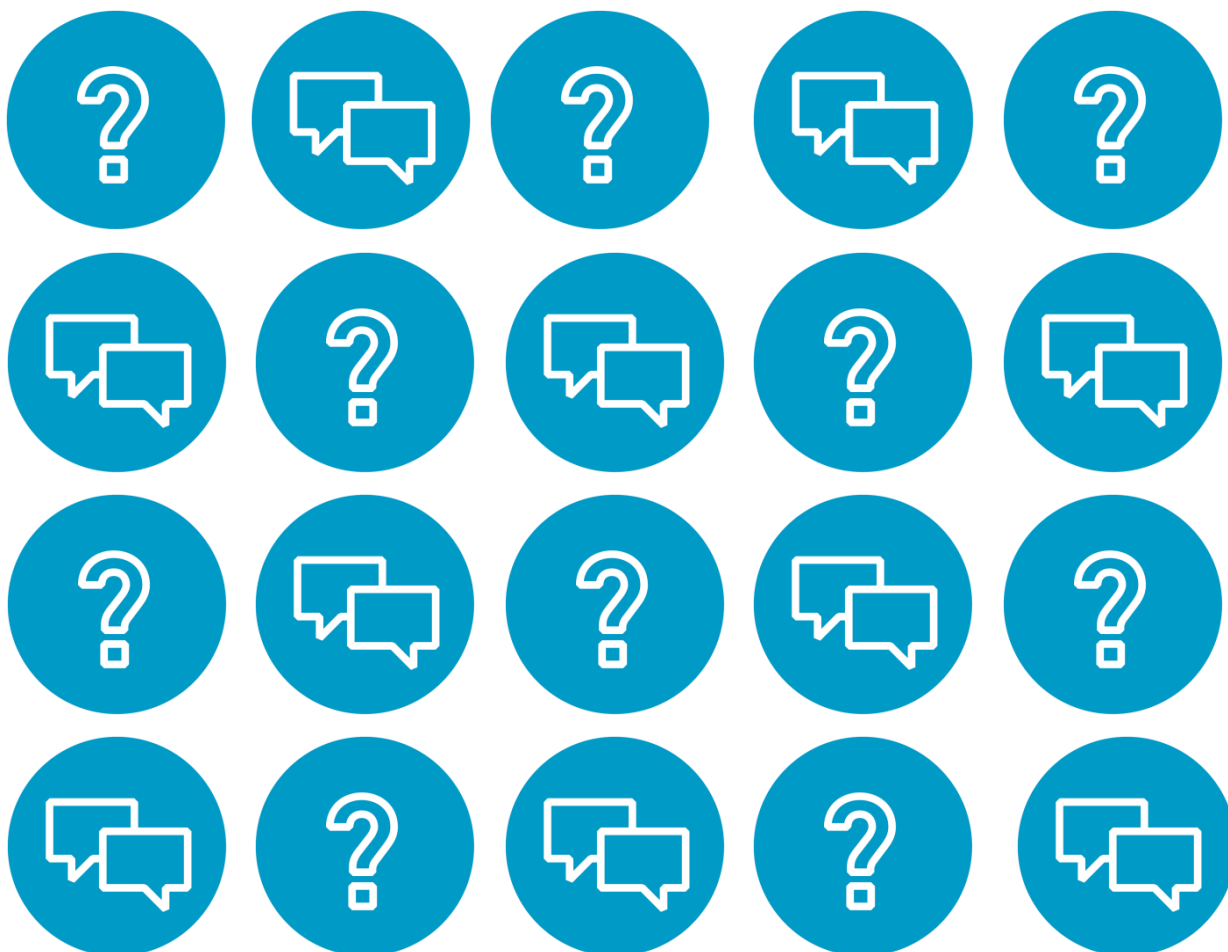


BCAP rule 5.9 Consultation

Consultation on whether BCAP rule 5.9 (on 'enquiring about products') is compatible with the Consumer Protection from Unfair Trading Regulations 2008

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Contents

- 1. Executive Summary 3
- 2. Introduction to BCAP and the ASA..... 4
- 3. Legal Framework 6
- 4. Encouraging children to ask their parents to enquire about products 7
- 5. Responding to this Consultation 9

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 protecting children, seeks to reflect the requirements of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) which prohibit unfair, misleading or aggressive practices.

In order to ensure the rules contained in the 'Children' section of the BCAP Code are clear, proportionate and consistent with the law, the Broadcast Committee of Advertising Practice (BCAP) is seeking views on a proposal to remove wording from rule 5.9, which prohibits advertisements from encouraging children to ask their parents, guardians or other persons to enquire about an advertised product or service for them. The effect of this would be to ensure that rule 5.9 is consistent with the maximum harmonisation requirements imposed by the CPRs, which rule 5.9 seeks to reflect. Advertisements would be permitted to directly encourage children to ask their parents, guardians or other persons to enquire about a product or service for them, whilst being prohibited from directly encouraging children to persuade their parents to buy a product or service for them.

BCAP proposes to amend the rule as follows:

- 5.9 Advertisements must not directly exhort children to buy or hire a product or service, nor directly encourage them to persuade their parents or others to buy or hire the advertised product or service for them.

Further details on BCAP's proposal can be found in **section 4**. The consultation will close **at 5pm on 22 July 2014**.

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, 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 self-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, 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. Information about Asbof and Basbof is available at www.asbof.co.uk.

3. Legal Framework

3.1 Communications Act 2003

The [Communications Act 2003](#) sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The standards objective most relevant to the 'Children' section of the BCAP Code is found in section 319 (2) (h), and states:

that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented

3.2 Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

Business-to-consumer advertisements must comply with the CPRs. 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. The most relevant of the specific prohibitions is prohibited practice 28 (which rule 5.9 of the BCAP Code is designed to reflect):

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.

The CPRs implement European Directive 2005/29/EC (known as the Unfair Commercial Practices Directive or UCPD), prohibited practice 28 of which is worded as follows:

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. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.

Article 16 of Directive 89/552/EEC became Article 9(g) of the Audiovisual Media Services Directive ("AVMS Directive"), which provides:

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.

4. Encouraging children to ask their parents to enquire about products

The current position

BCAP rule 5.9 provides the following:

Advertisements must neither directly exhort children to buy a product or service nor encourage them to ask their parents, guardians or other persons to buy or enquire about a product or service for them.

Proposal to amend BCAP rule 5.9

BCAP considers that the wording of rule 5.9 goes further than the requirements of prohibited practice 28 the CPRs, the provision that the rule is designed to reflect. Without amendment, the current rule is likely to be seen as unlawful and, as such, should be amended after consultation as set out below.

The CPRs are intended to implement the UCPD, a maximum harmonisation directive. In other words, the laws, regulations and administrative provisions on unfair commercial practices harming consumers' economic interests must be consistent with the Directive's provisions in the areas it seeks to harmonise. These areas include advertising directed at children, intended or likely to affect their economic behaviour. BCAP rule 5.9 is such an administrative provision and, consequently, should not provide for a higher degree of consumer protection than that provided for in prohibited practice 28.

As currently worded, BCAP rule 5.9 appears to go further than the requirements of prohibited practice 28 of the CPRs, in prohibiting even encouraging children to ask their parents to enquire about a product or service for them. However, UCPD prohibited practice 28 is without prejudice to AVMS Article 9(g). AVMS is not a maximum harmonisation directive and recital 41 provides that Member States should be able to provide stricter rules (e.g. rules prohibiting encouraging children to ask their parents to enquire about a product or service for them), provided that those rules are consistent with general principles of Union law. 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 prohibited practice 28 and Article 9(g).

BCAP also proposes to make the following further changes to the current wording of the rule:

1. Rule 5.9 uses the word "encourage", as opposed to "persuade" which appears in banned practice 28. Whilst the two words appear to be synonyms, BCAP considers that rule 5.9 could be usefully amended for the sake of consistency and accuracy, to use the word "persuade" in the place of "encourage".
2. In the current wording of rule 5.9, the "neither...nor" construction suggests that the rule is designed to prevent two types of mischief: directly exhorting children to buy a product or service, and encouraging children to ask their parents, guardians or other persons to buy or enquire about a product or service for them. Banned practice 28, however, applies the direct exhortation requirement to both types of mischief - i.e. directly exhorting children to buy advertised products or directly encouraging children to persuade their parents

or other adults to buy advertised products for them. By not having the adverb 'directly' in the encouragement limb, BCAP rule 5.9 could be read to put advertisers in jeopardy of a breach for even an indirect encouragement; a stricter standard than that imposed by the law. BCAP considers that the word 'directly' could be added for clarity.

3. The word 'hire' which appears in the AVMS Directive does not appear in rule 5.9. BCAP considers the word 'hire' could be included in rule 5.9 for greater consistency.

If amended as set out above, BCAP rule 5.9 would read as follows:

Advertisements must not directly exhort children to buy or hire a product or service, nor directly encourage them to persuade their parents or others to buy or hire the advertised product or service for them.below.

Question: Do you agree to the proposed amendments to rule 5.9? If you disagree, please explain why.

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 Tuesday 22 July 2014**.

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.

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 Rule 5.9 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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