

Consultation on the Regulation of Unfair Trading Practices in Broadcast Advertisements

BCAP's summary evaluation of consultation responses

Question 1

a) Do you consider that Attachment A correctly summarises the CPR's general prohibitions on unfair, misleading and aggressive practices?

b) Do you agree that Attachment A correctly summarises the CPR's provisions on "the average consumer"?

a) One respondent commented that the statement:

Advertisements can deceive consumers by ambiguity, through presentation or by omitting important information that consumers need to make an informed transactional decision, as well as by including false information.

did not appear in the Regulations.

The sentence summarises sections 5 and 6 of CPRs. Section 5 forbids misleading by action, which is defined in the Regulations as deceiving consumers by including false information or by presenting true information in a way that is likely to deceive consumers. Section 6 forbids misleading by omission, which is defined as omitting or hiding material information or by presenting material information in an unclear, unintelligible, ambiguous or untimely manner.

BCAP considers that, although it does not directly quote the legal definitions in the CPRs, Attachment A accurately summarises their effect. BCAP considers that no amendment is necessary.

b) One respondent commented that Attachment A implied the characteristics of average consumers were limited to being reasonably well-informed, observant and circumspect and suggested the addition of "amongst other things" in the sentence:

The likely effect of a marketing communication is generally considered from the point of view of the average consumer who it reaches or to whom it is addressed. The average consumer is assumed to be, amongst other things, reasonably well-informed, observant and circumspect.

BCAP considers that Attachment A does not imply average consumers have no characteristics beyond those listed and that the proposed amendment is unnecessary.

Question 2

a) Do you consider BCAP has, in Attachment B, correctly reflected the CPRs Schedule 1 banned practices that are, or could be, relevant to advertising?

b) Do you consider BCAP has correctly omitted the CPRs Schedule 1 banned practices that are not, or could not be, relevant to advertising?

a) One respondent pointed out that the rule:

Advertisements must not falsely claim or imply that after-sales service is available in an EU member state other than the one where the advertised product is sold

did not accurately reflect the CPRs Schedule 1, which relates to EEA, not EU, member states.

BCAP has amended the Codes to:

Advertisements must not falsely claim or imply that after-sales service is available in a state that forms part of the European Economic Area other than the state where the advertised product is sold

One respondent suggested that the TV Code rule

Advertisements must not directly advise or ask children to buy or to ask their parents or others to make enquiries or purchases

Should be amended to more closely reflect the CPRs. The suggested amendment was:

Advertisements must not directly advise or ask children to buy or to ask their parents or others to make enquiries or purchases for them

BCAP has amended the Code as suggested.

One respondent commented that, in their view, the CPRs allowed marketers to offer “free” items conditional on the purchase of another item. The respondent believed the TV Code did not allow conditional-purchase offers.

BCAP considers that the TV Code does allow conditional-purchase “free” offers and that the interpretation of the TV Code by the ASA will be consistent with the respondent’s desired interpretation. In 2007 BCAP published Guidance on the Use of Free, together with CAP, which explicitly sets out the conditions under which “free” claims, including those for products that are offered only on condition that the consumer buys another product, are allowed. That Guidance remains in force and the ASA uses it to guide its interpretation of the rules on “free”.

BCAP therefore considers that no amendment to the Code is necessary.

Question 3

Do you consider that TV rule 5.3.4 (Attachment C) and Radio rule 17.2 (Attachment D), correctly reflects the CPR’s provisions on “Invitation to Purchase”?

Two respondents, including representatives of radio broadcasters and teleshopping broadcasters, commented that the information specified as material for advertisements

that include invitations to purchase might acceptably be supplied through a website (that is, it needn't be included in the ad itself).

BCAP considers the rule that lists material information for invitations to purchase does not imply that the material information need be included in all advertisements; the rule is clear that material information must be included if its omission would affect consumers' decisions about whether or how to buy the advertised product and that, in the case of advertisements that are limited by time or space, the measures taken to communicate material information by other means will be taken into account.

BCAP therefore considers that the rule does not necessarily require the provision of material information in advertisements and already allows for its provision through follow-up material or other sources made available to consumers.

BCAP considers that the Code should not state that follow-up information may be provided through a website; whether the provision of material information through a website is adequate to avoid misleading consumers depends both on the significance of the information and consumers' access to the internet. For example, if the advertised service is available only through the internet and consumers cannot buy the service without clicking through a page that prominently gives the less significant material information, consumers are unlikely to be misled. If the advertised product is available through other channels, providing information on a website will not be enough to ensure that consumers without internet access have all the information they need.

One respondent commented that, in their view, "invitation to purchase" referred to advertisements that allowed consumers to buy the advertised products immediately, without recourse to further information. The respondent regarded advertisements that included premium-rate telephone numbers as invitations to purchase but regarded advertisements that merely made consumers aware of products and their prices as outside the scope of invitations to purchase.

BCAP has discussed the definition of invitations to purchase with BERR and the OFT. The view that advertisements are invitations to purchase only if they include direct response mechanisms is not supported in the Regulations themselves or in the interpretative material produced by the OFT. BCAP understands from the OFT that the law is likely to be interpreted to mean that indications of product characteristics together with price constitute invitations to purchase, with or without the provision of direct response mechanisms.

BCAP understands the respondent's interpretation of the scope of "invitation to purchase" is inconsistent with that of the relevant statutory regulators; it has not amended its rules on invitations to purchase.

Question 4

Subject to your responses to questions 1-3, do you consider that BCAP has correctly reflected the relevant provisions of the CPRs into the BCAP TV and Radio Advertising Standards Codes?

One respondent commented that the Codes did not clarify what charges consumers might be asked to pay towards "free" goods, especially the postage and packing charges.

BCAP has produced Guidance on the Use of Free, which addresses the charges that might be made in greater detail than the Code allows. Because the points that the respondent raises are addressed in that Guidance, BCAP considers no amendment to the Codes is necessary.

One respondent pointed out that the appendix to the TV Code that lists legislation that affects advertising omitted the Business Protection from Misleading Marketing Regulations 2008.

BCAP has added the BPRs to the appendix.

One respondent queried why the Codes did not use the term “trader”, as the CPRs do, but instead used the term “marketer” or “advertiser”.

The CPRs apply to a broad range of commercial activities, not just advertising. “Trader”, in the CPRs, means any person acting for purposes relating to his business; it includes manufacturers, distributors, media owners and retailers. Because the traders that are subject to the Codes are engaged in broadcasting or advertising, the Codes refer to “licensees” (broadcasters) or “advertisers” and BCAP has maintained those terms in the proposed amendments, instead of introducing the new term “trader”.

BCAP rejects the suggestion that the Code should use the word “trader”.