing communication. They should ensure that the basis of the comparison is clear to consumers.

In 2013 a supermarket objected to price comparisons made by a competitor; they believed important product attributes had not been taken into account, that some of the products compared were not comparable and that the basis of the price match policy had not been made clear. The ASA considered that despite potential differences in areas such as animal welfare or provenance of the ingredients the advertiser had objectively compared price for products which met the same need (*Tesco Stores Ltd, 31 July 2013*).

Some comparisons are intended to affect behaviour by, for example, switching brands or, in one case, to eat wholemeal bread instead of cereal. In adjudicating, the ASA considered that the advertiser had used an unacceptably small portion size of cereal as the basis of the comparison and was therefore misleading (*Premier Goods Group Ltd, 28 January 2009*).

And in 2007, the ASA had considered an ad that compared the environmental impact of air travel on the Airbus A380 with that of an "average family car". The complainant believed the comparison was unfair and misleading but the ASA concluded that, although the A380 and a family car did not have the same use, the comparison was acceptable and merely used the average family car as a point of reference (*Airbus S.A.S, 31 October 2007*).

## **Hold evidence**

Of course, marketers must ensure that they hold up-to-date substantiation to support all claims that consumers are likely to regard as objective and that are capable of objective substantiation. The ASA will uphold complaints if objective comparative claims, including superiority claims, are not supported by comprehensive documentary evidence.

In 2008 the ASA upheld complaints about the claims "removes more plaque than any other premium power toothbrush" and "sets a new standard for effective plaque removal". Despite having seemingly robust data, the ASA considered the evidence did not conclusively show a meaningful benefit to the consumer (*Philips Electronics UK Ltd, 26 March 2008*).

## **Don't mislead when comparing with unidentifiable competitors**

The rules relating to unidentifiable competitors have fewer requirements. Essentially comparisons must not mislead the consumer and the elements of the comparison must not be selected to give the marketer an unrepresentative advantage.

For example, in 2014 the ASA ruled that a comparison between the prices of an online furniture retailer's products and similar high street products was misleading, because

comparator products were selected on the basis that they served the same function and were similar in terms of aesthetic, but might vary in terms of the quality of finish or the quality of the materials used (*Made.com Design Ltd*, 16 April 2014). Marketers should not omit from the marketing communication information that consumers are likely to need to form an opinion on the relative merits of the products being compared.

### Verifiability

The ASA and CAP recognise that comparative advertisements help give customers valuable information as well as encourage competition between advertisers. But, as with all ads, it is important that they are clear and easy for consumers to understand and they comply with the relevant legislation.

The CAP Code requires that comparisons with identifiable competitor products “must objectively compare one or more material, relevant, verifiable and representative feature of those products” (rule 3.35).

#### What is meant by verifiable?

The Code does not specify what constitutes ‘verifiable’, but in 2006 the European Court of Justice ruled in the case of *Lidl v Colruyt* that for a general price comparison to be verifiable, the advertiser should set out the relevant information in the ad or signpost how the information used to make that comparison can be checked by the target audience.

While CAP does not give legal advice, the ASA has taken this position into account when investigating complaints on this issue.

#### What kinds of comparisons require verification information?

It is clear from the ECJ judgment that the requirement for verifiability is not confined to price comparisons and the ASA has ruled that it would also apply to general comparisons.

An ad which compared the number of people likely to be affected by noise at two proposed runways but did not include any information regarding the source of the figures was ruled against because the claims were not verifiable (*Gatwick Airport Ltd*, 12th August 2015).

Similarly an ad for an optician that claimed they achieved “better results than anyone else in Europe” was considered problematic, as a means for consumers to verify the claim was not provided (*Optical Express Ltd*, 8 September 2010).

One advertiser questioned whether their ads were subject to the verifiability requirement, because they did not contain a price comparison but instead referred to their price match scheme. The ASA ruled that because the competitors were identifiable the verifiability requirement applied, and the advertiser should signpost consumers to their methodology (*Wm Morrison Supermarkets plc*, 26 August 2015).



Marketers should be aware that competitors do not need to be explicitly named in an ad for them to be identifiable. Whether a competitor or its products are identifiable will obviously depend on the ad, claims, audience, context and nature of the market in which the advertiser operates. “Leading” claims are, by their nature, likely to be seen as a comparison with all competitors as are claims like “UK’s most effective...” (*Medichem International (Manufacturing) Ltd, 13 April 2016; Liverpool-Kop.com, 27 May 2015*).

### **How can I make sure my comparisons are verifiable?**

Advertisers should give readers enough information about the comparison to understand it and include a signpost in the ad to information on the basis of the comparison. If verifying the comparison requires specialist knowledge, consumers should be able to get a knowledgeable and independent person or organisation to verify the comparison for them.

Some comparisons are easily verifiable; a comparison between two identical products sold by two different retailers, for example, could be checked by looking on their websites. But some comparisons, such as those that involve many products, could be more difficult.

An ad that contained a comparison of that type was ruled to breach the Code because, although the comparison was unlikely to mislead, it gave no way for readers to verify the advertised savings (ASDA Stores Ltd, 14 January 2009). Similarly an ad for kitchens that provided only enough information to verify some aspects of the products being compared and their respective prices, was judged not to be verifiable and in breach of the Code (*Wren Kitchens Ltd, 30 January 2013*).

### **How can I provide the information?**

Perhaps the most straightforward way to ensure a comparison is verifiable is to direct consumers to a website that contains information on the basis of the comparison, such as the products, prices and the methodology. Marketers could, for example, include “comparison can be verified on [www...](#)” or “visit [www...](#) to verify the comparison” in small print.

It is also likely to be acceptable to provide verification information upon request, by directing consumers to contact a postal or email address to obtain verification information (*Wm Morrison Supermarkets plc t/s Morrisons, 26 August 2015*).

Simply citing a third-party website, such as [MySupermarket.com](#) in the case of grocery retailer price comparisons, without telling consumers which specific products were used in the comparison and the date the comparison was made, is unlikely to be acceptable.

### **How do I make signposts clear?**

Marketers should be explicit about how readers can verify a comparison; merely including a website or postal address, without stating that it is where consumers can verify the comparison, is unlikely to be sufficient.

A comparison which included claims about "Market leading signal strength", "Fastest speeds in the UK" and "Reaches parts of your home that the best routers from the other big providers can't" was ruled misleading because the means to verify the comparison was considered not to have been sufficiently or clearly signposted. Although a link to a copy of the test report was provided, it could only be accessed by clicking and expanding a heading found under "Small Print" and clicking through to a page with another link to open the test report (*TalkTalk Telecom Ltd, 1 June 2016*).

### **What constitutes 'relevant information'?**

In terms of the information required to make a comparison verifiable, this will depend entirely on the specific comparison and the evidence used to support it. Generally speaking, marketers should include as much information as possible to ensure that consumers are able to check it for themselves.

An ad which stated an average customer saving when selling property, based on the fee charged on the advertiser's average sale price versus the amount if the UK average commission fee of 1.5% had been applied, was found to breach the Code because it didn't state or provide a signpost to information such as what the average sale price was, how that average (and their associated fee) had been calculated and details of the source for the average estate agent fee (*New Broom Ltd, 14 September 2016*).

Similarly, the claim "you save up to 90%" against 'banks' was ruled misleading because the ad did not contain or signpost to details about the basis of the comparison, such as the identity of the competitors, the currency transfer routes compared and the currency amounts compared in the mystery shopping exercise (*TransferWise Ltd, 4 May 2016*).

Where a comparison is made with "the leading brand", although in many cases it is likely that consumers will be able to readily identify the competitor, ads featuring this type of comparison will still need to state or direct consumers to the full information about the comparison, including which products were selected and how the comparison was carried out (*Procter & Gamble (Health & Beauty Care) Ltd, 2 December 2015*).

### **What about surveys and test results?**

Comparisons based on survey results, particularly where the details are not published or accessible in the public domain, are likely to need to signpost consumers to information such as the sample size, the methodology, the group of respondents represented in the sample, which competing providers were included and the factors that respondents were required to consider when answering the question(s) on which the claim was based (*HPI Ltd, 15 June 2016*).

Similarly, efficacy comparisons are likely to need to detail the methodology of the tests carried out, include a breakdown of individual results and make clear which products were tested (*TalkTalk Telecom Ltd, 1 June 2016; Medichem International (Manufacturing) Ltd, 13 April 2016*).

### **What if my comparison is based on confidential information?**

Comparisons based on commercially sensitive or confidential data should be made with care since in the case of some comparisons the ASA may decide that such information should be made available to consumers and competitors when requested.

*Updated 5 December 2016*

# TESTIMONIALS

Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine and hold contact details for the person who, or organisation that, gives it (rule 3.45). Showing that a testimonial is genuine has two elements; showing that the quote is from a real person and that it reflects what they said. Claims within a testimonial must not mislead or be likely to mislead the consumer.

## Do not pose as a consumer

Marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession (Rule 2.3). It is a breach of the Code for a marketer to write reviews of their own products whilst posing as a genuine consumer.

## Seek permission to use the testimonial

Marketing communications must not feature a testimonial without permission (Rules 3.45 and 3.48). When seeking permission to use a testimonial, marketers should be aware of their obligations under *Section 10: Database practice*.

The ASA has upheld complaints when marketers have not been able to prove they have the author's consent (*Conservatory Outlet Ltd, 20 March 2013*) and when a testimonial was wrongly attributed to a complainant whose image was used without her consent (*Phyto Nature Source, 25 October 2006*).

Rule 3.48 allows for some exceptions to the requirement to get permission when making accurate quotes from a published source. Marketers quoting from a published source still need evidence to show that the statements are genuine and accurate (*eSmart Media Ltd t/a top10healthinsurance.com, 22 January 2014*).

The ASA ruled that a list of quotes with references to the publications in which they appeared was not sufficient to show that the quotations were from those publications (*www.comedyclubbookings.com, 27 March 2013*).

The ASA ruled against a Spotify ad for the film *Taken 2* which quoted “‘Eat your heart out 007’, says the Daily Star, ‘ten out of ten’” because whilst the advertiser had provided an e-mail approving the use of the quote, it did not appear to have come from the same person who had written the published Daily Star review. Furthermore the ASA considered that the average listener would understand “‘Eat your heart out 007’, says the Daily Star, ‘ten out of ten’” to mean that the quote had been made in a published Daily Star review when this was not the case.

## Hold documentary evidence

Signed and dated proof is likely to be considered acceptable documentary evidence, however it is not the only form of evidence that the ASA will consider acceptable. For

example, where an advertiser was able to provide copies of the e-mails which contained testimonials, the addresses and the ordering history of the customers, the ASA considered sufficient evidence had been provided to demonstrate that the testimonials were genuine (*Monark Global Ltd t/a Tru-Diamonds, 11 December 2013*).

E-mail testimonials from unverifiable addresses (such as hotmail) would not be acceptable in and of themselves although the ASA has accepted testimonials in the form of a provable company e-mail address (*de Verde Ltd, 28 August 2013*).

The ASA considered that a testimonial from an unverifiable web based e-mail address which contained no further contact details was insufficient to demonstrate that the testimonial was genuine and therefore ruled the claim "all testimonials are from actual real customers!" to be misleading (*de Verde Ltd, 28 August 2013*).

### **Use testimonials that are relevant to the product**

As would you expect, testimonials must relate to the product advertised (Rule 3.46, Home Shopping Selections, 12 December 2007). They should not be taken out of context or edited in a way which is misleading.

An ad which used the review of one track on an album in an advertisement for the whole album without attributing the review to the previously released single was found to be misleading (*Warner Music UK Ltd t/a Atlantic Records, 23 November 2011*).

Marketers using testimonials for companies that no longer trade should be careful not to misleadingly imply that they are for other companies and should note that amending testimonials so that they refer to a more recent incarnation of a company will be considered misleading (*YorHost, 13 June 2012*).

However the ASA ruled that it was acceptable for an advertiser to use a genuine testimonial which referred to client's satisfaction with a specific individual albeit that the testimonial related to work done with a company which had dissolved (*Holzmeister Haus Ltd, 4 September 2013*).

### **Beware of restricted product categories**

Marketers should be aware that in some circumstances the use of testimonials and endorsements is excluded altogether. Namely, marketers may not use health professionals or celebrities to endorse medicines (rule 12.18) and may not make health claims that refer to the recommendation of an individual health professional (rule 15.6.3).

*Updated 15 December 2016*

### **Claims made within testimonials**

Testimonials must relate to the product advertised and claims in a testimonial that are likely to be interpreted as factual must not mislead or be likely to mislead the consumer

(Rules 3.46 and 3.47). Marketers may not use testimonials to circumvent the Code by making claims in a consumer review that they would not otherwise be permitted to make. For example, if a marketer doesn't hold the evidence to substantiate an efficacy claim, they cannot use a testimonial which makes that claim.

Testimonials alone do not constitute substantiation so marketers should not rely on testimonials as support for any direct or implied claims made in the marketing communication. Although it acknowledged that a testimonial which made implied claims that a topically applied gel could have similar effects to surgery might have been a genuinely held opinion, the ASA held it breached the Code because the marketer did not provide objective evidence to show the product was an effective alternative to surgery (*Rodial Ltd, 11 January 2012*).

Customer survey responses which made positive comments about saving money on energy bills were not considered adequate substantiation for savings claims (*Bright Networks Ltd t/a Bright Heating, 9 January 2013*).

The ASA upheld complaints against a testimonial which described an individual's theory regarding "hexagonal water" because it considered consumers would interpret the claims as being in relation to a theory based on evidence, particularly because it appeared to be endorsed by a scientist (*Water for Health Ltd, 3 July 2013*).