

APPENDIX 3 THE DMCCA AND THE BPRS



Background

As well as this Code, advertising is subject to legislation. See www.asa.org.uk for a non-exhaustive list.

The Digital Markets, Competition and Consumers Act 2024 (DMCCA)

One important piece of legislation that affects broadcast advertising is the Digital Markets, Competition and Consumers Act 2024 (DMCCA). For the purpose of the Regulations and in this Appendix, "consumers" refers to individuals acting outside the course of their business. Chapter 1 of Part 4 of the DMCCA prohibits unfair advertising to consumers, including misleading or aggressive advertising. Whenever it considers complaints that an advertisement misleads consumers or is unfair or aggressive to consumers, the ASA will have regard to the relevant section of the DMCCA. That means it will take factors identified in the DMCCA into account when it considers whether advertisements breach the BCAP Broadcast Advertising Code. Relevant principles established in the DMCCA are summarised below. The summary is not an exhaustive statement of the effect of the DMCCA and licensees who would like detailed guidance on the DMCCA, as opposed to the Code, should seek legal advice.

Many rules in this Code prohibit misleading advertising. All rules that refer to misleading advertising should be read, in relation to business-to-consumer advertising, in conjunction with this summary:

Consumers

The likely effect of an advertisement 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 reasonably well-informed, observant and circumspect. In some circumstances, an advertisement may be considered from the point of view of the average member of a specific group.

The average consumer is to be treated as not knowing information in relation to a commercial practice where such information has been concealed by the trader (even if the average consumer might know the information from another source).

- If the ad is directed to a particular group, the advertisement will be considered from the point of view of the average member of that group.
- If an advertisement is likely to affect the economic behaviour of an identifiable group of people who are particularly vulnerable, in a way that the advertiser could reasonably be expected to foresee, because of, for example, mental or physical health, age, credulity,

or the circumstances that group of people is in, the advertisement will also be considered from the point of view of the average member of the affected group.

Misleading advertisements

Advertisements are misleading if they

- are likely to deceive consumers and
- are likely to cause consumers to take transactional decisions that they would not otherwise have taken.

A "transactional decision" is any decision made by a consumer relating to the purchase or supply of a product (including whether, how or on what terms to make the purchase or supply); the retention, disposal or withdrawal of a product (including whether, how or on what terms to retain or dispose of it); or the exercise of contractual rights in relation to a product (including whether, how or on what terms to exercise such rights).

Advertisements can mislead consumers even if they do not include false information; for example, they can deceive through presentation or by omitting important information that consumers need to make an informed transactional decision.

Aggressive advertisements

Advertisements are aggressive if they use harassment, coercion or undue influence.

Unfair advertisements

Advertisements are unfair if they

- are likely to cause the average consumer to take a transactional decision that the consumer would not have taken otherwise, as a result of a practice involving one or more of the following:
 - o a misleading action
 - o a misleading omission
 - o an aggressive practice
 - o a contravention of the requirements of professional diligence
- omit material information from an invitation to purchase
- involve a practice prohibited in all circumstances under the DMCCA

"Professional diligence" is the standard of skill and care that a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice or the general principle of good faith in the trader's field of activity.

An “invitation to purchase” is a commercial practice involving the provision of information to a consumer which indicates the characteristics of a product and its price, and which enables, or purports to enable, the consumer to decide whether to purchase the product or take another transactional decision in relation to the product.

The Business Protection from Misleading Marketing Regulations 2008 (the BPRs)

Business-to-business advertisements are subject to the Business Protection from Misleading Marketing Regulations 2008 (the BPRs). Under the BPRs, an advertisement is misleading if it:

- in any way, including its presentation, deceives or is likely to deceive the traders to whom it is addressed or whom it reaches and by reason of its deceptive nature, is likely to affect their economic behaviour
- or, for those reasons, injures or is likely to injure a competitor.

The BPRs also set out the conditions under which comparative advertisements, directed at either consumers or businesses, are permitted. This Code incorporates those conditions.