

BCAP Rule 5.9 Consultation: evaluation of responses



1. Introduction

As currently worded, BCAP rule 5.9 (on 'enquiring about products') appears to go further than the requirements of prohibited practice 28 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), in automatically prohibiting even encouraging children to ask their parents to enquire about a product or service for them, as opposed to directly exhorting them to buy a product or service for them, which the CPRs prohibit. It is BCAP's view, following public consultation, that in doing so, BCAP's rule imposes a stricter standard than that imposed by the CPRs, and as such, is unlawful. The full consultation responses evaluated in this document can be found [here](#).

2. List of respondents and their abbreviations used in this document

	Organisation	Abbreviation
1	Mearns FM	MFM
2	Play Therapy UK	PT UK
3	Bauer Media Group	BMG
4	Direct Marketing Association	DMA
5	93.5 Unity fM (Birmingham)	93.5
6	Mothers' Union	MU
7	Reg Bailey (individual responding in his capacity as the author of the 'Letting Children be Children Report', an Independent Review of the Commercialisation and Sexualisation of Childhood)	RB
8	The Walt Disney Company Ltd	WD

3. Evaluation of consultation responses

Do you agree with the proposed amendments to rule 5.9? If you disagree, please explain why.			
	Respondent making points in favour of the proposal: MFM, PT UK, BMG and DMA	The respondents listed on the left agreed with the statement above. A summary of other significant points follows below:	BCAP's evaluation:
1.1	MFM	Agrees with the change in wording but would have liked to have seen more evidence that children have been receiving, or influenced their parents to buy, products as a result of advertising. States that parents and board members of companies who advertise should be leading by example.	BCAP welcomes the support for the changes. BCAP also acknowledges that there are issues around responsibility for advertising and children's behaviour but considers that the proposed amendment is mandated by law and, as such, BCAP is obliged to make the amendment.
1.2	PT UK	Fully supports change.	BCAP agrees.
1.3	BMG	Supports changes and acknowledges the rationale for doing so under the maximum harmonisation principle.	BCAP agrees.
1.4	DMA	Agrees that the proposed changes to rule 5.9 are necessary in order to ensure that the rule is consistent with the maximum harmonisation requirements of the Consumer Protection from Unfair Trading Regulations 2008 and is in line with the provisions of the Audiovisual Media Services Directive.	BCAP agrees.
	Respondent making points against the proposal: 93.5, MU, RB and WD	The respondents listed on the left disagreed with the proposal above. A summary of other significant points follows below:	BCAP's evaluation:
1.5	93.5	The underlying purpose of the existing rule is to stop children pestering their parents to buy products. The changes to the existing rule will violate this principle. The subtle differences in the wording employed are mere semantics – the intention from the advertisers is clear: get kids to pester their parents. The existing rule should remain.	The response does not address the rationale for the proposed change, BCAP's legal obligations under the maximum harmonisation principle.
1.6	MU	<u>Comments on the relationship between UCPD and AVMS</u> The consultation document states that the wording of rule 5.9 goes further	<u>Comments on the relationship between UCPD and AVMS</u> BCAP may introduce restrictions on advertising to children

		<p>than the requirements of the provision that the rule is designed to reflect, i.e. it goes further than the highest protection provided for by the combination of prohibited practice 28 and Article 9(g) which it is subject to.</p> <p>Strongly believes that where children, child welfare or the impact of something on children is under consideration or being provided for, it is important that the very best level of care is provided, going above and beyond the minimum.</p> <p>Questions why the need to amend BCAP rule 5.9 has been raised at this time. While MU agrees that the principle of clarity is important, it does not believe that the proposed change would result in clarity in practice. Furthermore, the provisions of the Audiovisual Media Services Directive allow in several instances the freedom for member states to lay down more detailed or stricter rules as necessary for their jurisdiction while ensuring that they are consistent with the general principles of European Union Law; particularly, with regards to advertising, Recital (83).</p> <p>Would encourage BCAP to place the UK at the forefront of good practice and to show that it is possible to go beyond the minimum in order to protect children.</p>	<p>in TV advertising that go beyond AVMS, as it is a minimum harmonisation directive that explicitly permits Member States to provide stricter or more detailed rules than those it sets out, so long as any such rules remain compliant with EU law</p> <p>BCAP may impose a stricter rule than is required by UCPD read on its own, but strictly only to the extent that UCPD explicitly allows, given that UCPD is a maximum harmonisation directive.</p> <p>MU wants BCAP to provide a higher level of protection than UCPD and AVMS offer when combined. It is BCAP's view that it can only impose restrictions that offer the level of protection set by combining prohibited practice 28 of the UCPD with Article 9(g) of the AVMS – no more or less.</p> <p>UCPD is a maximum harmonisation directive. The starting point is therefore that the BCAP Code must provide no more and no less protection for consumers than is required by that Directive. To the extent that <i>other</i> Directives are relevant to its implementation in EU Member States, this is only because of the caveats set out in UCPD itself. Hence in this case BCAP must have regard to the caveat in prohibited practice 28 in the Annex I of the UCPD, expressed as follows:</p> <p style="text-align: center;"><i><u>“Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. <u>This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.</u>”</u></i> (emphasis added)</p> <p>The underlined wording is not reproduced in the CPRs but nevertheless has effect to the extent that Article 16 of Directive 89/552/EEC (now replaced by Article 9(g)the AVMS Directive (see below)) provides for a higher, but probably not lower, degree of consumer protection than that</p>
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		<p>provided for in prohibited practice 28. There appears to be nothing in UCPD that would justify providing <i>less</i> protection for children when advertising is delivered via television than by other means. It is BCAP’s view that this carve-out for television advertising in prohibited practice 28 must only be intended to allow for <u>higher</u> levels of protection in respect of television advertising.</p> <p>Article 9(g) of AVMS provides as follows:</p> <p><i>“audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.”</i></p> <p>However, Article 4(1) and Recital 41 to the Directive make clear that Member States can impose more detailed or stricter rules in the fields coordinated by AVMS, so long as they are consistent with “Union law”, which BCAP understands to include UCPD. Therefore, a rule that was stricter than Article 9(g) but consistent with prohibited practice 28 would be lawful.</p> <p>On this issue, it is BCAP’s view that the UCPD, being a maximum harmonisation measure, is key, and not AVMS. The MU response does not address AVMS completely: it points to Recital (83) but not to Recital 41 or Article 4(1), which both eclipse Recital (83) (by covering all fields coordinated by the Directive, not just advertising) and set upper limits to the stricter rules Member States may introduce – i.e. the requirement to be consistent with Union law (including UCPD).</p> <p>It appears that MU’s overall point is its call on BCAP to “<i>go beyond the minimum</i>” set by AVMS in protecting children, but the proposed new wording of Rule 5.9 <u>does</u> in one</p>
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		<p><u>Comments on rule 1.1 of the BCAP Code</u></p> <p>Rule 1.1 of the BCAP Code states that, “Advertisements must reflect the spirit, not merely the letter, of the Code.” Believes that by introducing the proposed new wording, it will be possible for advertisers to adhere to the letter of the code, but in doing so will be avoiding the spirit of the Code which is holistic and comprehensive protection for children. Believes that the proposed new wording will undermine the spirit of the rules, and furthermore in practice it will be difficult to define the proposed words and any resulting definitions will be blurred.</p> <p><u>Comments on using the word ‘persuade’ instead of ‘encourage’</u></p> <p>The word ‘encourage’ appears in both the old 5.9 wording, and also the proposed new wording.</p> <p>However, considers it is the word ‘ask’ that will be substituted by the word ‘persuade’ under the proposed change. Concerned that the consultation document is not clear at this point and may have caused confusion as to the proposed change being suggested here.</p> <p>With regards to the substance of the change, feels that changing the word ‘ask’ to ‘persuade’ would diminish the protections currently offered by the rule. While this distinction may be made in theory, in practice it would be very hard to judge when a child is ‘asking’ rather than ‘persuading’, and the effect on the parent, guardian or other person is likely to be the same.</p> <p>The spirit of the current regulation is that a child should not be manipulated to put pressure on their parent, guardian or other persons to buy something for them. Fears that the reality of this change in wording</p>	<p>respect go further than the minimum prohibition in Article 9(g), because (in line with UCPD) it prohibits <u>all</u> exhortations to children to buy or hire a product or service, not just exhortations that exploit children’s inexperience or credulity. To the extent that BCAP proposes making the rule less strict (insertion of “directly”, replacing “ask” with “persuade”), it does this is to ensure compliance with UCPD, not AVMS.</p> <p><u>Comments on rule 1.1 of the BCAP Code</u></p> <p>Although, the Code is applied in spirit as well as the letter, BCAP is bound by its obligations under a maximum harmonisation Directive in the standards that it must apply, and considers that change is necessary for the reasons set out in its consultation document.</p> <p><u>Comments on using the word “persuade” instead of “encourage”</u></p> <p>BCAP agrees that the consultation document is unclear on this point, and that it is the word “persuade” that should appear in place of “ask”; however, BCAP considers that the change is mandated by its legal obligations under the maximum harmonisation principle.</p>
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		<p>would erode the protection, as a stronger word such as ‘persuade’ would in theory cover fewer scenarios than ‘asking’ and would permit and encourage more marketing towards children.</p> <p>Believes that an advert that may comply with the revised ruling would still in practice result in a child putting pressure on their parent, guardian or another person regarding that product which is what the rule is designed to protect against.</p> <p><u>Comments on the addition of the word ‘directly’</u></p> <p>Believes that the addition of the word ‘directly’ will weaken the current rule and will enable advertisers to indirectly put pressure on children.</p> <p>Refers to a statement from the ASA in relation to its commitment to protect children, as it believes that it is vital that the protection of children is placed at the heart of this discussion. Does not see that the proposed wording change to rule 5.9 places the protection of children and the heart of the rules, rather it seeks to make life easier for advertisers.</p> <p><u>Comments on the addition of the word ‘hire’</u></p> <p>Although does not agree with the proposed changes as outlined above for the benefits of consistency, no objection to the addition of the word ‘hire’ to rule 5.9.</p>	<p><u>Comments on the addition of the word “directly”</u></p> <p>MU does not address BCAP’s rationale for proposing the addition of the word ‘directly’, i.e. its legal obligations under the maximum harmonisation principle.</p> <p><u>Comments on the addition of the word “hire”</u></p> <p>BCAP welcomes MU’s comments.</p>
1.7	RB	<p>It is only by being bold with the measures that are taken to protect children that real progress will continue to be made, and put the UK at the forefront of leading the way.</p> <p>The proposed changes to the BCAP rule 5.9 mark a step backwards from an accepted rule and will have a negative impact in practice. The proposed new wording will make it possible for advertisers to adhere to the letter of the code, but in doing so will be avoiding the spirit of the Code which offers a greater protection for children and also their parents, guardians or other adults from pester power.</p> <p>The Review highlighted the prevalence of pester power, with just over a third of children questioned as part of the review (32%) saying that if they really wanted something and knew their parents did not want them to buy it, they would always keep on asking until their parents let them have it. More than half (52%) of those questioned said they sometimes did this with only 15% saying they never did.</p>	<p>BCAP welcomes the acknowledgement that the UK Code of Broadcast Advertising offers protection by preventing ads from encouraging pester power, but it must do so within the limits of the law. The Code will continue to offer this and numerous other protections to ensure ads don’t exploit children’s vulnerabilities. Following consultation, BCAP considers it must now amend its direct exhortation rule to ensure that it and rulings made by the ASA against the rule, comply with the law by not exceeding the requirements of prohibited practice 28 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).</p>

		<p>The proposed new wording undermines the progress that has begun to be made against pester power and the intention that a child should not be manipulated to put pressure on their parent, guardian or other persons to buy something for them.</p> <p>The proposed changes will not result in the best protections for children and families against advertising targeted towards children. Concerned that this would be a backwards step.</p> <p>Strongly opposes the proposed changes.</p>	
1.8	WD	<p><u>Comments on relationship between UCPD and AVMS</u></p> <p>Strongly supports BCAP’s proposed revisions to rule 5.9. In particular, welcomes the reasonable and practical distinction BCAP has drawn; namely, allowing advertisements that may encourage children to have their parents (guardians or others) enquire rather than directly exhort a purchase. Appreciates BCAP’s recognition that the current rule 5.9 could be read to impose a stricter standard than that imposed by the law provided by the CPRs prohibited practice 28.</p> <p>However, strongly urges BCAP to go further than its proposals, by incorporating into rule 5.9 the important clarifying language from Article 16 of Directive 89/552/EEC and Article 9(g) of the AVMS Directive which is cross-referred in Paragraph 28 of Annex 1 of the UCPD: “by exploiting their inexperience or credulity,” such that Rule 5.9 would read:</p> <p style="text-align: center;"><i>Advertisements must not directly exhort children to buy or hire a product or service by exploiting their inexperience or credulity, nor directly encourage them to persuade their parents or others to buy or hire the advertised product or service for them. (Emphasis added.)</i></p> <p>This provides significant protection for children against marketing efforts that deliberately exploit children’s innocence. Strongly believes children are better protected through the inclusion of this language.</p> <p>Considers that this language must be included in Rule 5.9 to ensure the lawfulness of the rule. As the BCAP consultation document states, “It is BCAP’s view that Union law includes UCPD, so the UK is not lawfully able to maintain restrictions on advertising directed at children which go beyond the highest protection provided for by the combination of</p>	<p><u>Comments on relationship between UCPD and AVMS</u></p> <p>It is BCAP’s view that it may introduce restrictions on advertising to children in TV advertising that go beyond AVMS, as it is a minimum harmonisation directive that explicitly permits Member States to do provide stricter or more detailed rules than those it sets out, so long as any such rules remain compliant with EU law. BCAP may impose a stricter rule than is required by UCPD read on its own, but strictly only to the extent that UCPD explicitly allows, given it is a maximum harmonisation directive.</p> <p>Article 9(g) of AVMS provides that:</p> <p style="text-align: center;"><i>“audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.”</i></p> <p>However, Article 4(1) and Recital 41 to the Directive make clear that Member States can impose more detailed or stricter rules in the fields coordinated by AVMS, so long as they are consistent with “Union law”, which BCAP understands to include UCPD. Therefore a rule that was stricter than Article 9(g) but consistent with prohibited</p>

	<p>prohibited practice 28 and Article 9(g).” The absence of the wording regarding the exploitation of children’s “inexperience or credulity” arguably constitutes a material change from Article 9(g) of the AVMS Directive. In omitting this clause, the proposed Rule 5.9 may impose a stricter standard than that imposed by the AVMS Directive. The additional element of dishonest practice should be required in determining a marketing effort violates Rule 5.9.</p> <p>Strongly recommends BCAP further amend Rule 5.9 to include the clause, “by exploiting their inexperience or credulity,” to ensure complete compliance with Article 9(g) of the AVMS Directive.</p> <p><u>Ancillary matters</u></p> <p>Notes points relating to child protection from the EU Charter of Fundamental Rights and the OFT’s “Principles for Online and App-Based Games”.</p>	<p>practice 28 would be appear to be lawful.</p> <p>Disney’s response calls on BCAP to limit the restriction set out in the proposed new version of rule 5.9. It points out that AVMS only prohibits direct exhortations to minors to buy or hire a product or service <u>by exploiting their inexperience or credulity</u>, and argues that the BCAP Code should mirror that. The implication of this is that Disney considers that advertisers should be allowed to exhort minors to buy products or services in a way that does <i>not</i> exploit minors’ inexperience or credulity.</p> <p>BCAP does not agree with the argument that such wording must be included in the rule for it to be “lawful”. Prohibited practice 28 offers a higher level of protection than Article 9(g) in this specific aspect, so in order to provide the highest possible protection in respect of “<i>exhortations</i>”, rule 5.9 must contain the wording from UCPD, not that from AVMS. BCAP does not agree with the implied argument that the BCAP Code cannot contain a rule stricter than Article 9(g) of AVMS.</p> <p><u>Ancillary matters</u></p> <p>BCAP does not consider that these matters relate to the rationale upon which the changes are proposed, i.e. BCAP’s legal obligations under the maximum harmonisation principle.</p>
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