

SECTION 3: MISLEADING

Question 8: Given BCAP's policy consideration, do you agree that rules 3.4 (puffery is permitted provided it does not mislead) and 3.5 (subjective claims must not mislead) should be included in the Code? If your answer is no, please explain why.

<p><i>Responses received in favour of BCAP's proposal from:</i></p> <p>Kao Brands E.On energy</p> <p>MEF RWE Square 1 Two organisations requesting confidentiality Two individuals</p>	<p><i>Summaries of significant points:</i></p> <p>The respondents listed in the left hand column agreed that rules 3.4 and 3.5 should be included in the Code.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents' comments.</p>
<p><i>Responses received against BCAP's proposal:</i></p> <p>Sainsbury's</p>	<p><i>Summaries of significant points:</i></p> <p>The rule seems to conflict with rule 3.12, advertisements must not exaggerate the capability or performance of a product or service.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP has amended the rule to state "advertisements <u>must not mislead by exaggerating</u> the capability or performance of a product or service". This clarifies that exaggerations that consumers are unlikely to take literally or are unlikely to mislead are permissible.</p>
<p>RSPCA</p>	<p>The rule does not make clear whether the</p>	<p>BCAP considers that the rule applies to both. It</p>

	subjective views that are permissible are those of the advertiser or third parties quoted in advertisements.	considers that the rule does not require amendment.
An organisation requesting confidentiality	The rules conflict with the statement, in the principle to the comparative advertising rules, “that subjective superlative claims such as ‘the best’ are unlikely to be justified.	BCAP agrees: subjective superlative claims may be justifiable. The first two sentences of the principle are adequate to establish the likely interpretation of superlative claims. BCAP has deleted the phrase “subjective superlative claims are unlikely to be justified”.
Question 9: Given BCAP’s policy consideration, do you agree that rule 3.13 (advertisements must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists) should be included in the Code? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP’s proposal from:</i> None	<i>Summaries of significant points:</i> 	<i>BCAP’s evaluation of those points and action points:</i>
<i>Responses received against BCAP’s proposal:</i> RSPCA	<i>Summaries of significant points:</i> It is not clear what constitutes significant division of informed opinion.	<i>BCAP’s evaluation of those points and action points:</i> What constitutes a significant division of opinion must be determined on a case-by-case basis by the ASA Council.
Danone	The Nutrition and Health Claims Regulation renders this rule redundant.	The NHCR establishes clear scientific and informed opinions on matters concerning health and nutrition claims but the rule applies to claims on all topics, not just nutrition and health claims.
Question 10: Given BCAP’s policy consideration, do you agree that rule 3.24 (Price claims such as “up to” and		

“from”) should be included in the Code? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i> E.On energy Two organisations requesting confidentiality Two individuals	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rule 3.24 should be included in the Code.	<i>BCAP's evaluation of those points and action points:</i> <i>BCAP welcomes the respondents' comments.</i>
<i>Responses received against BCAP's proposal:</i> none	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
Question 11: i) Given BCAP's policy consideration, do you agree that rule 3.28 (Broadcasters must be satisfied that advertisers have made a reasonable estimate of demand) should be included in the Code? If your answer is no, please explain why. ii) Given BCAP's policy consideration, do you agree that rule 3.29.2 (if the advertiser does not intend to fulfil orders, because the purpose of the advertisement is to assess potential demand, the advertisement must make that clear) should be included in the Code? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i>	<i>Summaries of significant points:</i> The respondents listed in the left hand column	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.

An organisation requesting confidentiality E.On energy Two individuals	agreed that rules 3.28 and 3.29 should be included in the Code.	
<i>Responses received against BCAP's proposal:</i> Home Retail Group	<i>Summaries of significant points:</i> The rule exceeds the requirements of the CPRs.	<i>BCAP's evaluation of those points and action points:</i> BCAP notes the CPRs identifies availability of a product as a factor in relation to which traders' statements may be regarded as misleading: advertisers must make a reasonable estimate of demand in order to ensure either that the products they advertise are likely to be available to consumers or, if demand is likely to exceed supply, make clear the limitations on availability.
E.On energy	The advertisers should bear the responsibility for ensuring that a realistic estimate of demand has been made.	Whilst the advertisers bear the primary responsibility for making adequate estimates of demand, the BCAP Code applies to broadcasters and cannot impose rules on advertisers directly. Requiring advertisers to give assurances at least ensures that advertisers are aware of their responsibilities and have taken steps to make adequate estimates of demand.
Global Radio	It is unreasonable to place the burden on broadcasters, who are not in a position to judge whether estimates of demand are reasonable: assurances are meaningless.	
Question 12: Given BCAP's policy consideration, do you agree that rule 3.40 (comparisons with recommended retail prices) should be included in the Code? If your answer is no, please explain why.		

<p><i>Responses received in favour of BCAP's proposal from:</i></p> <p>An organisation requesting confidentiality E.On energy An individual</p>	<p><i>Summaries of significant points:</i></p> <p>The respondents listed in the left hand column agreed that rule 3.40 should be included in the Code.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents' comments.</p>
<p>An organisation requesting confidentiality</p>	<p>Suggests an amendment to the wording, for clarity:</p> <p>Advertisements may compare a price with a recommended retail price (RRP) or similar if <u>the RRP</u> does not differ significantly from the price at which the product is generally sold. [Emphasis added]</p>	<p>BCAP considers that the suggested amendment makes the rule clearer but, as explained below, proposes a different amendment to this rule.</p>
<p><i>Responses received against BCAP's proposal:</i></p> <p>Home Retail Group</p>	<p><i>Summaries of significant points:</i></p> <p>The rule exceeds the requirements of the CPRs.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>The CPRs identify the existence of a specific price advantage as one of the factors in relation to which an advertisement could mislead consumers. BCAP considers that advertisements should be allowed to feature comparisons with RRP's but is concerned that such comparisons must not mislead consumers. BCAP notes the rule is consistent with the BIS Pricing Practices Guide. For consistency with the CPRs, BCAP</p>

		<p>has amended the rule to:</p> <p>Price comparisons must not mislead by falsely claiming a price advantage. Comparisons with recommended retail prices (RRPs) are likely to mislead if the RRP differs significantly from the price at which the product or service is generally sold.</p>
<p>Question 13: Given BCAP's policy consideration, do you agree that the rule on subliminal advertising is relevant to radio and should, therefore, be apply to radio as well as TV advertisements? If your answer is no, please explain why.</p>		
<p><i>Responses received in favour of BCAP's proposal from:</i></p> <p>Two organisations requesting confidentiality</p> <p>E.On energy Four individuals</p> <p>RACC</p>	<p><i>Summaries of significant points:</i></p> <p>The respondents listed in the left hand column agreed that the rule on subliminal advertising should apply to radio as well as TV advertisements.</p>	<p><i>BCAP's evaluation of those points and action points:</i></p> <p>BCAP welcomes the respondents' comments.</p>
<p><i>Responses received against BCAP's proposal:</i></p> <p>None</p>	<p><i>Summaries of significant points:</i></p>	<p><i>BCAP's evaluation of those points and action points:</i></p>
<p>Question 14: Given BCAP's policy consideration, do you agree that rule 3.19 (non-optional taxes and VAT-exclusive</p>		

prices) should be included? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i> Three organisations requesting confidentiality E.On energy An individual	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rule 3.19 should be included in the Code.	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.
<i>Responses received against BCAP's proposal:</i> None	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
Question 15: Given BCAP's policy consideration, do you agree that rule 3.20 (if a tax, duty or fee cannot be calculated in advance because it depends on the consumer's circumstances, the advertisement must state that the they are excluded and how they will be calculated) should be included in the Code? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i> Two organisations requesting confidentiality E.On energy An individual	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rule 3.20 should be included in the Code.	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.
<i>Responses received against BCAP's</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>

<i>proposal:</i>		
None		
Question 16: Given BCAP's policy consideration, do you agree that rule 3.23 (prices that depend on other prices) should be included in the Code? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i> Two organisations requesting confidentiality E.On energy An individual	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rule 3.23 should be included in the Code.	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.
RACC	The rule seems to apply only to one-off set-up fees for subscription services and could be more simply worded.	The rule applies more widely, to all types of conditional pricing: for example, free entry for membership card holders; pay £10 for the first three months of your 12 month contract.
<i>Responses received against BCAP's proposal:</i> None	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
<i>Responses received in favour of BCAP's proposal from:</i> Two organisations	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rules 3.26 and 3.27 should be included in the Code.	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.

requesting confidentiality E.On energy Two individuals Sue Peters		
<i>Responses received against BCAP's proposal:</i> Home Retail Group	<i>Summaries of significant points:</i> The Code is more restrictive than the CPRs.	<i>BCAP's evaluation of those points and action points:</i> The rules are in line with recent internal guidance produced by the European Commission. The ASA will take account of any UK or European court decisions on the topic.
Question 18: Given BCAP's policy consideration, do you agree that rule 3.29.3 (restrictions on the availability of products) should apply to TV and radio advertisements? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP's proposal from:</i> Two organisations requesting confidentiality E.On energy An individual	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that rule 3.29.3 should apply to TV and radio advertisements.	<i>BCAP's evaluation of those points and action points:</i> BCAP welcomes the respondents' comments.
An organisation requesting confidentiality	The rule could helpfully add "limited number of purchases per person" to the list of restrictions that must be stated.	BCAP agrees that limits on the number of purchases per person is a significant condition that should be mentioned in the advertisement, but considers that geographical restrictions and age limits are given as examples and that the rule does not require amendment.
<i>Responses received against BCAP's</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>

<i>proposal:</i> Home Retail Group	The rule is unnecessary.	BCAP considers that, although the rule is merely an example of the types of restriction on availability that should be stated in advertisements, it is helpful to include it in the Code to help marketing departments avoid misleadingly omitting information.
Bond Pearce	The Code does not make clear the extent to which national retailers must disclaim the availability of items that are not offered in all stores.	The Code cannot reasonably give such guidance: the ASA will consider, on a case-by-case basis, whether the advertisement was likely to mislead consumers.
An organisation requesting confidentiality	The rule should include the phrase “if its omission is likely to mislead.	BCAP considers the proposed addition is helpful. It has amended the rule to “advertisements must not mislead consumers by omitting restrictions on the availability of products, for example geographical restrictions or age limits”
Consumer Focus	The rule should explicitly require advertisers to state restrictions on mobile network coverage.	BCAP considers the addition is unnecessary: if the restriction is significant and likely to affect consumers’ understanding of the product, it must be stated. The examples given (geographic restrictions and age limits) are not intended to be exhaustive.
Question 19: Given BCAP’s policy consideration, do you agree that the proposed amendment in 3.44 (Advertisements must not present a product as an imitation or replica of a product or service with a protected trade mark or trade name) correctly reflects the BPRs 4(i) requirement? If your answer is no, please explain why.		
<i>Responses received in favour of BCAP’s proposal from:</i>	<i>Summaries of significant points:</i> The respondents listed in the left hand column agreed that the proposed amendment in 3.44	<i>BCAP’s evaluation of those points and action points:</i> BCAP welcomes the respondents’ comments.

Two organisations requesting confidentiality	correctly reflected the BPRs requirement.	
E.On energy		
<i>Responses received against BCAP's proposal:</i>	<i>Summaries of significant points:</i>	<i>BCAP's evaluation of those points and action points:</i>
None		
Question 20: Given BCAP's Policy consideration, do you agree that rule 5.2.7 (Claims that a product has not been tested on animals are unlikely to be acceptable) should not be included in the Code? If your answer is no, please explain why.		
No responses		
Question 21: Given BCAP's policy consideration, do you agree that it is not necessary to include in the BCAP Code the requirement for advertisements by or on behalf of solicitors to comply with the Solicitors Code of Conduct? If your answer is no, please explain why?		
No responses		
Question 22: Given BCAP's policy consideration, do you agree that it is not necessary to maintain, in BCAP's		

<p>proposed Code, a rule that requires advertisements for conditional fee arrangements which claim ‘no win, no fee’ to suitably qualify if the client is (or may be) required to pay any costs or fees (including those of the other party), such as insurance premiums or disbursements? If your answer is no, please explain why.</p>		
No responses		
<p>Question 23:</p> <p>i) Taking into account BCAP’s policy consideration, do you agree that BCAP’s rules in the Misleading Section are necessary and easily understandable? If your answer is no, please explain why?</p> <p>ii) On consideration of the mapping document in Annex 2, can you identify any changes from the present to the proposed Misleading rules that are likely to amount to a significant change in advertising policy and practice and are not reflected here and that should be retained or otherwise be given dedicated consideration?</p> <p>iii) Do you have other comments on this section?</p>		
<i>Responses received from:</i>	<i>Summaries of significant points:</i>	<i>BCAP’s evaluation of those points and action points:</i>
Misleading principle		
<i>Danone</i>	The ASA should take the advertisers’ intentions into account, especially when considering health and nutrition claims.	BCAP considers that the effect on consumers, not the advertisers’ intentions, is the message that should be considered: a rule that favours advertisers’ intentions over consumer take-out fails to adequately protect consumers.
<i>Sainsbury’s</i>	Taking into account the ‘impression’ on consumers instead of assessing whether it would lead the average consumer to take a transactional decision he would not otherwise have taken” amounts to	The definition of misleading action in the CPRs involves both concepts (overall impression and transactional decision):

	gold-plating the CPRs.	<p>A commercial practice is a misleading action if it [...] (a) contains false information and is therefore untruthful [...] or if it or its overall presentation in any way deceives or is likely to deceive the average consumer [...] even if the information is factually correct; and (b) it causes or is likely to cause the average consumer to take a transaction decision he would not have taken otherwise.</p> <p>BCAP therefore considers that taking the overall impression that a marketing communication leaves on consumers into account is justified.</p>
Rule 3.1		
Internal respondents	Rule should include the phrase “likely to mislead”.	<p>The draft followed the structure of the CPRs, which prohibits “misleading” practices and defines “misleading” as including practices that are “likely to” deceive consumers or cause them to take transactional decisions they would not otherwise have taken. CAP considers, however, that the inclusion of “likely to mislead” is helpful because it clarifies that practices may be deemed to be misleading even before evidence is available that consumers’ interests have in fact been harmed. It had revised the wording to:</p> <p>Marketing communications must not materially mislead or be likely to do so.</p>
Rule 3.9		
Nestle	Seeks clarification that the documentary evidence to substantiate claims need not be included in the	No, the substantiation need not be included in the ad. This is established practice. BCAP considers

	ad itself.	that the Code does not require amendment.
Channel Four	Seeks confirmation that the enquiries made by Clearcast are adequate to fulfil broadcasters' responsibility.	Clearcast, if appointed by a broadcaster to carry out pre-vetting of advertisements on its behalf, may seek substantiation for claims. Whether the substantiation seen by Clearcast is adequate will be independently assessed by the ASA, in the event of a complaint.
Channel Four	Is the requirement for the documentary evidence to "prove" claims stronger than the requirement in the previous code for the evidence to "support" the claims.	No, the intention is not to seek a higher standard of evidence.
Rule 3.11		
Sainsbury's	The rule gold-plates the requirements of the CPRs.	<p>The CPRs state that it is misleading to omit, hide or present in an unclear, unintelligible, ambiguous or untimely manner material information that is likely to cause the average consumer to take a transactional decision he would not otherwise have taken (section 6). If an advertisement needs to give information in qualifying text, to avoid misleading by ambiguity or omission, that information must be clear to consumers. marketers must not provide information in, for example, small print or difficult-to-understand language that consumers are unlikely to decipher or understand. Requiring information to be presented in such a way that it is clear to consumers on their initial exposure to the advertisement is, in BCAP's view, consistent with the CPRs.</p> <p>No amendment required.</p>
Rule 3.12		

Nestle BSkyB	“Normal use” should be interpreted to mean “in line with manufacturers’ instructions”, not “used the way the average consumer would use it”: advertisements should be permitted to promote advanced features that many consumers may ignore, or to make claims for maximum performance, provided that is realistically and safely achievable.	BCAP agrees. It has deleted the reference to “normal use”, which is confusing, and reworded the rule to state “Advertisements must not mislead by exaggerating the capability or performance of a product or service”, to clarify that it is not exaggeration as such, but misleadingness that breaches the Code.
BSkyB	The requirement not to exaggerate performance seems to conflict with the rule on puffery.	
Pricing principle		
Sainsbury’s	The suggestion that price statements should take account of the Pricing Practices Guide is an attempt to make law by the back door. The Guide itself says it can be ignored! The section should be re-phrased to make it clear it is one way of securing compliance.	The Code states merely that marketers should take account of the Pricing Practices Guide. Following the Pricing Practices Guide is an easy way for a marketer to demonstrate that their pricing claims are responsible and unlikely to mislead, but marketers may be able to justify departures from the Guide. The reference occurs in a principle, not in a rule, so there is no question that BCAP has attempted to make adherence to the Guide a requirement of the Code.
Free		
Sainsbury’s	The rule gold-plates the CPRs.	The rules are in line with recent internal guidance produced by the European Commission. The ASA will take account of any UK or European court decisions on the topic.
BSkyB	The rule could be re-ordered to emphasise its consistency with the present UK interpretation of the CPRs.	BCAP had amended the wording to Marketing communications must not describe items as “free” if: [...]

		Cost of response, including the price of any product that the consumer must buy to take advantage of the offer, has been inflated.
Consumer Focus	Welcomes the guidance on the unavoidable cost of response.	
Consumer Focus	The Code should forbid the use of “free” to describe products that consumers may obtain in exchange for personal information.	BCAP considers that it is reasonable for consumers to be asked to provide personal information in return for free products. BCAP’s position on use of “free” must be no more permissive or restrictive than the CPRs, which are a maximum harmonisation measure.
Bond Pearce	The rule should explicitly refer to Buy One Get One Free and introductory offers.	BCAP will maintain its present practice of giving advice on specific types of “free” claim in Guidance, not the Code itself.
Mobile Entertainment Forum	The BCAP rule differs from the PhonepayPlus rule on the use of “free”.	The PhonepayPlus rule requires that the “free” item provided on condition that the consumer pays for a premium-rate telephone call must be of equal or greater value to the call: that is a more stringent requirement than the BCAP Code imposes, but is not inconsistent: all broadcast advertisements must comply with the BCAP Code, and those for PRS must comply, over and above that, with the stricter requirements of the PhonepayPlus Code.
“up to” and “from” price claims		
Two organisations requesting confidentiality	The “10% rule” (the principle that an “up to x% off” claim or a “from £x” claim is likely to be acceptable if 10% of the available stock is available at the quoted price/ with the quoted discount) should be included in the Code.	The principle to the prices rule states that price statements in advertisements should take into account the BIS Pricing Practices Guide, which sets out this approach. BCAP considers that price claims should not mislead consumers. Adherence to the 10% principle will, in most cases, ensure that the claim is justified, but the
Alliance Boots	The ASA should not take the 10% rule into account when assessing compliance with 3.23, because it	

	has no basis in law.	Code should not prescribe that in all circumstances.
Comparisons principle		
CMS Cameron McKenna	The rule should be interpreted in such a way that the ASA may verify a comparative claim, if the information that verifies the claim is too complex or technical for consumers to understand or is commercially confidential.	The ASA does interpret the rule in that way. BCAP considers that it is not necessary to include that interpretation in the rule itself.
General		
Home Retail Group	The Broadcast clearance centres take insufficient account of the CPRs in their clearance process.	BCAP has passed this comment on to the Clearance Centres
RWE	The Code must be consistently applied.	BCAP agrees but considers that consistency of application is primarily the responsibility of the ASA and not something that can be secured by further amendments to the Code.
Square 1, Association for Interactive Media and Entertainment, Alliance Boots	The Code should simply have one rule, that advertisements must not mislead, and all other rules in the “misleading” section should be re-formulated as Guidance	CAP regards the detailed rules as complementing the overall principle that consumers must not be misled. It considers that including these requirements in the body of the Code helps the marketing and media industries to ensure the advertisements they produce or carry are compliant, by explaining the meaning of the general principles.
Royal Society for the Prevention of Cruelty to Animals	The Code should include guidance to cover: identifying the seller as private or trader; pet vending licence; minimum age at which mammals may be sold, licence requirements for dangerous animals; inc breeds of illegal dogs; use of "pedigree"; country of origin of imported dogs; certification required for dogs with docked tails.	BCAP considers that such detailed rules are not necessary. In practice, the general rules mean that advertisements should not mislead consumers or promote illegal sales, which address the concerns raised.