

The Broadcast Committee of Advertising Practice (**BCAP**) proposes to amend the 'pester power' provision in Rule 5.9 of the BCAP Code. The proposed change will represent a small but significant relaxation in the UK regulatory regime.

What is BCAP?

BCAP is a non-governmental body made up of advertising industry representatives who draft the Code with the aim of safeguarding the integrity of advertising in the UK. The BCAP Code is enforced by the Advertising Standards Authority (**ASA**), which is also a non-governmental body, but which does have special recognition as a legitimate regulator of the advertising industry by the Government. Compliance with the BCAP Code is mandatory.

Changes to Rule 5.9

The current Rule 5.9 prohibits advertisements from "*encouraging*" children to buy a product or service or from asking their parents and others to "*buy or enquire about a product or service*". The Rule is seen as unnecessarily restrictive by many advertisers, particularly in light of the legislation that Rule 5.9 of the BCAP Code is supposed to reflect: namely, the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**). In particular, paragraph 28 at Schedule 1 to the CPRs contains a list of 'banned' practices, which, if engaged in, will always be considered "unfair" and thus unlawful (note however, that engaging in that particular practice will not be criminal under Regulation 12 of the CPRs). Paragraph 28 to Schedule 1 of the CPRs contains a pester power rule, but it is less restrictive than the current wording in BCAP Rule 5.9.

BCAP proposes bringing Rule 5.9 into line with the CPRs so that there would no longer be a prohibition against "*encouraging children to enquire*" about a product or service. The wording of the CPRs is that traders are not permitted to include in an advertisement a "*direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.*" Note also use of the word "*persuade*", rather than "*encourage*". BCAP also proposes to harmonise this aspect. The result of the BCAP proposed amendments would be to permit ads to (i) indirectly encourage children to persuade parents to buy something; and (ii) encourage children to ask their parents to enquire about a product.

The European Directive which the CPRs implement also refers to persuading an adult to "*hire*" as well as "*buy*". BCAP wishes to include this extra word within a revised Rule 5.9, even though the UK Parliament did not consider it necessary to include the word in the CPRs.

Implications

The small change will be welcomed by many advertisers, since there is no good reason for the inconsistency. The current version of the BCAP Code is an example of 'gold-plating' EU rules, which the UK is sometimes accused of. The argument is that such overly-restrictive rules put UK traders at a disadvantage on the EU platform, since the rules in other EU member states do not prohibit ads on pester power to encourage mere enquiries.

The practical effect of the change, if adopted, will be twofold. Firstly, advertisers will have greater certainty that a pan-EU campaign will not face objection on the pester power point if it complies with the wording in the Directive i.e. it will not fall down on that point simply because the UK has enacted slightly stricter rules. Secondly, Trading Standards and the Competition and Markets Authority (having taken over from the Office of Fair Trading as regulators in this area) are very unlikely to enforce the CPRs against an ad in breach of paragraph 28 to Schedule 1 of the CPRs. Such enforcement is much more likely to be dealt with by the ASA under the BCAP code and, as such, it makes sense for the rules to be consistent for the regulator most likely to be handling these compliance issues.

One wonders whether this review represents a further step towards the full harmonisation of the BCAP Code with English law. There remain many provisions which BCAP thinks fit to include within the Code, but which have no legal basis (and which, consequently, cannot be enforced by Trading Standards as the ASAs 'legal backstop'). Just one example of a provision which appears in the Code but which does not form part of wider law is the prohibition against using models in ads who are (or appear to be) under the age of 25 to sell alcohol. The accepted consensus is that this rule exists to prevent the promotion of underage drinking. However, it remains to be seen whether rules such as this will survive further future reviews of the BCAP code if the intention is to ensure that the code and wider law run in close parallel. Nonetheless, advertisers looking to conduct more risqué advertising may see this as their opportunity to lobby hard for a relaxation of some of the more onerous rules which do not have solid legal foundation.

BCAP's proposal is currently out for consultation. The consultation ends on 22 July 2014. Squire Patton Boggs has a team of advertising experts who are closely involved in this and other similar consultations. If the proposed change to Rule 5.9 impacts on your business, we can work with you to add your views to the consultation within the deadline. Please feel free to contact Carlton Daniel on this or any other advertising issue.

Contacts

Carlton Daniel

Senior Associate

T +44 20 7655 1026

E carlton.daniel@squirepb.com