

## Consultation: Price Comparisons

<b>Question 1: Do you agree to the deletion of 3.39? If you disagree, please explain why.</b>			
	<b>Respondent making points in favour of the proposal:</b>	<b>Summary of significant points:</b>	<b>BCAP's evaluation:</b>
<b>1.1</b>	Institute of Practitioners in Advertising (IPA)	We agree to the deletion of Code rule 3.39.	BCAP agrees.
<b>1.2</b>	Direct Marketing Association (DMA)	The DMA agrees with BCAP's interpretation of 3.39 in that it can be seen to go beyond the minimum requirements under the law for price comparisons. The DMA therefore agrees to the deletion of 3.39.	BCAP agrees.
<b>1.3</b>	An organisation requesting confidentiality	As outlined in the consultation, there is an already robust level of protection for consumers from misleading advertisements in the existing provisions in the Code (and external legal framework). Removal of rule 3.39 provides advertisers a clearer understanding of the requirements when communicating benefits between own-brand and premium brand products to consumers. For continuity of comparative campaigns conducted simultaneously across both print and broadcast media, rule 3.39 in the non-broadcast CAP Code would also need deleting.	BCAP agrees.  The Committee of Advertising Practice (CAP) which writes the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code), will consider the outcome of this consultation when deciding whether the corresponding rule in the CAP Code also merits deletion.
	<b>Respondent making points against the proposal:</b>	<b>Summary of significant points:</b>	<b>BCAP's evaluation:</b>
<b>2.1</b>	Member of the public	<p>I disagree with the proposed removal of clause 3.39.</p> <p>While I support the objective of permitting comparative advertising I feel there is confusion about "objective comparison" particularly with regard to products which meet the "same need or purpose" but have significantly varying qualities. For example under the current code Cheapo's timber yard could not say "Our price for 4" x 2" pine £5 per linear metre. TopQual's price £7" where Cheapo's product was untreated unseasoned timber and TopQual's was both seasoned and treated, without making that distinction clear. Without 3.39 this claim could run as both products meet the same "need or purpose" despite one having significant other unstated functional and measurable differences.</p> <p>The problem arises particularly because in the example above both products would not meet the same "need or purpose" in all circumstances, but would in many.</p>	<p>BCAP disagrees.</p> <p>As noted in the Consultation Document, Code rule 3.34 reflects the minimum requirement for a comparison between products that is provided for in law and rule 3.39 may be interpreted in a way that exceeds that requirement, thus stifling robust comparative advertising. While removal of 3.39 would allow advertisers to make more comparisons between products that meet the same need or purpose, such as brand vs non-brand products, all advertisements will still need to comply with the other provisions in section 3 which govern the prevention of Misleading Advertising. In the example cited, the ASA would remain able to find the advertisement misleading if the main characteristics or characteristics of the product were not made clear, such as that one piece of timber was treated and the other not. By way of illustration, in a recent case against <a href="#">Aldi</a>, the ASA concluded that while a robust comparison on price between brand and non-brand products could be made, the advertisement was misleading overall because it did not make clear that the savings claim was based on a comparison between the advertisers' own branded products and their competitor's premium brand products.</p> <p>The removal of 3.39 would not remove the obligation under the BCAP Code and the law to ensure that advertising does not mislead consumers.</p>

<p><b>2.2</b></p>	<p>Home Retail Group</p>	<p>We do not agree to the deletion of 3.39.</p> <p>We completely agree with the preamble to the consultation, that as the Unfair Commercial Practices Directive is a maximum harmonisation measure, it is unlawful for the UK Government to allow more onerous provisions to be imposed.</p> <p>Whilst removing detail from the code would on the surface appear to avoid imposing additional burdens, the process has to be taken in the round, and in reality the "gold plating" that occurs does not necessarily come from the wording of the Code but from how the code is interpreted by Clearcast and the ASA.</p> <p>We do not agree that stripping out rule 3.39 and relying solely on rule 3.34 will deliver adverts that comply with the full text of the Unfair Commercial Practices Directive.</p> <p>This Directive is much broader than the specific requirement copied into the Code from the BPRs in rule 3.34 ("advertisements must compare products or services meeting the same need or intended for the same purpose".) Regulation 4 of the BPRs is intended to protect businesses from unfair comparative advertisers instigated by their competitors; the CPRs are intended to protect consumers from the effect of that advertisement, based on much broader principles.</p> <p>Any advertisement must be able to withstand additional tests as to whether a misleading action has occurred or whether there has been misleading omission. If rule 3.39 is removed it must be replaced in the body of the code by clarity as to the requirements of the CPRs to ensure that (in summary) adverts containing comparisons are not unfair, are not misleading by action or omission. This may require specific sections of the legislation (regulations 3 - 6 of the CPRs) to be repeated in the code, or explicitly referred to.</p> <p>We can see the arguments in relation to food products - for a supermarket to compare their value brand ketchup to the market leading brand may be adequate (the products meet the same need and are intended for the same purpose). The TV advert containing images of the product would further assist consumers in making that informed choice. We do not accept that the same simple criteria can be applied to non food consumer goods, even if the goods are relatively simple.</p> <p>For example, two TVs may well meet the same need and are intended for the same purpose (receiving and displaying broadcast television pictures) but there are likely to be significant differences</p> <ul style="list-style-type: none"> <li>- Brand (brand vs own brand)</li> <li>- Screen size</li> <li>- Specification</li> </ul> <p>This is particularly acute on television where time and space may be limited, and the law allows any material information that may avoid a misleading omission to be referenced rather than included.</p>	<p>See response 2.1.</p> <p>BCAP considers that the requirements of the Code should be clear and understandable to all readers, including clearance bodies, so that all parties are aware of their obligations. BCAP does not, therefore, consider it reasonable to retain a very clearly worded rule that is either not intended to be enforced or would be done so in a way counter to its clear meaning.</p> <p>BCAP agrees that all advertisements must comply with the Code in its entirety, including its obligations to ensure that advertisements do not mislead consumers, by action or omission, to deceive them and cause them to take a transactional decision that they would not have otherwise have taken. BCAP considers that the relevant provisions from the Consumer Protection from Unfair Trading Regulations 2008 are already reflected in section 3 of the BCAP Code.</p> <p>See response 2.1.</p>
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2.3	Home Retail Group	<p>The guidance provided by BCAP and CAP should be amended with text that ensures that adherence to the test in 3.34 - that products must fulfil the same purpose is qualified by the more complete requirements of CPRS and that the adverts are not unfair or misleading by action or omission.</p>	<p>BCAP agrees and will update the current Retailers' Price Comparisons help note as appropriate.</p>
2.4	The Co-Operative	<p>We do not agree that 3.39 should be removed from the BCAP Code as we fear this will open the door to spurious advertising of price competitor claims that will lead to consumers being misled and non-compliance with the law. In our view, this would constitute a retrograde step and so support the like-for-like provisions of the Code remaining in place.</p> <p>We note that reference is made just to breach of the Business Protection from Misleading Marketing Regulations (BPRs) where identifiable competitors are referenced in comparative advertising claims. Whilst these regulations govern this scenario, we consider the Consumer Protection from Unfair Trading Regulations (CPRs) are also relevant in terms of both giving false information (misleading actions) and omitting material information (misleading omissions) and so compliance with the CPRs also needs to be ensured.</p> <p>It should be noted that the BIS Pricing Practices Guide does indeed deem comparisons with another trader's prices to come under the remit of the CPRs. The Guide at 1.5.1 (d) states that in order to not mislead consumers it should be ensured that the other trader's price applies to the same product or to a substantially similar product. This is the very same requirement that BCAP is suggesting should be removed from the Code, yet this is considered necessary for compliance with the CPRs in the BIS Guide.</p> <p>If just the minimum element is retained in the Code that advertisements "must compare products or services meeting the same need or intended for the same purpose" this will allow for comparisons with products that may well have the same need, like own brand v premium brand or value brand v standard brand, but could lead to consumers being misled as clearly comparisons are not being made with similar products. We do not consider that the remaining rules in the Code around making competitor price comparisons ensure that the basis of such comparisons will be made clear to ensure the law is not breached.</p>	<p>See response 2.1.</p> <p>BCAP notes that the BIS Pricing Practices Guide states that comparisons should be fair and reasonable and advertisers should "compare like with like or with very similar products in terms of quality, composition and description. If there is a difference, then an unambiguous, easily identifiable and clearly legible explanation of the difference(s) should be given" (1.4.1). It goes on to state:</p> <p><i>"1.5.1 Comparisons should not be misleading by giving false or misleading information, by omitting material information or by deceptive presentation. You should:</i></p> <ul style="list-style-type: none"> <li><i>(a) ensure that the other trader's price which you quote is accurate and up-to-date: if the comparison becomes inaccurate after it is quoted, it should be removed or amended as soon as reasonably practicable;</i></li> <li><i>(b) give the name of the other trader clearly and prominently with the price comparison;</i></li> <li><i>(c) identify the circumstance where the other trader's price applies and the date it applied;</i></li> <li><i>(d) ensure that the other trader's price to which you quote applies to the same product - or to a substantially similar product and you state any differences clearly (see paragraph 1.4); and</i></li> <li><i>(e) compare prices for goods supplied in the same quantity and the same state; or, if that is not possible, state the differences clearly."</i> <p>Of course, the BIS Pricing Practices Guide is guidance on how advertisers can comply with the law, whereas the BCAP Code contains rules which are mandatory and apply to all. In that context and particularly being mindful of the maximum harmonisation legal provisions in this area, BCAP considers that the Code must allow comparative advertising to flourish without being perceived as exceeding those legal requirements.</p> <p>As explained in response 2.1, all comparisons must be fair and not misleading. BCAP considers that comparisons between brand and non-branded products which may not be "substantially equivalent", but nonetheless meet the same intended need and purpose, can be made in a manner that does not mislead consumers or cause unfair advantage to competitors. The removal of rule 3.39 would not absolve advertisers of the responsibility to ensure that ads do not mislead by action or omission and, in practice, it would be advisable that advertisers explain the significant differences between products if they are not obvious.</p> <p>BCAP does not therefore consider that the removal of rule 3.39 would place the BCAP Code at odds with BIS guidance on pricing claims, particularly when the broad range of protections offered by the Code around the prevention of misleading advertising are taken into account.</p> </li></ul>
2.5	The Co-Operative	<p>The consultation says that guidance will be provided through supplementary notes and advice. If it is decided that 3.39 is to be removed, then any such guidance should include a similar provision</p>	<p>See response 2.3.</p>

		for competitor price comparisons to be with identical or substantially similar products so in the least this will still be the mainstay of price competitor comparisons.	
	The Co-Operative	We also consider it is an inopportune time for BCAP to be proposing removal of this element of the Code given the current OFT focus on potential breaches of consumer protection law arising from retailers' pricing strategies and practices which includes looking at misleading comparative advertising.	BCAP disagrees. It considers that it is appropriate for BCAP to consider whether the Code remains fit for purpose and fosters an environment where comparative advertising can thrive, while protecting consumers. BCAP and the ASA will, of course, consider the outcome of any work by the OFT and examine any implications that may arise for the Codes and the co-regulatory system as a whole.
	Next Retail Limited (Next)	<p>Next disagrees to the deletion of Rule 3.39 of the Code on the grounds that its removal may allow a price comparison by a competitor offering items which will "meet the same need and be intended for the same purpose" and therefore would comply with proposal 3.34, however but may have significant differences between them, which if not pointed out, may lead to consumers being misled as to the true nature of the products being compared. Retailers of premium brand products, such as Next, could then be unfavourably compared in an advertisement featuring price comparisons to products offered by value brand competitors, without the consumer appreciating that there may be significant differences between the products in terms of their composition.</p> <p>By way of example, a white boys' school shirt made of 100% cotton could be price compared to a similar style shirt made of polyester or viscose. Both garments would meet the same needs and be intended for the same purpose, but the inherent differences in the fabric would provide the consumer with a significantly different product. The more expensive fabric would drive the higher price point and would result in an unfavourable comparison in terms of price alone. Visually, particularly in a photograph on screen, there would be no discernible difference to the consumer between the two garments, as the different properties of the fibres would not be apparent without further explanation i.e. an explanation of the significant differences of the composition of the products.</p> <p>Rules 3.33 to 3.37 do not contain the same requirement for a comparison with a competitor's price for an identical or substantially equivalent product, or the requirement that significant differences between the products should be explained and therefore Next does not agree with the deletion of Rule 3.39 from the BCAP Code.</p>	See response 2.1 and 2.4.