

## Guidance Note

### Rule 3.3: Serious or widespread offence

March 2019



## Rule 3.3: Serious or widespread offence

This guidance is intended to help drinks producers comply with the Portman Group's (PG) Code of Practice on the Responsible Naming, Packaging and Promotion of Alcoholic Drinks. This guidance represents the opinion of the Advisory Service. Please note that the Independent Complaints Panel (Panel) is the final arbiter on how the Code should be interpreted and applied. Following the advice in this document is no guarantee that a product's packaging or promotion will not be found in breach of the Code if a complaint is received. The guidance will be updated regularly to reflect the views of the Panel.

The fundamental principle is that the Code is applied in the spirit as well as in the letter. In judging compliance with the Code, the matter will be looked at broadly and with regard to all the circumstances including, but not limited to, the drink, the overall impression conveyed, and any other relevant matters. It is therefore difficult to say whether a particular product name, image or statement on a drink's packaging or in a promotion is acceptable under the Code without seeing/considering it in context. Companies are therefore encouraged to make use of the free Advisory Service before undertaking promotional activities or launching products to help ensure that they comply with the Code.

The Code sets the minimum standards; producers may have their own internal marketing guidelines which go above and beyond what is required of them under the Code.

### Introduction

Code paragraph 3.3 requires that a drink's name, packaging and any promotional material or activity should not cause serious or widespread offence. Because, at the time of writing, this is a new Code rule, there are no case precedents to show how this rule has been interpreted by the Independent Complaints Panel (Panel). This guidance, however, seeks to anticipate how the Panel may interpret the new rule in the future. The guidance will be amended and updated in light of future decisions by the Panel.

The rule is consistent with the Committee of Advertising Practice (CAP) UK Code of Non-broadcast Advertising and Direct and Promotional Marketing and we have included some Advertising Standards Authority (ASA) rulings to provide guidance where the Advisory Service believes the Panel may reach a similar conclusion; as with all advice this is only the opinion of the Advisory Service and does not bind the Panel in the event of a complaint being received.

### Context

- A drink's name, packaging and any promotional material or activity should not cause serious or widespread offence.
- Particular care must be taken to avoid causing serious offence on the grounds of race, religion, gender, sexual orientation, disability or age.
- The rule is designed to strike a balance between legitimate marketing freedoms and the prevention of marketing that causes serious or widespread offence.
- The Code rules are written as broad principles. This means that the rules are not overly prescriptive and allow the Panel to interpret and apply them on a case by case basis, taking multiple factors into account (overall impression conveyed, producer response, relevant research etc). This ensures that the Code, and its rules, are flexible to different scenarios, fit for purpose and responsive to innovation in the market (see guidance document How the Code Works).

- Prevailing standards in society are constantly evolving and it is important for the Code to be responsive to this; particularly in relation to marketing that is likely to cause serious or widespread offence.
- While we have listed areas below where particular care should be taken this is not an exhaustive list, and the Panel may consider other grounds which could cause serious or widespread offence (for instance, the ASA has upheld complaints on the grounds that advertising has caused serious offensive based on how death has been depicted).
- In line with the fundamental purpose of the Code, the rule also seeks to protect children from socially irresponsible marketing, from terms and/or imagery that children would traditionally be prevented from seeing due to watershed restrictions.
- Some might be offended by the mere existence (production and supply) of alcohol and object to all alcohol marketing. Alcohol is a legal product and subject to mandatory and strict self-regulatory controls. Furthermore, it is not the purpose of the Code to prohibit marketing on the grounds that alcohol, rather than its marketing, is offensive.
- As always, complaints will be assessed on a case by case basis. As the Code is principles-based it would be too difficult for the Advisory Service to produce an exhaustive list or prescribe a threshold of what constitutes serious or widespread offence. Consideration under this rule will take into account the severity of offence likely to be caused, based on the points discussed below.

## Application of the Rule

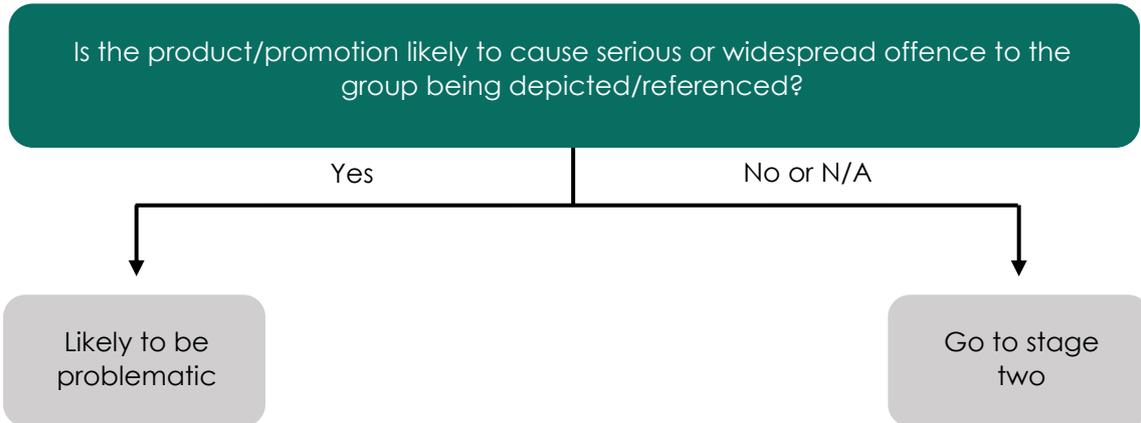
- Offence can be defined as 'annoyance or resentment brought about by a perceived insult to or disregard for oneself'<sup>1</sup>, or more broadly 'upset and hurt or annoyed feelings, often because someone has been rude or shown no respect'<sup>2</sup>. It is important to note that marketers have the right to cause some offence (although not serious or widespread) and purely distasteful marketing will not result in a breach of the Code. Please see below for an ASA example which demonstrates the difference between what some may consider distasteful, as opposed to seriously offensive marketing (Money Supermarket's 'Epic Squads').
- 'Serious offence' relates to the nature of offence caused. The rule will prohibit marketing that is discriminatory. It will also prevent derogatory and demeaning marketing that is seriously offensive. For a product or its promotional material to breach this rule, serious offence, as defined by the Panel, must have been caused; this can be to an individual (if targeted), a minority group, or more widespread.
- The number of complaints received does not necessarily correlate with whether 'widespread' offence has been caused. This is because the quantity of complaints received is not always representative of perceptions in society (i.e. campaign groups) but, also because the Portman Group takes each complaint on its individual merit and only requires one complaint to trigger an investigation. Applying this rationale, where a product/promotion causes widespread offence, even to a group, but not above a low level it is unlikely to breach the Code.

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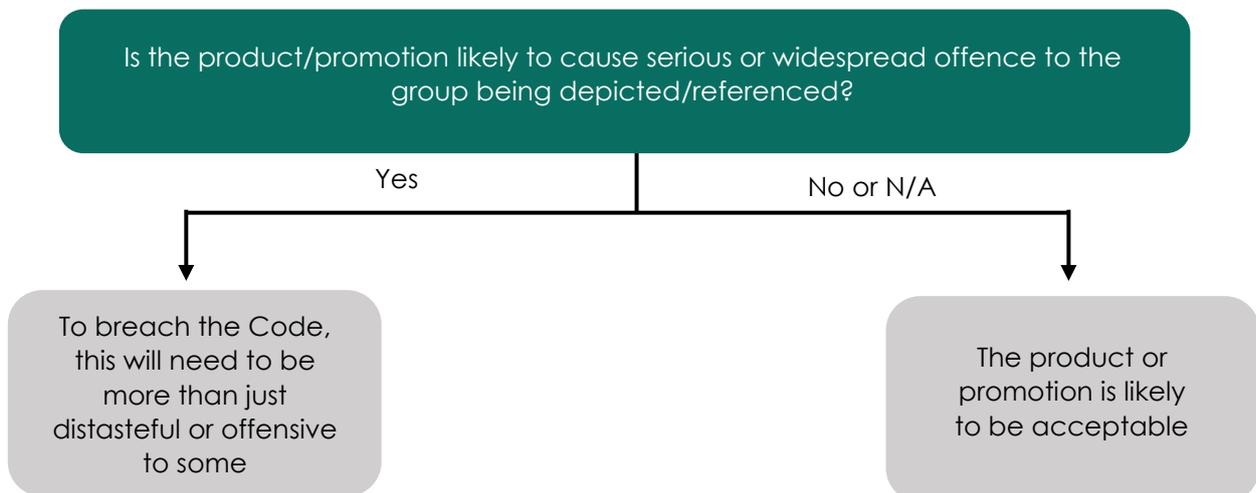
<sup>1</sup> Oxford English Dictionary

<sup>2</sup> Cambridge English Dictionary

## Stage One



## Stage Two



- Prevailing standards in society will be considered when determining whether serious or widespread offence has been caused. The Advisory Service would advise applying a twostep test to help determine whether a product or its promotional material is likely to cause serious or widespread offence. This flowchart is intended as a tool to assist evaluation only and is not intended to indicate binding assessments.
- Using two ASA cases we can demonstrate how the above may be applied:
  1. In 2016 the ASA received a complaint about an email from [Boylesports Enterprise](#) which showed a hand nailed to a length of wood. Blood dripped from where the nail entered the hand and a desert scene was shown in the background. Text below the image stated "Hi [recipient's name] – In memory of the dearly departed JC, we are offering you a sacrilegious [sic] bonus this Easter weekend ... So don't just sit there gorging your own body weight in chocolate, that's disrespectful. Get on Boylesports Gaming and get your nailed-on bonus". The complainant challenged whether the ad, which depicted a crucifixion, mocked the Christian religion at an important time in the Christian year and was therefore offensive.  
The ASA noted that the complainant received the email on Good Friday. Given the context, the ASA considered the way in which the ad made light of the subject matter,

with the play on words "Nailed on Bonus", "dearly departed JC" and "sacrilegious Bonus", and the cartoon-style image of blood dripping from the hand pierced by the nail, a particularly sacred image for Christians, and ruled that it was likely to cause serious offence to some recipients. The ASA considered the offence was likely to be particularly strongly felt by those of the Christian faith at Easter, when the imagery would have a particularly strong resonance.

If we test this case through 'Stage One' the answer would be yes, the marketing which used, and mocked, Christian references at Easter is likely to cause serious (not necessarily widespread) offence to the group being referenced in the ad and is problematic.

2. In 2016, the ASA received 895 complaints about Money Supermarket's 'Epic Squads' television advert<sup>3</sup>. The ad showed a character, Dave, dressed in a suit jacket, denim shorts and high heels, and another character, Colin dressed in a fluorescent jacket and hard hat. They were joined by other men dressed in the same clothes and engaged in a dance off. Complainants challenged that the ad was offensive, overtly sexual and some people stated that the ad could be seen to be homophobic and could encourage hate crimes.

The ASA Council did not formally investigate the ad, as the ASA Executive concluded that the ad, while distasteful to some, was unlikely to cause serious or widespread offence nor was it encouraging harmful discriminatory behaviour in real life.

This is an interesting case because as the second most complained about ad of 2016 it may seem like the 'widespread' part of the rule had been met. However, the high number of complaints was partly due to the fact that a man pole dancing in hot pants challenged some people's world views, and while perhaps distasteful to some, was not likely to be seen as offensive. Secondly, it also transpired that the complainants did not represent the LGBTQ+ community.

If we apply the 'Stage One' question here, the answer is no, the ad did not seriously offend the group being depicted in the ad. Moving on to 'Stage Two', the ASA considered that most people would not be offended by the ad and therefore did not think it was problematic.

- The two stages detailed above are intended to help producers think about who may be potentially offended by a product or promotion and how this may be applied in the context of the rule. Compliance will ultimately be determined by the context and content of the marketing.
- Alcohol marketing below the line, such as packaging and promotional materials, are carefully designed to be adult appropriate given their wide visibility. However, unlike some advertising, such as television ads and online videos, the medium cannot pre-warn individuals if the material is potentially offensive. This means that while the ASA judges' compliance on the context, medium, audience and reach of an advertising piece, the Portman Group's application of the rule is slightly different with medium, audience and context being less of a consideration. All alcohol packaging sold in the off-trade has the potential to end up in a home environment and beers, wines and spirits aisles in retailers are, for the most part, not restricted areas. The Panel is likely to consider context and audience targeting when considering complaints against marketing materials that appear only in the on-trade. However, it is also worth noting that restricting marketing materials to an on-trade, age-restricted, environment may be difficult in a digital age as consumers often take pictures

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<sup>3</sup> <https://www.asa.org.uk/news/2016-s-most-complained-about-ads.html>

of drink serves/marketing materials and upload these onto social media which could be incorporated by a producer into their own marketing.

- As always, the overall impression conveyed by a product is of paramount importance and this application is crucial here. The Advisory Service often advises that some elements, when considered in isolation may be acceptable under the Code but when combined with other elements may change the overall message that is being conveyed. For example, an American Pale Ale using an American flag for its labelling background is likely to be acceptable under the Code. However, if such a product were to incorporate an illustration of a scantily clad woman in an overly sexualised pose, it is likely that this would be considered seriously offensive for using a gratuitous image of an overtly sexualised woman (i.e. the image had no link to the beer itself). On this basis it may also be found in breach of Code Rule 3.2(d) for creating an association with sexual activity.
- Light-hearted humour and mild innuendo are likely to be acceptable. However, these cannot be employed carte blanche as a way of circumventing the spirit of the Code. The Advisory Service recognises that humour often forms the basis of viral marketing campaigns but, as mentioned above, if a producer is using the same language/imagery through the line it is difficult to control the audience who may see this in below the line materials. Innuendo can be used to veil the true meaning of a word/phrase but where the innuendo is so strong, or an asterisked word is clearly obvious (i.e. f\*ck) then this is likely to be problematic as the level of serious or widespread offence is unlikely to be affected when the same meaning is conveyed.
- When considering whether a product or promotion has caused serious or widespread offence the Panel and Advisory Service will consider contextual points such as brand heritage, historical context and the portrayal of any relevant imagery (i.e. is it vintage or stylised). While the Panel will take historical context into account, some historical words may still be seriously offensive in today's society, particularly if they have been used to dehumanise and marginalise minority groups.
- Marketing that utilises gratuitous terminology and/or imagery that is seriously offensive is likely to be problematic. If such language or imagery has nothing to do with the product and is only being used to market the product at the expense of the group being depicted, particularly if it is demeaning, derogatory and/or discriminatory, the Advisory Service would recommend re-designing these elements.

### Areas for particular care

- The Advisory Service has identified areas where particular care should be taken on the grounds of serious or widespread offence. However, these areas are only a guide and will not bind the Panel in their considerations in the event of a complaint being received.
- If a product or promotion references more than one area where particular care should be taken this will amplify the potential for serious or widespread offence and could result not only in a higher risk of complaint but a high risk of an upheld complaint.
- When considering bad language or swearing, the Advisory Service and the Panel will have regard to research conducted by Ofcom and Ipsos Mori on attitudes to potentially offensive language<sup>4</sup>. A quick reference guide can be found [here](#).

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<sup>4</sup> Attitudes to potentially offensive language and gestures on TV and Radio, Ofcom and Ipsos Mori, September 2016 [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/91624/OfcomOffensiveLanguage.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf)

- As part of this research, it was noted that potentially offensive language which related to race, sexuality, gender identity and disability required the most care. In general, discriminatory language caused the most serious and/or widespread offence.
- As is the case under all Code rules, the Panel may seek expert assistance at any stage during a formal investigation and under this rule, may choose to consult with relevant bodies where a minority group is being depicted.

## Race

- Ofcom and Ipsos Mori's research revealed that racist terms were the most unacceptable category when comparing potentially offensive language as they are typically used in a way that it is derogatory and discriminatory.
- The Advisory Service strongly advises against any language which refers to race and ethnicity in a derogatory and discriminatory way. If the reference is to a minority group where the group itself has not adopted the term as an expression of identity, this language should particularly be avoided.
- Some terms may have been adopted as common insults in modern language, but, where such language is insulting or discriminatory to specific groups, like 'pikery', this is still likely to be problematic for causing serious offence to Gypsies and Travellers who are likely to perceive this word as a strong insult with negative connotations<sup>5</sup>, and may still cause wider offence to other people.
- The Panel may consult with the Institute of Race Relations when determining whether certain terminology and/or imagery is likely to cause serious or widespread offence on the grounds of race.

## Religion

- Producers should exercise caution when using religious imagery and/or text and should consider whether such references are gratuitous. Consideration should be given to the faith being referenced i.e. would that group find such imagery/text seriously offensive.
- Producers should also be particularly mindful of using religious imagery and/or text if the religion prohibits alcohol consumption as such a link is likely to cause serious offence.

## Gender

- For the purposes of guidance, particular care should be taken in marketing which references gender, sex and/or gender reassignment.
- Marketing should not be demeaning, discriminatory or derogatory; particularly if this relates to gender identity, gender stereotypes, biological sex and/or gender reassignment.
- The Panel, and the Advisory Service, will always consider whether such depictions are gratuitous, how they are being portrayed and how sexualised the depiction/reference is.

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<sup>5</sup> Attitudes to potentially offensive language and gestures on TV and Radio, Ofcom and Ipsos Mori, September 2016 [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/91624/OfcomOffensiveLanguage.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf)

- Brand heritage, history, stylisation and context will be considered when determining compliance.
- The rule will prohibit marketing which objectifies and/or overly sexualises an individual. For the avoidance of doubt, any image or illustration which unnecessarily focuses on someone's body or body parts (i.e. focusing on a person's torso) is likely to be problematic for objectifying someone based on their gender and sex. Similarly, any image or illustration which depicts someone in a highly sexualised manner is likely to be problematic under this rule and Code rule 3.2(d) for creating a direct link to sexual activity.
- Graphic sexual references and sexual slurs, particularly when used as strong insults, are likely to be problematic.

## Sexual orientation

- Depictions of transgender people and homosexuality will be acceptable in the same way that the depiction of heterosexuality is acceptable under the Code. However, homophobic or transphobic language and imagery will not.
- The Advisory Service would recommend reviewing Ofcom and Ipsos Mori's research (referenced above) as it considers language that may be insulting, derogatory or discriminatory in relation to sexual orientation and gender identity.
- For instance, language referencing transgender people in a derogatory way or designed to marginalise them will carry a high risk of causing serious or widespread offence, particularly if it could have a detrimental impact on transgender people.
- In 2012 the ASA upheld a TV ad for Paddy Power which stated "we're going to make Ladies day even more exciting by sending in some beautiful transgendered ladies! Spot the stallions from the mares!" and featured brief shots of people at the event while the voiceover attempted to guess their gender. The ASA considered that the ad trivialised a complex issue and depicted a number of common negative stereotypes, caused serious offence, and condoned and encouraged harmful discriminatory behaviour (please see [ASA guidance](#) for further information).

## Disability

- Producers should carefully consider whether any language or imagery relating to mental health issues and physical and/or mental impairment is necessary in alcohol marketing.
- The Advisory Service recognises that some words relating to mental health are frequently used in contemporary society as mild insults such as 'nutter' and 'mental'<sup>6</sup>. We would advise caution using any words which could be insulting or seriously offensive.

## Age

- Producers should take particular care that marketing is not seriously offensive on the grounds of age.
- Prevailing standards in society will be considered as well as views from the group being depicted. For instance, as part of Ofcom and Ipsos Mori's research the phrases 'coffin dodger' and 'old bag' were tested and both (amongst participants) were found to be of

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<sup>6</sup> Attitudes to potentially offensive language and gestures on TV and Radio, Ofcom and Ipsos Mori, September 2016 [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0022/91624/OfcomOffensiveLanguage.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0022/91624/OfcomOffensiveLanguage.pdf)

little concern in terms of being potentially offensive. However, as language is constantly evolving, along with perceptions in society, this is not to say that such phrases will always be acceptable.

- The rule will not prohibit light-hearted humour or mild insults.

## Relevant ASA Rulings

- In 2018, the ASA investigated two ads over concerns they objectified either men or women:
  - A [Tunnock's Tea Cakes ad](#) depicted a female tennis player, alongside the text "Serve up a treat" and "Where do you keep yours?". The woman is shown holding a tea cake at the top of her thigh, in place of a tennis ball, with her skirt hitched up. A complainant challenged whether the ad was offensive because it was sexist and objectified women. The ASA upheld the complaint on the grounds that the combination of the image alongside the phrase "Serve up a treat" objectified women by using a woman's physical features to draw attention to the ad (it is worth nothing that the image of the woman was only of her lower torso and did not depict her as a whole person). The ASA also stated that the phrase "Serve up a treat" was a double entendre by implying that the woman herself was a 'treat' and therefore was demeaning to women. The ad was upheld for causing serious offence to some consumers.
  - In contrast, in the same year, a [Paco Rabanne television advert](#) received 120 complaints over concerns that it was sexist and objectified the man depicted, as well as being sexist by reinforcing negative gender stereotypes that women were weak. The ASA did not uphold the complaints on the basis that it objectified the man being depicted because it found that the scenario portrayed in the ad was not realistic and the tone was risqué but comedic and farcical. The ASA concluded that viewers were likely to recognise the ad as a comical dramatisation of a surreal situation. In response to the second element of the complaint, that the portrayal of the women was uncomplimentary and distasteful, the ASA noted that the women shown were in a position of power over the male character (they were watching him without his knowledge) and their reactions to him undressing were exaggerated and caricatured which contributed to the overall comedic tone of the ad. As the setting of the ad was unrealistic and highly stylised the ASA concluded that viewers would understand that the portrayal of women in this instance was removed from reality. Therefore, complaints that the advert was sexist or seriously offensive were not upheld.
  - In 2014, Paddy Power released an ad prior to the trial of South African Olympic and Paralympic athlete Oscar Pistorius, for the alleged premeditated murder of his girlfriend Reeva Steenkamp. The ad, which received 5525 complaints, included an image similar to an Oscar statuette and had the face of Oscar Pistorius appeared alongside text which stated, "It's Oscar Time", "Money back if he walks" and "We will refund all losing bets on the Oscar Pistorius trial if he is found not guilty". Complainants challenged whether the ad was likely to cause serious or widespread offence by trivialising the issues surrounding a murder trial, the death of a woman and also disability. The ASA considered that the ad went further than simply being in poor taste and that it was likely to cause serious or widespread offence by trivialising the sensitive issues surrounding the murder trial. The ASA also concluded that the text "if he walks" made light of disability and was likely to cause serious or widespread offence and accordingly upheld the complaints.

The Portman Group is a responsibility body and regulator of the naming, packaging, promotion and sponsorship of alcohol. The above guidance should help you to avoid problems under the Portman Group's Code of Practice.

### The Portman Group's Advisory Service

If you are in any doubt as to whether your proposed activity conforms to the Code you can seek free, fast and confidential advice from the Portman Group's Advisory Service. To obtain advice, please telephone the Portman Group on 020 3295 5704 and ask for the Advisory Service. Alternatively email your request to [advice@portmangroup.org.uk](mailto:advice@portmangroup.org.uk), with full details of the proposed activity.

### The Portman Group's Code Training Programme

We also provide free CPD accredited training to ensure that the Code is widely understood and applied; as well as providing details on the wider regulatory landscape. Should you wish the Portman Group's training sessions can be tailored to suit your organisation or individual needs. To book a training session or to find out more, please telephone the Portman Group on 020 3925 5704 and ask for the Training Manager. Alternatively, email your booking request or query to [training@portmangroup.org.uk](mailto:training@portmangroup.org.uk).

