

Broadcast Committee of Advertising Practice Consultation on Direct Exhortation: Regulatory Statement

Consultation on whether BCAP rule 5.9 (on “direct exhortation” and “enquiring about products”) is compatible with the Consumer Protection from Unfair Trading Regulations 2008



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1. 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 from advertisements which directly exhort them to purchase products or services, seeks to reflect the requirements of The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs).

As currently worded, BCAP rule 5.9 appears to go further than the requirements of prohibited practice 28 of the 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 children to persuade their parents to buy a product or service for them, which the CPRs prohibit. It is BCAP's view following a process of 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 CPRs implement Directive 2005/29/EC (known as the Unfair Commercial Practices Directive, or UCPD), a maximum harmonisation measure, so BCAP is not able to maintain rules which impose stricter or more permissive standards than those contained in this legislation.

BCAP received [eight responses](#) to its [consultation](#) and an evaluation of these can be found [here](#). BCAP will amend rule 5.9, to align it with the requirements of the CPRs, in the following way:

Existing rule:

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.

New rule:

Advertisements must not include a direct exhortation to children to buy or hire a product or service or to persuade their parents, guardians or other persons to buy or hire a product or service for them.

It should be noted that BCAP considers that it is obliged to make these changes by law; it has not taken a policy decision to make them.

2. Legal framework

2.1 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

2.2 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.

3. BCAP's decision to consult

3.1 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.

3.2 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.

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 European 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).

In order to ensure that its restrictions do not go beyond the highest protection provided for by law, BCAP consulted on making the following 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 it can be argued that 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. Prohibited practice 28, however, applies the direct exhortation requirement to both types of mischief - i.e. directly exhorting children to buy advertised products or directly exhorting children to persuade their parents to buy advertised products for them. BCAP rule 5.9 could be read to put advertisers in jeopardy of a breach for even an indirect encouragement / exhortation; a stricter standard than that imposed by the law. The rule also

automatically prohibits even encouraging children to ask their parents to enquire about a product, a prohibition not included in prohibited practice 28. BCAP considers that the rule should be amended to apply the direct exhortation prohibition to children in buying products themselves and in persuading their parents to buy products for them, whilst not restricting advertisers from encouraging children to ask their parents to enquire about a product.

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.

When amended as set out above, BCAP rule 5.9 reads as follows:

Advertisements must not include a direct exhortation to children to buy or hire a product or service or to persuade their parents, guardians or other persons to buy or hire a product or service for them.

4. Consultation Outcome

4.1 BCAP's decision

In light of the reasons for the consultation proposal set out above, and the evaluation of consultation responses, BCAP will make the following changes to the wording of rule 5.9:

Existing:

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.

New:


Advertisements must not include a direct exhortation to children to buy or hire a product or service or to persuade their parents, guardians or other persons to buy or hire a product or service for them.

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