

The Regulation of Unfair Practices in TV and Radio Advertisements

BCAP Consultation Document

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This document sets out proposals to bring the Broadcast Committee of Advertising Practice (BCAP) TV and Radio Advertising Standards Codes into line with the Consumer Protection from Unfair Trading Regulations 2008.

BCAP welcomes feedback on the proposed amendments to the existing Codes. Please see page 15 for information on responding to this consultation.

The consultation period ends at **5pm on 22 July 2008**.

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Section 1

Executive Summary

New legislation called the Consumer Protection from Unfair Trading Practices Regulations 2008 (CPRs) came into force on 26 May 2008.

The CPRs prohibit unfair trading practices and identify misleading and aggressive practices as forms of unfair practice. They introduce legal definitions of unfair, misleading and aggressive trading practices and set out a framework for the assessment of commercial practices that are alleged to be unfair. The CPRs also prohibit specific practices on the grounds that they are always unfair.

Advertisements are a form of trading practice and are therefore subject to the CPRs. BCAP proposes to amend its Codes to ensure that they are in line with the new legal requirements.

This consultation seeks stakeholders' opinions on whether BCAP's proposed amendments accurately reflect the new legal requirements.

Section 2

Introduction to BCAP and the ASA

The Broadcast Committee of Advertising Practice

The Broadcast Committee of Advertising Practice (BCAP) is the regulatory body with responsibility for writing and maintaining the BCAP Radio Advertising Standards Code and the BCAP TV Advertising Standards Code (the BCAP Codes) 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 advertising. Ofcom entrusted BCAP and the ASA with the regulation of broadcast advertising in 2004 in recognition of CAP and the ASA's successful regulation of non-broadcast advertising for over 40 years and in line with better regulation principles.

The BCAP Codes regulate all advertising on TV channels and radio stations licensed by Ofcom, including teleshopping channels and any additional TV service (including TV text services). They are enforced against Ofcom-licensed broadcasters.

BCAP members include broadcasters and trade associations representing advertisers and agencies. BCAP must seek advice on proposed Code changes, including the proposed amendments that derive from the Consumer Protection from Unfair Trading Regulations 2008, 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 aims to ensure that its rule drafting is transparent, accountable, proportionate, consistent and warranted, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them in its Codes.

The Advertising Standards Authority

The Advertising Standards Authority (ASA) (through its broadcast arm) is the independent body responsible for administering the BCAP Codes so that all TV and radio advertisements 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.

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. In the event of serious or repeated breaches of the BCAP Codes, the ASA can refer the licensee concerned to Ofcom, which can invoke statutory sanctions. But that is rarely necessary.

The ASA's work in regulating broadcast advertising is funded by a levy administered by BASBOF¹ on the cost of advertising space. BASBOF operates independently of the ASA, which means there is no question of funding affecting the ASA's decision-making.

Information about BCAP and the AAC can be accessed at www.cap.org.uk, which includes copies of the present BCAP Advertising Standards Codes. Information about the ASA is available at www.asa.org.uk.

¹ The Broadcast Advertising Standards Board of Finance (BASBOF, www.basbof.co.uk).

Section 3

Regulatory Framework for Unfair Advertising

Legal Position before 26 May 2008

Directive 1984/450/EC (amended by 97/55/EC) on Misleading and Comparative Advertising prohibited misleading advertising, whether directed at consumers or businesses, and set out conditions under which comparative advertising was permitted. It was implemented in UK law by the Control of Misleading Advertisements Regulations 1988 (as amended) (CMARs).

Regulatory Position before 26 May 2008

In practice, broadcast advertisements are regulated by the ASA under the BCAP Radio Advertising Standards Code and the BCAP TV Advertising Standards Code (the BCAP Codes). The Codes have proved an effective tool for the control of misleading advertisements and no legal cases were brought under CMARs against misleading broadcast advertisements.

Legal Position from 26 May 2008

The EU adopted Directive 2005/29/EC (the Unfair Commercial Practices Directive) in December 2005. The Directive prohibits unfair commercial practices directed at consumers, including unfair advertising practices. “Unfair” practices include misleading and aggressive practices.

Directive 1984/450/EC (as amended by 97/55/EC) on Misleading and Comparative Advertising has been repealed. Directive 2006/114/EC now prohibits misleading business-to-business advertisements and sets out the conditions under which comparative advertising is permitted.

The UK has implemented the Unfair Commercial Practices Directive through new legislation known as the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). It has implemented Directive 2006/114/EC through new legislation known as the Business Protection from Misleading Marketing Regulations 2008 (BPRs).

CMARs has been repealed and replaced by the CPRs and BPRs.

Regulatory position from 26 May 2008

The ASA continues to regulate broadcast advertisements under the present BCAP Codes. The vast majority of rules in the Codes are consistent with the CPRs but, to the extent that any rules are inconsistent with the Regulations, the provisions of the Regulations take precedence. BCAP intends this consultation to help ensure that its Codes are in line with the CPRs.

Enforcement of the Proposed BCAP Advertising Rules

Ofcom-licensed television and radio broadcasters are responsible for ensuring that the advertisements they carry comply with the BCAP Codes. If it considers that the BCAP Codes have been breached, the ASA can require the broadcaster not to repeat the advertisement in its present form. On those rare occasions that a broadcaster continues to broadcast advertisements that the ASA has found in breach of the BCAP Codes, the ASA can refer the broadcaster to Ofcom, which can impose statutory sanctions on the broadcaster. Ofcom can fine broadcasters and, in extreme cases, revoke the broadcaster's licence. For more information on the ASA's complaint handling procedure go to www.asa.org.uk and for Ofcom's outline procedures for statutory sanctions go to www.ofcom.org.uk.

Section 4

Policy Background to the Proposed Amendments to the BCAP Advertising Codes

General Policy Objectives

The BCAP Codes require that advertisements must comply with the law and broadcasters must make that a condition of acceptance of advertisements for broadcast. In addition, broadcasters must comply with the rules in the relevant BCAP Code, which can promote compliance with the law by reflecting legal requirements that are especially relevant to advertising. Broadcasters should feel confident that the BCAP Codes do not endorse practices that are illegal or otherwise undermine the law.

In proposing revisions to the present BCAP TV and Radio Advertising Standards Codes, BCAP's general policy objective is to incorporate the requirements of the Consumer Protection from Unfair Trading Regulations 2008 that are most relevant to advertising and to delete or revise existing Code rules that conflict with the new legal requirements.

Amendments prompted by the Consumer Protection from Unfair Trading Regulations 2008

General Prohibitions on Unfair, Misleading and Aggressive Practices

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) introduce legal definitions of unfair, misleading and aggressive commercial practices. Although the legal definitions are new, the concepts are familiar. The definitions in the CPRs comprise tests to determine whether a practice is unfair, misleading or aggressive and is, therefore, prohibited.

Instead of incorporating the tests set out in the CPRs into every BCAP Code rule that relates to unfair, misleading or aggressive advertisements, BCAP proposes to include an appendix in the TV and Radio Codes that will summarise those tests and state that, whenever the ASA considers complaints under the rules that prohibit unfair, misleading or aggressive advertisements, it will have regard to the tests set out in the CPRs.

The general prohibitions are set out in sections 3, 5, 6 and 7 of the CPRs. BCAP's proposed summaries of tests to determine those prohibitions are in Attachment A of this consultation document.

The Average Consumer

The CPRs specify that the effect of a commercial practice must be considered from the point of view of the average consumer (section 2, paragraphs 2 to 6). That is consistent with the ASA's existing practice.

In most cases, the average consumer is an average member of the population as a whole. If the advertisement is directed at a specific group of consumers, however, or if the advertisement is likely to affect the behaviour only of a vulnerable group in a way that the advertiser could reasonably be expected to foresee, the effect will be considered from the point of view of the average consumer in the affected group. The CPRs' provisions on "average consumers" are incorporated in the Appendix to the TV and Radio Codes that summarise the tests to determine unfair, misleading or aggressive commercial practices (Attachment A).

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"?

Specific Prohibitions on Unfair Practices

Schedule 1 to the CPRs contains a list of 31 commercial practices that are unfair in all circumstances. BCAP proposes to incorporate those that are, or could be, relevant to advertising into the Codes. The practices that it does not intend to incorporate are those that fall outside the remit of BCAP's Codes.

Attachment B lists the 31 banned practices that are identified in Schedule 1 of the CPRs alongside the present or proposed rules that BCAP considers reflect those banned practices. If BCAP proposes not to reflect the Schedule 1 practice in the Code, the Attachment explains why.

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?

“Invitation to Purchase”

The CPRs introduce the concept of “Invitation to Purchase”. The section of the CPRs that forbids misleading by omission (section 6) specifies information the omission of which may render an “invitation to purchase” advertisement misleading (section 6, paragraph 4). Whether the advertisement is misleading by omission is determined by means of the test set out in the general prohibition on misleading omissions (section 6, paragraph 1).

Because “invitation to purchase” is a significant aspect of the CPRs and is a concept that does not exist in the present regime for advertising regulation, BCAP proposes to include in the Codes the CPRs’ prohibition of misleading omission in advertisements that feature invitations to purchase.

Question 3

Do you consider that TV rule 5.1.4 (Attachment C) and Radio rule 3.1(b) (Attachment D) correctly reflects the CPR’s provisions on misleading omission in the case of “Invitations to Purchase”?

How the proposed amendments are incorporated into the Codes

Because users of the Codes are familiar with the existing structure of the Codes, BCAP proposes to insert the new rules in the most relevant existing section, not in a separate section or appendix. For some rules, BCAP proposes to introduce new section headings.

The full BCAP TV and Radio Advertising Standards Codes, incorporating the proposed revisions, are attached in Attachments C and D.

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?

Other background information

Ongoing Code Review

BCAP is in the middle of a comprehensive review of its Codes. BCAP intends to issue revised Codes for consultation by the first quarter of 2009. The rules proposed in this consultation are intended as an interim measure to ensure that the present Codes do not undermine the CPRs and to help broadcasters and advertisers to

comply with the requirements of the Consumer Protection from Unfair Trading Regulations 2008 that are most relevant to advertising.

The fully revised BCAP Codes to be published in 2009 will incorporate all of the rules that are agreed as a result of this consultation. The revised Codes will be the subject of a full public consultation, so respondents will have a second opportunity to comment on the attached rules. Although BCAP intends this consultation to be the main vehicle for stakeholder comment on the amendments proposed in light of the CPRs, stakeholders could well be able to offer more comments in the full Code Review consultation, on the basis of their experience of the rules, and BCAP will take such comments into account at that time.

Non-broadcast advertisements

Non-broadcast advertisements are regulated by the ASA under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code).

The Committee of Advertising Practice (CAP), the self-regulatory body that creates, revises and enforces the CAP Code, has also amended its Code to reflect the CPRs. It has drafted the amended Code with advice from the Office of Fair Trading. CAP is not, however, consulting beyond its own membership on those proposed amendments². CAP will take into account any changes that BCAP makes as a result of this consultation in its comprehensive review of the CAP Code.

² BCAP is obliged to consult under the terms of the contracting-out agreement with Ofcom. Consultation is a time-consuming process, however, which means that the implementation of amendments to the BCAP Code will be necessarily delayed. CAP is not legally obliged to consult and has decided to publish its amendments as soon as possible.

Guide to attachments

The proposed amendments are set out in four attachments:

Attachment A summarises the general provisions of the CPRs as they relate to advertisements. BCAP proposes to include this summary in the TV and Radio Codes as an Appendix.

Attachment B is a table showing the 31 practices that are defined in Schedule 1 of the CPRs as being “always unfair” and the requirements for “invitations to purchase”. For each practice, the table shows the corresponding provision in the TV and Radio Codes.

Note on Attachment B

In some cases, BCAP proposes to add new rules; in others, BCAP proposes no amendment, because it considers that existing rules effectively prohibit the banned practice; and in some cases, BCAP proposes to delete existing rules and replace them with rules that more closely reflect the CPRs. Text in capital letters states whether the proposed action is to add, delete or maintain rules. For some practices, BCAP considers no amendment is necessary because, in BCAP’s view, the practice falls outside the scope of the Codes; in those cases, the table explains why no amendment is proposed.

Attachment C is a marked-up version of the TV Code. **Attachment D** is a marked-up version of the Radio Code. In these attachments, proposed additions are underlined and proposed deletions are struck through.

Note on Attachments C and D

In some cases, BCAP proposes to replace an existing rule with another very similar rule. In those cases, the existing rule is struck through. The replacement rule is shown beneath it, with wording taken over from the present rule in normal type and new wording underlined. In other words, text that appears in normal type already exists in the present Codes and does not derive from the CPRs.

All rules that include new wording, both new rules and amendments to existing rules, have been given new unique numbers. That is to ensure clarity about the requirements of each rule before and after the introduction of the CPRs.

Text in blue boxes beneath proposed amendments shows the CPRs provision on which the amendment is based.

Annex 1

Consultation questions

BCAP welcomes all responses to this consultation. To help us to evaluate your response more efficiently, BCAP prefers respondents to address the questions below. (See 'Responding to this consultation'.)

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"?

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?

Question 3

Do you consider that TV rule 5.1.4 (Attachment C) and Radio rule 3.1(b) (Attachment D) correctly reflects the CPR's provisions on misleading omission in the case of "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?

Please:

- be as specific as possible in your responses;
- if you disagree with a BCAP proposal, explain why and
- suggest an alternative proposal.

Annex 2

Responding to this consultation

How to respond

BCAP invites written comments on the proposals contained in this document, including supporting evidence, by **5pm on 22 July**.

When responding, please state whether you are doing so as an individual or if you are representing 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.

We strongly prefer to receive responses as e-mail attachments, in Microsoft Word format, because that helps us to process the responses.

Please send your response to consult@cap.org.uk.

If you are unable to reply by e-mail, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

Catherine Thomas
Broadcast Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

Accessibility

We want our consultation process to be accessible to everyone. If you have particular accessibility needs please contact us and we shall be happy to help.

Telephone: 020 7492 2200
E-mail: consult@cap.org.uk
Fax: 020 7404 3404
Textphone: 020 7242 8159

Note that we do not need a hard copy in addition to an electronic version. Also note that BCAP will not routinely acknowledge receipt of responses.

BCAP has sent written notification of this consultation to the organisations and individuals listed on pages 17 & 18. We welcome suggestions of others you think should be informed of this consultation.

More information

If you have any questions about this consultation or need advice on the form of response, please contact BCAP's Code Policy team on +44 (0)20 7492 2200.

Confidentiality

BCAP considers that everyone who is interested in the consultation should see the consultation responses. We shall publish all non-confidential responses on our website, www.cap.org.uk, usually within three months of the end 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 e-mail 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.

Annex 3

List of Consultees Invited to Respond

To obtain a variety of opinions, BCAP has invited these individuals and organisations to respond to this consultation:

Advertising Association
Advertising Producers Association
Age Concern
Aspra
Association of Advertisers in Ireland
Association of British Insurers (ABI)
Association of Commercial Television in Europe
Association of Professional Astrologers
Astrological Association of Great Britain
Better Regulation Executive
British Astrological & Psychic Society
British Interactive Media Association
British Internet Publishers Alliance
British Promotional Merchandise Association
British Retail Consortium
British Shops & Stores Association
Cinema Advertising Association
Clearcast
Competition Commission
Confederation of British Industry
Data Publishers Association
Department for Business, Enterprise and Regulatory Reform
Department for Culture, Media and Sport
Direct & Database Publishers Association
Direct Marketing Association
Direct Selling Association
Electronic Retailing Association UK
European Advertising Standards Alliance (EASA)
European Group of Television Advertising (EGTA)
Food Advertising Unit
Gambling Commission
Health Food Manufacturers Association
Incorporated Society of British Advertisers
Institute of Directors
International Advertising Association (IAA)
International Chamber of Commerce UK
Internet Watch Foundation (IWF)
Institute of Practitioners in Advertising
Institute of Sales Promotion
Internet Advertising Bureau
J Walter Thompson & Co

Lacors
Mail Order Traders Association
Media Watch UK
Mobile Broadband Group
Mobile Marketing Association
National Consumer Council
National Consumer Federation
Newspaper Publishers Association
Newspaper Society
Ofcom TV and Radio Licensees
Outdoor Advertising Association
Periodical Publishers Association
PhonepayPlus
Postwatch
Press Complaints Commission
Proprietary Association of Great Britain
Radio Advertising Clearance Centre
RadioCentre
Royal Mail
Safe Home Ordering Protection Scheme
Satellite & Cable Broadcasters' Group
Scottish Daily Newspaper Society
Scottish Newspaper Publishers Association
The Chartered Institute of Marketing
The Financial Services Authority
The Institute of Direct Marketing
The Marketing Society
The National Association of Citizens Advice Bureaux
Thinkbox
Voice of the Listener & Viewer
Which?
World Federation of Advertisers

Please note that BCAP welcomes responses from all other interested parties. Copies of this document are available in alternative formats upon request. Please contact us at:

Code Policy Team
Broadcast Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

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F +44 (0)20 7404 3404

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The Broadcast Committee of Advertising Practice (BCAP) is the industry body responsible for writing and enforcing the UK's TV and radio advertising Codes to ensure that all broadcast advertisements are legal, decent, honest and truthful.

To find out more about the work of the Committee or to subscribe to our quarterly advertising industry e-mail newsletter, visit our website at:

www.cap.org.uk