

# **DECISION**

## **FIRST INSTANCE JURY**

Complaint by	Consumer
EASA Cross Border Complaints System	Forwarded to CARO by the UK Advertising Standards Authority (ASA, <a href="http://www.asa.org.uk">www.asa.org.uk</a> ) <b>EASA CBC Case 4904</b>
Advertiser	Felarona Ltd, CY Company Reg. No. HE 348485
<b>Issue / Complaint</b>	Consumer complained about an email survey they received which promised that upon completion they would receive an exclusive reward. The complaint was as follows:  “The survey had 5-6 questions about my opinion/ experience with boots - fairly straightforward multiple choice questions but the free reward had questionable/ irresponsible rewards and included a postage fee which was not previously mentioned. The postage fee for the option I chose ‘nolatreve’ only appeared on the last page after I input my details.  I now worry that this is a boots partner misleading customers or worse still a scam.”
<b>Decision issued</b>	<b>Tuesday 29 September 2020</b>

### **Advertiser’s Response:**

The advertiser’s lawyer contacted us with the following email:

« We will be representing FELARONA LTD (HE348485) regarding the matter addressed in your e-mail dated 09/07/2020 concerning the complaint made by a United Kingdom resident in relation to the BOOTS survey and rewards (EASA CBC 4904).

Our client rejects the validity of the complaint allegations made and are confident they have complied with all marketing communication standards as set by the Cyprus Advertising Code and the European Advertising Standards Alliance (EASA).

Our client's BOOTS survey involvement was to simply notify the individual that he/she had been selected to complete a brief shopping experience questionnaire and gain access to an exclusive reward options. No statements were made in any way to mislead the consumer into thinking they were getting a "free reward"; or infer they were receiving a communication on behalf of Boots UK Limited.

On the contrary, their survey participation was voluntary; with the questions as well as the list of rewards presented after completion of the survey including the value, delivery fees, etc. are all handled by a third-party advertising entity, on whom FELARONA LTD has no control.

Therefore, the consumer's complaint in relation to the reward and the postage fee not previously mentioned was not an action taken by or a responsibility for our client, nor was a mis-leading statement made about there being a "free reward".

We remain at your disposal regarding any further clarifications regarding this matter and are confident the jury's decision will support our response».

Further communication ensued from CARO side requesting clarifications. A compilation of queries and replies follows:

Query	Reply from Felarona
<p>“... with the questions as well as the list of rewards presented after completion of the survey including the value, delivery fees, etc. are all handled by a third-party advertising entity, on whom FELARONA LTD has no control.”</p> <p>If I understand correctly, Felarona sends the email to consumers. Which entity selects those consumers and on what basis?</p>	<p>Yes, correct. This activity is completed by Felarona. They review their database of opted in consumers and then determine based on their profiles who would be eligible and interested in receiving the communication.</p>
<p>Moreover, which is the third party advertising entity which becomes involved after survey completion and what is their relationship with Felarona?</p>	<p>The third-party advertiser provides shopping survey questionnaires on various topics; the relationship is solely advertising based ... Felarona decides who will receive the message in exchange for financial considerations for their time and resources.</p>
<p>Since we do not have access to the links on the initial email, please clarify the following terms and conditions on the attachment 1_Boots Shopper Survey Email</p> <p>The offer requires paid participation within the Advertiser's rewards program, details apply</p> <p><b>Query: which entity is "the Advertiser"?</b></p>	<p>Felarona's third-party advertising partner who owns the offer and facilitates offer fulfillment activities. Paid participation means willingness of the recipient to cover fully disclosed shipping and handling costs of the free-trial product they have selected to receive in exchange for their time to complete the shopper survey.</p>

Query	Reply from Felarona
<p>This rewards program is not endorsed, sponsored by or affiliated with any merchants listed above. <b>Query: "Merchant" being Boots?</b></p>	
<p>Registered trademarks are the property of their respective owners. <b>Query: reference to the Boots trademark?</b></p>	<p>Yes, the statement is a notifying the recipient that Boots has no involvement on any level with the survey and/or compensation for any recipient's time for voluntary participation of the survey. This is all voluntary interaction by recipients and in no way is anyone forcing and/or misleading anyone into doing something they don't want to do.</p>
<p>This ad is sent by a third-party on behalf of the advertiser. All promotional fulfillment is the sole responsibility of the owner of the program. Please refer to "program requirements" listed on the offer's registration page for further details. <b>Query: Which entity is the "third-party", which entity is "the advertiser" and which entity is the "owner of the program"?</b></p>	<p>Advertiser/Owner of the offer program are the same company. Free trial offers that require the payment of shipping and handling fees, which is clearly presented (nothing hidden) to the consumer prior to their selection of a free-trial offering, see screenshots of the survey flow.</p>
<p>If you wish to opt-out of receiving further marketing messages from us please click here. <b>Query: "us" here refers to which entity, Felarona, Constant Marketing or some other legal entity?</b></p>	<p>The opt-out action is in reference to receipt of future shopper survey invitations either sent by Felarona and/or another partner of the Advertiser.</p>
<p><b>What are the provisions governing the relationship between Felarona and Constant marketing?</b></p>	<p>This is a vague question. Kindly define what's meant and referenced by "provisions". Do understand that advertising contracts are private and confidential, but generate terms can be released if agreed upon both by both entities.</p>
<p>CARO also received screenshots of survey flow as per the clarifications to CARO questions.</p>	

Query	Reply from Felarona
<p>Essentially what the Jury needs to understand is who does what and what are the terms of the offer to the consumer.</p> <p>In the clarifications provided on 27.7.2020, you mention that Felarona has a database of opted in consumers. Based on their profiles Felarona chooses who would be eligible and interested in receiving the communication.</p> <p>Please note that yesterday I received the following communication from the consumer:</p> <p>“1) Has there been any recent development on the issue?  <b>Consumer: The company continues continue to send spam email which I've now blocked</b></p> <p>2) Did you proceed with the order of the nolatreve cream?  <b>Consumer: No as it seemed like a scam as the company wanted my address and bank details...”</b></p> <p>You then mention that "The third-party advertiser provides shopping survey questionnaires on various topics; the relationship is solely advertising based ... Felarona decides who will receive the message in exchange for financial considerations for their time and resources."</p> <p><b>Query: which entity is "the Advertiser"?</b>          "Felarona's third-party advertising partner who owns the offer and facilitates offer fulfilment activities. Paid participation means willingness of the recipient to cover fully disclosed shipping and handling costs of the free-trial product they have selected to receive in exchange for their time to complete the shopper survey."  <b>Please provide full details of advertiser (company name, address, telephone and email).</b></p>	

Query	Reply from Felarona
<p>In the screenshot accompanying the complaint (attachment 5_Nolatreve Anti Ageing Terms and Conditions), in small print, it is mentioned that "... billed £3.91 shipping and handling, you will also be enrolled into the Exclusive Nolatreve Anti Aging auto-shipment program which sends you a 1 month supply every 30 days from today's shipment of the first bottle for £81.04. ..."</p> <p>From the above, I understand that the consumer is required not only to cover shipping and handling costs, but also to enroll in a program with a monthly charge. Which entity owns and/or administers the auto-shipment program, Felarona or the advertiser?</p>	<p>The Advertisers of the products listed on the offer wall that's presented after completion of the survey handles and manages all fulfillment. This isn't one Advertiser. There's an independent Advertiser for each offer. This isn't responsibility of the company running the shopper survey either.</p>
<p>Finally, please send me the "Program Requirements" mentioned in the initial email, see attachment 1_Boots Shopper Survey Email.</p>	<ul style="list-style-type: none"> <li>- The terms in question are listed in the screenshot below. Again, the Advertisers of the products listed on the offer wall that's presented after completion of the survey handles and manages all fulfillment. This isn't one Advertiser. There's an independent Advertiser for each offer. This isn't responsibility of the company running the shopper survey either.</li> <li>- The offer's terms are posted on the landing page of the product the consumer has selected. It's the responsibility of the product owner to properly fulfill the consumer terms associated with the product.</li> <li>- The individual who has decided to find out more information about the offer is doing this at their own "free will". No one is forcing them to engage with the product owner and their terms. It's the responsibility of the consumer to read the fine print of the offer and decide if they would be interested in moving forward with the "consumer value proposition" being presented.</li> </ul>

## Jury Assessment:

1. The jury considered all the information presented to them.
2. The CARO Code, as all marketing communications codes, is interpreted in the spirit as well as to the letter. It applies to marketing communications in their entirety, including all words and numbers (spoken and written), visual treatments, etc. Communications are judged by their likely impact on the average consumer, having regard to the characteristics of the targeted group and the medium used.
3. The jury notes that the advertiser did not dispute the email screenshots received by the consumer and forwarded by CARO with the initial complaint information (**incl. in page 8 of this document**). We also note the clarification provided that "Our client's BOOTS survey involvement was to simply notify the individual that he/she had been selected to complete a brief shopping experience questionnaire and gain access to an exclusive reward options. No statements were made in any way to mislead the consumer into thinking they were getting a "free reward"; or infer they were receiving a communication on behalf of Boots UK Limited."

The first of those screenshots presented an email, apparently coming from Boots including a picture from a Boots store and Boots logo, addressed to a "Boots Shopper" and asking them to complete a survey about their experiences with Boots. The fine print at the bottom of the email mentions that "This rewards program is not endorsed, sponsored by or affiliated with any of the merchants listed above. Registered trademarks are the property of their respective owners. This ad is sent by a third-party on behalf of the advertiser....". Further down, it is mentioned that the email is "sent by Felarona Ltd of Spyrou Kyprianou, 84 4004 Limassol Cyprus on behalf of CONSTANT MARKETING. ... "

The jury is of the opinion that the **fine print below is insufficient to counter the initial and dominant impression that the email is sent by and/or on behalf of Boots. It should not be upon the consumer to "play detective" in order to surmise that this email has nothing to do with Boots and it is the duty of the email sender to present that information in a clear manner.** The reference that "Registered trademarks are the property of their respective owners.", explained by Felarona to mean that "the statement is a notifying the recipient that Boots has no involvement on any level with the survey and/or compensation for any recipient's time for voluntary participation of the survey.", is not acceptable to that end. As presented, the jury believes that the use of the Boots brand name and logo in the email, together with the references to a "Boots Shopper" and "experiences with Boots", is in breach of both **article 10** of the Code about the need for the identity of the marketer to be apparent, and **article 15** of the Code, Exploitation of goodwill, which states that "*Marketing communication should not make unjustifiable use of the name, initials, logo and/or trademarks of another firm, company or institution. Marketing communication should not in any way take undue advantage of another firm's, individual's or institution's goodwill in its name, brands or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent.*"

This is important because, as we understand from the survey questions supplied by Felarona itself, the survey asks the consumer to impart with information which the consumer might not have given, had they known that they were giving it to another entity and not Boots or a company acting on its behalf.

4. The jury notes that the box SEND MY ORDER, is set in vivid green background, the text in large capital letters, **before** the information that *"By placing your order ... you will also be enrolled into the Exclusive Nolatreve Anti Aging auto-shipment program which sends you a 1 month supply every 30 days from today's shipment of the first bottle for £81.04. ..."*, information which is provided in **fine print**, something which is acknowledged by Felarona when they mention that "The individual who has decided to find out more information about the offer is doing this at their own "free will". No one is forcing them to engage with the product owner and their terms. It's the responsibility of the consumer to read the **fine print** of the offer and decide if they would be interested in moving forward with the "consumer value proposition" being presented."

It is the jury's opinion that this **crucial information which forms an integral component of the "reward" offer - namely the recurring charge- must be made absolutely clear to consumers before they engage with the survey.**

The fine print reference in the initial survey email that *"the offer requires paid participation within the Advertiser's rewards program"*, explained by Felarona to mean "Paid participation means willingness of the recipient to cover **fully disclosed shipping and handling costs of the free-trial product** they have selected to receive in exchange for their time to complete the shopper survey.", "Advertiser/Owner of the offer program are the same company. Free trial offers that require the **payment of shipping and handling fees**, which is clearly presented (nothing hidden) to the consumer prior to their selection of a free-trial offering, see screenshots of the survey flow", are in conflict with another clarification by Felarona that "The individual who has decided to find out more information about the offer is doing this at their own "free will". No one is forcing them to engage with the product owner and their terms. It's the responsibility of the consumer to read the fine print of the offer and decide if they would be interested in moving forward with the "consumer value proposition" being presented." Taken together, the above statements show that Felarona is aware that, in order for the consumer to receive the reward promised, they **are required not only to cover shipping and handling fees but also to enroll into a further payment program.** Therefore, **the failure by Felarona to disclose that essential information in a clear, unambiguous and timely manner to the consumer in the initial email and before the consumer has engaged with the survey, is in breach of articles 3b, 5a and b of the Cyprus Advertising Code.**

5. Finally, the jury believes that this type of communication -which essentially entices the consumer into a recurring charge for products on the promise of an "exclusive reward"-, is in breach of **article 9** of the Cyprus Advertising Code about identification of advertisements.

It should therefore be withdrawn and/or amended **within 5 working days** from the dispatch of this decision. Please note that, for the purpose of assessing the deadline, count begins the working day following the dispatch of this decision.

