

# Broadcast Committee of Advertising Practice: Distance Selling Consultation

Consultation on whether to remove the distance selling rules from the UK Code of Broadcast Advertising

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## 1. Executive Summary

The Broadcast Committee of Advertising Practice (BCAP) is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising (the BCAP Code) under a contracting-out agreement with the Office of Communications (Ofcom). The BCAP Code covers advertising on Ofcom-licensed broadcasting in the UK and includes rules which ensure that advertising does not mislead, harm or offend audiences: it offers particular protection for vulnerable audiences. BCAP strives to ensure that its rules are transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003.

The BCAP Code reflects the law where appropriate and, in the case of distance selling, seeks to reflect the requirements of The Consumer Protection (Distance Selling) Regulations 2000, which give certain rights to consumers in respect of distance contracts.

On 13 June 2014, The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into force, replacing The Consumer Protection (Distance Selling) Regulations 2000. Perhaps most significantly for BCAP, the new Regulations implement a maximum harmonisation measure, whereas the old Regulations implemented a minimum harmonisation measure. Consequently, BCAP is obliged to consider what might be the legal implications of continuing to maintain distance selling provisions under the new regime. Since 13 June, where the use of any Code rule would be inconsistent with any provision of the new Regulations, the rule has been interpreted by the Advertising Standards Authority (ASA) and BCAP in the light of the new Regulations.

The obligation on BCAP to consider the compatibility of its rules with the new legislation has provided BCAP with an opportunity to consider more generally the extent, if at all, to which it wishes to reflect distance selling legislation in its Code. The current BCAP distance selling rules fall into two broad categories:

1. pre-contractual information requirements; and
2. post-contractual matters.

BCAP is consulting on proposals to remove both categories of rule from its Code (the rationale for these proposals is set out in detail in **section 4** below).

## 2. Introduction to BCAP and the ASA

### 2.1 The Broadcast Committee of Advertising Practice

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising (the BCAP Code) under a contracting-out agreement with the [Office of Communications](#) (Ofcom).

Ofcom has statutory responsibility, under the [Communications Act 2003](#), for maintaining standards in TV and radio advertisements. Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in 2004 in recognition of CAP and the ASA's successful regulation of non-broadcast advertisements for over 40 years and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to observe the standards set out in the BCAP Code.

The members that make up BCAP include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). In accordance with [Section 324](#) of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule drafting is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Information about BCAP and the AAC is available at [www.cap.org.uk](http://www.cap.org.uk), which includes the [BCAP Code](#).

### 2.2 The Advertising Standards Authority

The ASA is the independent body responsible for administering the BCAP Code and UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and ensuring that the advertising regulatory system works in the public interest. The Codes require that all marketing communications are legal, decent, honest and truthful.

The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's adjudications are published on the ASA's website, [www.asa.org.uk](http://www.asa.org.uk), and made available to the media. An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case.

If the ASA Council upholds a complaint, the advertisement must be withdrawn or amended. BCAP conducts compliance, monitoring and research to enforce the ASA Council's decisions.

The ASA's work in regulating broadcast advertising is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about the ASA, including the complaint-handling and investigations procedures and the ASA's independent review procedure, is available at [www.asa.org.uk](http://www.asa.org.uk). Information about Asbof and Basbof is available at [www.asbof.co.uk](http://www.asbof.co.uk).

### 3. Legal Framework

[Section 8](#) of the BCAP Code reflects some of the requirements of [The Consumer Protection \(Distance Selling\) Regulations 2000](#) (the 2000 Regulations); it does so in a ‘best practice’ fashion, sometimes providing a higher standard of consumer protection than that provided for in law. Until 13 June 2014, this was a permissible approach, owing to the minimum harmonisation nature of [Directive 97/7/EC](#) which the 2000 Regulations implemented. From 13 June 2014, the 2000 Regulations have been replaced by [The Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the 2013 Regulations). The 2013 Regulations provide significant changes to the old regime; perhaps most significantly for BCAP, they implement a maximum harmonisation measure ([Directive 2011/83/EU](#)) and, consequently, where BCAP seeks to regulate in the harmonised field, it can be no more restrictive or permissive than maximum harmonisation allows.

It should be noted that from 13 June 2014, BCAP has issued the following notice in relation to its distance selling rules:

*CAP and BCAP are reviewing the distance selling sections of their Codes in light of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which come into force on 13 June 2014. From 13 June, where any Code rule is inconsistent with any provision of the new Regulations, the rule will be interpreted in the light of the new Regulations.*

The notice is to prevent any unlawful use of the BCAP rules whilst this consultation is being carried out.

### 4. Proposals for change

#### 4.1 Introduction

BCAP’s current rules reflect the requirements of the 2000 Regulations which implemented a minimum harmonisation directive. This is especially important because some of the rights given to consumers (in both the old and new legislation) depend on the trader’s behaviour: for example, if a trader fails to comply with the information requirements, the consumer has enhanced cancellation rights.

The current rules reflect a “best practice” scenario and do not set out all the different rights and obligations that apply in different circumstances. This approach is not possible under the new legislative regime, because the Code would then be imposing greater restrictions than are permitted under the maximum harmonisation principle. Because of this, BCAP has had to examine the compatibility of its rules with the new legislation. BCAP has also taken the opportunity to consider to what extent, if at all, it wishes to reflect distance selling legislation in its rules, and this consultation is the result of that process.

The current BCAP distance selling rules fall into two broad categories:

1. pre-contractual information requirements; and
2. post-contractual matters.

BCAP is consulting on proposals to remove both categories of rule from its Code (the rationale for these proposals is set out in 4.2 and 4.3 below). It is important to note two important contextual points in relation to the proposals:

1. Under [Regulation 44](#) of the 2013 Regulations, every local weights and measures authority in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland are under a duty to consider any complaints made to them about a contravention of the Regulations; this duty would not be affected by any removal / retention of BCAP's distance selling rules.
2. Consumers do complain to the ASA about teleshopping channels or teleshopping window advertisers failing to deliver products, failing to process cancellations or failing to provide refunds when reasonably requested; however from 2011-2013, the ASA resolved only ten broadcast cases under the distance selling rules. These concerned post-contractual matters, mainly fulfilment problems (non-receipt of goods/refunds etc.).

#### **4.2 Proposal to remove rules relating to pre-contractual information**

Currently, BCAP's rules relating to pre-contractual information requirements are the following:

- 8.2** *Broadcasters must be able to give consumers the advertiser's name and geographical address for complaints if that information is not included in the advertisement.*
- 8.3** *Broadcasters must be satisfied that the advertisers:*
  - 8.3.2** *can take enquiries during normal business hours*
  - 8.3.4** *tell consumers if they intend to supply substitute products or services if the advertised product or service becomes unavailable*
  - 8.3.8** *inform consumers about their cancellation rights.*
- 8.6** *This rule must be read in conjunction with Directive (EC) No 2010/30/EU and the Energy Information Regulations 2011 on labelling and standard product information of the consumption of energy and other resources by energy-related products and its subsequent delegated regulations. The Directive introduces an information and labelling framework whereby delegated regulations will detail which products need to contain an energy efficiency rating or fiche. The rule only applies to products which are subject to a delegated regulation.*

*For more information on delegated regulations, go to <http://ec.europa.eu/energy>. Advertisers must make product fiche information available about products that fall under delegated regulations to consumers before commitment.*

BCAP considers it is proportionate to remove rules which do not mandate the content of advertising. The 2013 Regulations require certain information to be provided by traders to consumers before a consumer is bound by a distance contract. BCAP considers that it could only require advertisers to include this information in their advertising where the

advertising constituted the first and last stage of communication from the marketer before a distance contract is concluded. To require it in all ads would exceed the requirements of the 2013 Regulations, given that they allow the information to be provided *before a consumer is bound by a distance contract*. In almost all circumstances, a broadcast ad does not constitute the first and last stage of communication, and consumers will normally have to use a website or a telephone line to place orders; the Regulations allow for pre-contractual information to be given at this later stage.

BCAP's regulation of information that must appear in business-to-consumer advertisements is also governed by [The Consumer Protection from Unfair Trading Regulations 2008](#) (the CPRs) which implement [Directive 2005/29/EC](#) concerning unfair business-to-consumer commercial practices (UCPD). The CPRs forbid advertisers from using misleading, aggressive or unfair sales techniques. They impose a general prohibition on unfair, misleading or aggressive practices, which are defined in the Regulations, and specific prohibitions on certain practices that are deemed to be unfair in all circumstances.

[Regulation 6\(4\)](#) of the CPRs sets out the following categories of material information the omission of which must not mislead the average consumer:

- (a) *the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;*
- (b) *the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;*
- (c) *the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;*
- (d) *either—*
  - (i) *the price, including any taxes; or*
  - (ii) *where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;*
- (e) *where appropriate, either—*
  - (i) *all additional freight, delivery or postal charges; or*
  - (ii) *where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;*
- (f) *the following matters where they depart from the requirements of professional diligence—*
  - (i) *arrangements for payment,*
  - (ii) *arrangements for delivery,*
  - (iii) *arrangements for performance,*
  - (iv) *complaint handling policy;*



- (g) *for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.*

These categories of material information are reflected, both expressly and through falling under the general category of 'material information', in rules 3.1, 3.2, 3.3 and 3.6 of the BCAP Code in the following terms:

**3.1** *Advertisements must not materially mislead or be likely to do so.*

**3.2** *Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.*

*Material information is information that consumers need in context to make informed decisions about whether or how to buy a product or service. Whether the omission or presentation of material information is likely to mislead consumers depends on the context, the medium and, if the medium of the advertisement is constrained by time or space, the measures that the advertiser takes to make that information available to consumers by other means.*

**3.3** *For advertisements that quote prices for an advertised product or service, material information [for the purposes of rule 3.2] includes:*

**3.3.1** *the main characteristics of the product or service*

**3.3.2** *the identity (for example, a trading name) and geographical address of the marketer and any other trader on whose behalf the advertiser is acting*

**3.3.3** *the price of the advertised product or service, including taxes, or, if the nature of the product or service is such that the price cannot be calculated in advance, the manner in which the price is calculated*

**3.3.4** *delivery charges*

**3.3.5** *the arrangements for payment, delivery, performance or complaint handling, if those differ from the arrangements that consumers are likely to reasonably expect*

**3.3.6** *that consumers have the right to withdraw or cancel, if they have that right. If the advertisement encourages consumers to buy a product or service through a distance-selling mechanism, please refer to Section 8: Distance Selling.*

**3.6** *Advertisements must not mislead by omitting the identity of the advertiser. Rule 8.2 requires broadcasters to give enquirers the identity and geographical address of distance selling advertisers if that information is not included in the advertisement. Advertisers should note the law requires advertisers to identify themselves in some advertisements. Advertisers should take legal advice.*

BCAP considers that even if a broadcast ad did constitute the first and last stage of communication before a consumer was bound by a distance contract, thereby allowing

BCAP to require certain information to be included under the 2013 Regulations, the requirements of the CPRs, as reflected in [section 3](#) of the BCAP Code (as set out above), already effectively mandate the type of information that should be included in ads.

In 2011, CAP and BCAP consulted on how the Codes should reflect two advertising-related provisions contained in The Energy Information Regulations 2011 which transposed Directive 2010/30/EU. As a result of the consultation, rule 8.6 was added to the distance selling section because it addresses information that must be provided before a consumer enters into a contract but which may be provided separately from a given marketing communication, for example in follow-up literature.

For the avoidance of doubt, CAP and BCAP do not propose to reopen the question put in their 2011 consultation and rules relating to energy labelling are unaffected by the outcome of the current consultation. If CAP and BCAP ultimately adopt the present consultation proposal, rule 8.6 will be relocated to [section 9](#).

In considering the questions and proposals below, BCAP would ask respondents to consider the wider consumer protection context (as set out in paragraph 4.1 of this document) in which they are made, and would welcome any comments from respondents on this.

**Question 1: Do you agree with BCAP's proposal to remove its distance selling rules which relate to pre-contractual information? If you do not, please indicate why not.**

#### **4.3 Proposal to remove rules relating to post-contractual matters**

Currently, BCAP's rules relating to post-contractual information requirements are the following:

**8.3** *Broadcasters must be satisfied that the advertisers:*

**8.3.1** *have made adequate arrangements to protect consumers' money*

**8.3.3** *make samples of the advertised products available for public inspection, pre-clearance and investigation of complaints about claims made in advertisements for the product*

**8.3.5** *fulfil orders within 30 days unless*

- a.** *the nature of the product or service makes it reasonable to specify a longer period in the advertisement; for example, advertisements for made-to-measure products, plants that are out of season, or products or services that are supplied on an instalment basis may reasonably specify a longer period or*
- b.** *a longer performance period has been agreed with the consumer*

**8.3.6** *give refunds in accordance with rule 8.4*

**8.3.7** *will not seek payment for products or services that are supplied without the recipient's authority*

**8.4** *Advertisers must give refunds within 30 days if the consumer cancels, for any reason, within seven days of receiving goods or seven clear days from the conclusion of a contract for services, unless*

*a. performance of the service has already begun, with the consumer's agreement*

*b. the price of the product or service is dependent on fluctuations in the financial market beyond the control of the advertiser*

*c. the product is perishable, personalised or made-to-measure*

*d. the product is an audio or video recording or computer software unsealed by the consumer*

*e. the product is a newspaper, periodical or magazine*

*f. the service is a betting, gaming or lottery service.*

**8.5** *Advertisers must give a refund if the consumer can show reasonable cause for dissatisfaction with the product or service or delay in delivery.*

*Except for substitute goods supplied in place of the goods that the consumer ordered, and faulty goods, advertisers may require consumers to pay the direct cost of returning goods ordered through a distance selling mechanism if the consumers were informed before the contract was concluded that they would be liable for the cost of returning unwanted goods.*

BCAP considers rules relating to post-contractual matters do not generally relate to advertising but rather to the trader's behaviour after a contract has been concluded; a notable exception to this is where statements relating to post-contractual behaviour are made in advertising. In such cases, the ASA would look at these under its "Misleading advertising" rules (this is elaborated on in **4.2** above), even in the absence of the above distance selling rules. BCAP's current view is that post-contractual matters are sufficiently regulated by other authorities and under legislation. On this basis, it proposes to remove these matters from its Code.

**Question 2: Do you agree with BCAP's proposal to remove its distance selling rules which relate to post-contractual matters? If you do not, please indicate why not.**

## 5. Responding to this Consultation

### 5.1 How to respond

BCAP invites written comments, including supporting evidence on the proposals contained in this document, by **5pm on 13 January 2015**.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

Responses via email with attachments in Microsoft Word format are preferred to assist in the processing of responses.

Please send your response to [jamesc@cap.org.uk](mailto:jamesc@cap.org.uk).

If you are unable to reply by email, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

BCAP Distance Selling Consultation  
Regulatory Policy Team  
Committee of Advertising Practice  
Mid City Place  
71 High Holborn  
London WC1V 6QT

### 5.2 Confidentiality

BCAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.


If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

## Contact us

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