

Evidence-based policy-making

How CAP and BCAP assess
calls for regulatory change

Foreword

The Committee of Advertising Practice (CAP) is the self-regulatory body that creates, revises and enforces the [UK Code of Non-broadcast Advertising and Direct & Promotional Marketing](#) (the CAP Code). The CAP Code covers marketing communications across all non-broadcast media including on marketers' own websites.

The Broadcast Committee of Advertising Practice (BCAP) is the regulatory body responsible for maintaining the [UK Code of Broadcast Advertising](#) (the BCAP Code) under agreement with the [Office of Communications](#) (Ofcom).

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).

These Advertising Codes (Codes) are enforced by the Advertising Standards Authority (ASA) which investigates complaints and publishes [rulings](#) on complaints about individual ads each week in addition to conducting proactive work in relation to particular regulatory issues.

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1. Introduction

CAP and BCAP aim to deliver regulation which is transparent, accountable, proportionate, consistent and targeted where action is needed. They consider that an evidence-based approach is the best way of responding to those principles and that evidence, particularly in the absence of legislative imperatives, is likely to provide the most sound basis for regulatory change.

CAP and BCAP keep their Codes under review and welcome new evidence on where they may need to offer additional protection, where existing protections may no longer be necessary or proportionate or where other regulatory action might be warranted. All evidence is useful in building a picture of whether a regulatory change might be necessary, even if it does not in itself justify such change.

CAP and BCAP are committed to:

- acknowledging receipt of all evidence sent to them,
- receiving and reviewing all evidence fairly, impartially and with an open mind,
- responding formally to significant pieces of evidence, and
- keeping significant evidence on file, even if it does not on its own merit immediate action by CAP and BCAP.

CAP and BCAP consider it in keeping with the principles of transparency and accountability to offer guidance on CAP and BCAP's approach to regulatory change. This document sets out that approach and the key factors which are likely to inform their thinking. It should be useful to those who wish to argue for regulatory change or better understand CAP and BCAP's approach to policy-making.

2. Evidence

Evidence can take many forms; in some cases there may be independent academic research and in others there may be a survey, public opinion poll or assessment of advertising to specific audiences. Stakeholders may choose to submit existing evidence, secondary analysis or bespoke research. Quantitative and qualitative data can be meaningful when assessing the need for advertising regulation.

CAP and BCAP do not consider any one type of research to be the best in supporting a case for change. Evidence might diagnose a problem and / or describe the remedy. In general, CAP and BCAP will expect research and methodology to be submitted in full: they cannot assess evidence based only on a summary or abstract.

CAP and BCAP do not prescribe study design but they favour research which:

- identifies the nature, scale and impact of any detriment;
- is fair and impartial and follows a recognised methodology;
- takes into account confounding variables;
- is carried out on a representative cross-section of a population similar to that of the UK or on a representative sample of the relevant part of the population; and
- mitigates against potential bias.

CAP and BCAP have drawn up the following key points for those who are commissioning research or who aim to influence policy. The list is not exhaustive, nor is it a check list. Not all points will be of equal relevance to research in different areas.

- If a policy objective is significantly affected by socio-demographic factors or an existing regulatory regime (e.g. alcohol or gambling), the most useful studies will account for that, and will be based in and representative of the UK. Studies from other countries can be used as useful indicators, but alone are unlikely to support a proposal unless the underlying circumstances are sufficiently similar to make the study applicable to the UK. Similarly, studies conducted in just one particular region or part of the UK may not be sufficient to suggest a UK-wide problem or issue.
- Studies referenced in support of a particular call for regulatory change should focus on the group affected. For example, a call for a ban on airbrushed ads directed at teenagers should be supported by a study concerning those in that age group.
- Quantitative studies should be large enough to produce results that are representative of the population or the constituent group targeted. Results should be clear and statistically significant. Where weighting has been applied, this should be made explicit and the approach to weighting explained.

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- Where possible, experimental studies should replicate realistic viewing, reading or online behaviour and use actual published ads or those which are representative of the general tone and style of advertising in the relevant market.
 - Studies that show associations between factors can be useful, but alone are unlikely to prove that an advertisement or advertising practice caused a particular effect.
 - Studies which attest to media-specific effects where a phenomenon may be observed across media, for example in editorial content and advertising, are most useful if they make a distinction between advertising and other types of media content so that the effects measured can be attributed clearly to one medium or the other.

Those commissioning research may wish to look at the Social Research Association's guidance ["What is high quality social research?"](#) and The Market Research Society [Code of Conduct](#).

In some sectors the mere fact that a product or service is advertised at all can provoke concern that it will cause harm or "normalise" it in some way. CAP and BCAP do not regulate products and services themselves, only how they are advertised. Concerns about the potential harm of legally available products, while important, are unlikely to be sufficient on their own to justify further controls or an outright ban particularly if the product / service is already subject to specific rules. CAP and BCAP will expect evidence to identify why a particular advertising practice is irresponsible.

3. Evidence in context

Consideration of any policy issue will require CAP and BCAP to look at the broad evidential picture. Inevitably that picture will comprise different pieces of evidence varying in quality, quantity and in the conclusions they suggest. Many of the following factors will either constitute evidence or provide vital context for how evidence is assessed:

- the nature and legal status of the product or other subject of the advertising in question;
- any existing legal or regulatory controls on the sector and its advertising;
- the potential harm that might arise from the subject of the ad;
- the extent to which restrictions on the content, placement or scheduling of ads for those products might mitigate those harms; and
- CAP and BCAP's own regulatory objectives and legal obligations.

The law

The Codes themselves are not law but they exist alongside it, sometimes reflecting it, supplementing it or filling gaps where it does not reach. There is legislative context to all areas of CAP and BCAP's regulation, including both sector-specific law and the general duty, under the Human Rights Act 1998, not to restrict free speech unless it is necessary and proportionate to do so.

While stakeholders need not be experts on the law, an appreciation of the effects of the law both generally and in particular areas may inform how stakeholders think about an issue, commission research or frame a call for change.

For example, CAP and BCAP will often hear calls from those who consider a particular advertising practice to be misleading for it to be banned outright. However, the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) delimit how CAP and BCAP must regulate misleading advertising, providing a list of banned practices – to which CAP and BCAP cannot add – and provide a test that the ASA must apply in all other instances. Evidence that a particular advertising practice is not optimally clear or preferred by consumers is alone unlikely to provide grounds for change if it does not show that the practice in question is likely to mislead them. [Appendix 1 of the CAP Code](#) has information about the CPRs.

Where sections of the Codes have a particular legal context this will be set out in the relevant introduction to the section, sometimes with further guidance provided. The sections which deal with the advertising of [food](#), [medicines](#) and [e-cigarettes](#) are notable examples.

4. How CAP and BCAP might respond to evidence

Depending on the strength of the evidence before them and what it suggests, CAP and BCAP might do one or more of the following:

- implement new rules or remove / amend existing ones,
- publish guidance on how existing or new rules should be interpreted,
- conduct their own research and / or initiate a call for evidence,
- pass information to CAP or ASA teams to aid in their enforcement of existing rules, or
- take no action but keep the issue under internal review.

In considering where to devote their resources in relation to any policy issue the Committees may prioritise their work according the following prioritisation principles:

- what harm or detriment has occurred
- the likely risk of action versus inaction;
- the likely impact of their intervention; and
- what internal resources are proportionate to the problem to be tackled.

The case-studies in the next chapter provide examples of how CAP and BCAP have had to weigh evidence in light of contextual factors in recent projects and the action they have taken.

5. Case-studies

Below is a selection of case-studies of recent projects which illustrate how CAP and BCAP assess evidence and how they have responded in different ways to particular issues. Many policy issues are under regular review and further work may have been undertaken in relation to these policy areas since the publication of this document. Readers are advised to check the [consultation](#) page of the CAP website and subscribe to [CAP's Update](#) newsletter to ensure they stay up-to-date with new developments.

Implementing new rules

- In 2017 [CAP announced new rules banning the advertising of high fat, salt or sugar \(HFSS\) food in children's media](#). This extensive project included CAP's commissioning of external research, wide consultation and evidence-gathering to examine the link between advertising and obesity. Although the evidence suggested that advertising's impact on children's food preferences was relatively small, CAP had to weigh this against evidence of the wider detriment associated with childhood obesity and changes to media environments.
- In 2014 CAP and BCAP [put in place new rules](#) controlling the advertising of e-cigarettes. In writing rules for a new product about which there was little long-term evidence, they took account of evidence of impending European regulation, data from the MHRA about product quality and their own experience regulating other sectors which posed similar concerns about harm.

Decisions not to implement new rules

- In 2015 BCAP, having considered the outcome of considerable project work, [decided not](#) to introduced scheduling restrictions for ads for high-cost, short-term credit. This project encompassed a [review](#) of BCAP's and the ASA's existing regulation, a call-for-evidence and public consultation. The conclusions demonstrate how CAP and BCAP assess evidence in light of their regulatory objectives and how concurrent action by a primary regulator can influence CAP and BCAP's thinking on advertising regulation.
- In 2015, CAP and BCAP [reviewed the evidence base](#) on harms related to gambling. Although this review satisfied them that the existing evidence did not present a case for new rules or a new approach, it did lead to commitments to further work. Of particular note in this project is a [report by Dr Per Binde](#) of the University of Gothenburg which articulates well many of the issues with research about gambling advertising which may be of use to researchers in other sectors.

Deregulating in a changing regulatory environment

- In 2015 [CAP and BCAP updated](#) the rules in their Codes to allow advertisers of certain lifestyle weight loss programmes to refer to and target people who are obese in their ads, when they could not previously do so. Key to this decision was evidence that such programmes were regarded by NICE and promoted by the NHS as a safe and effective means of losing weight.

Responding to changes in the law

- In 2017 [CAP announced](#) a new rule, with accompanying guidance, reflecting the legal prohibitions on e-cigarette advertising set out in the Tobacco and Related Products Regulations 2016.
- In 2016 BCAP amended rule 5.9 of its Code, concerning direct exhortations to children, slightly less restrictive to make it consistent with the CPRs. The materials from this project can be found [here](#).
- In 2016 BCAP considered that it would be proportionate to [remove the rules](#) in the Distance Selling section of its Code in light of the coming in to effect of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.
- In 2015 CAP amended a number of rules in the Promotional Marketing section of its Code to ensure that it did not unlawfully create banned practices that were not already included in the CPRs. The materials from this consultation can be found [here](#).

Offering guidance on the interpretation of existing rules

- In November 2017 CAP [published new guidance](#) requiring ads for broadband services to only use numerical speed claims which are available to at least 50% of customers at peak time. This change came as a result of research exploring consumers' understanding of such claims.
- In 2017 CAP published three pieces guidance to assist marketers in complying with Code rules protecting children. This included guidance on how best to [disclose the commercial nature of content to under-12s](#), the [placement of non-broadcast ads](#) and [how to use interest-based factors in online environments](#) to minimise the risk of age-restricted ads being seen by children.

6. How to submit evidence

Those who have reviewed this document and wish to submit evidence to CAP and BCAP may do so via the Regulatory Policy team. Evidence should be sent in full with a covering letter explaining its nature and relevance to the regulation of advertising to AdPolicy@cap.org.uk.

Only emails submitting evidence are answered from this inbox. Those wishing to contact the ASA, CAP or BCAP on other matters should refer to the [Contact us](#) page of the website.