

Broadcast restriction of ads for unregulated investments

Broadcast Committee of Advertising Practice consultation to clarify the scope of broadcast restrictions on ads for unregulated investments

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1. Executive summary

The Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (BCAP Code) are consulting on an amendment to their rule restricting ads for certain types of financial products to specialised financial channels, stations and programming.

The BCAP Code has long included a rule that restricts ads for certain types of complex financial products to specialised financial channels, stations and programming, meaning that such ads cannot be broadcast on mainstream TV or radio to a general audience. The restriction was put in place by the Independent Television Commission (ITC), the predecessor of Ofcom, because of concerns about the relative unsuitability of TV and radio as media for promotion of complex financial products, with their attendant risks for investors.

Wider review of the Code section has revealed a previously unidentified technical interpretation issue with the rule and its interaction with the wording of the background to the section, which has the unintended effect of banning TV ads for mass market financial products that would fall outside a layman's understanding of an 'investment', on mainstream channels. This consultation seeks to clarify that the restriction in rule 14.5.4 applies to unregulated products that would be regarded as investments, in a conventional sense. 'Investment activity' defined under the Financial Services and Markets Act (FSMA) includes services unlikely to be regarded by the public as investments, and therefore the Code as currently worded unintentionally restricts ads for products that do not conform with the type of high-risk investments the rule was intended to keep away from mass audiences.

The consultation will close at 5pm on Thursday 31 October 2024. For more information on how to respond, please see section 7.

2. Introduction to UK advertising regulation

2.1 The Broadcast Committee of Advertising Practice (BCAP)

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). Ofcom has a statutory duty, under the Communications Act 2003, to maintain standards in TV and radio advertisements. In 2004, Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in recognition of CAP and the ASA's successful regulation of non-broadcast marketing for over 40 years, and in line with better regulation principles.

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). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to adhere to the standards set out in the BCAP Code.

BCAP members include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). Under Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule-making is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Further information about BCAP and the AAC is available at www.cap.org.uk.

2.2 The Advertising Standards Authority (ASA)

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertising is legal, decent, honest and truthful.

The ASA assesses complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the ASA's website and made available to the media. If the ASA Council upholds a complaint about an ad, it must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions. Information about the ASA is available at www.asa.org.uk.

2.3 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The [Communications Act 2003](#) (the Act) sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to this consultation is:

[319\(2\)\(h\)](#) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The Act requires Ofcom to set and, from time to time, review and revise, a Code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#). Ofcom has contracted out the setting of advertising standards to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and Specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and agreement of Ofcom.

3.2 Existing rule

The following sections from the BCAP Code Financial products, services and investments section is under consideration:

[Background]

The rules in this section largely draw attention to statutory regulation with which all advertisements must comply. Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).

[...]

[Definitions]

Under FSMA, a financial promotion is "an invitation or inducement to engage in investment activity" that is made "in the course of business" and is "capable of having an effect in the UK." That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA. Under FSMA, "investment activity" does not cover only conventional investments; it includes deposits, home finance transactions (regulated mortgages, home purchase plans and home reversion plans), unsecured consumer credit or consumer hire agreements, other forms of secured consumer credit or hire and credit-related activities, such as credit broking, debt counselling, debt adjusting and most insurance, including some advertisements by insurance intermediaries (see the Insurance Conduct of Business sourcebook - ICOBS).

[...]

14.5

These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

14.5.1

advertisements for the acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FCA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive)

14.5.2

advertisements for spread betting, as an investment only. Spread betting advertisements may be advertised on interactive or additional TV services (including text services). They must comply with the gambling rules (see Section 17: Gambling). The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience

14.5.3

advertisements for contracts for differences (except spread betting), provided the products are available only to clients who have demonstrated through an appropriate pre-vetting procedure that they have relevant financial trading experience.

14.5.4

advertisements for investments not regulated or permitted under FSMA. An advertisement that implies, for example, that a collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

4. Proposals

BCAP are proposing an amendment to BCAP Code Section 14:

Proposed amendments:

[Background]

Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA) and are (or are presented as) conventional investments (in the sense that the consumer may invest money with the expectation of a return).

[...]

[Definitions]

Under FSMA, a financial promotion is "an invitation or inducement to engage in investment activity" that is made "in the course of business" and is "capable of having an effect in the UK." That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA. Under FSMA, "investment activity" does not cover only conventional investments (in the sense that the consumer may invest money with the expectation of a return) [...]

14.5

These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

[...]

14.5.4

advertisements for investment products not regulated or permitted under FSMA that are (or are presented as) conventional investments (in the sense that the consumer may invest money with the expectation of a return). An advertisement that implies, for example, that a collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

5. Background

Regulation of financial promotions in broadcast media

Unlike in the non-broadcast Code, which assigns the ASA responsibility for regulating non-technical aspects of ads for FCA-regulated financial products only (with the FCA regulating technical aspects), the ASA is responsible for regulating both technical and non-technical aspects of ads for financial products when it comes to broadcast media. This is a consequence of BCAP and the ASA's delegated duties under the Communications Act 2003. Most rules in the financial section of the broadcast Code draw attention to statutory regulation, and the ASA may seek the input of the FCA on the interpretation of those rules when investigating cases.

Existing restriction on ads for complex financial products

The rule restricting certain types of financial products to specialised financial channels and programming does not derive from FCA regulation, but was put in place by the ITC, the predecessor of Ofcom. The introduction to the financial rules section of the BCAP Code states that selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising certain types of financial products.

Rule 14.5 explicitly restricts to specialised financial channels several specific categories of complex financial investments, including derivatives, spread betting and contracts for differences. In addition, it includes a general sub-clause that refers to ads for investments not regulated or permitted under FSMA.

Scope of 'investment activity'

In the course of carrying out a wider internal review of the financial section of the BCAP Code, which included a proposal to introduce a new rule explicitly banning ads for qualifying cryptoassets from mainstream TV, BCAP identified a technical interpretation issue that had not been considered previously.

The introduction to Section 14 of the Code replicates the definition of investment activity from FSMA, which includes:

deposits, home finance transactions (regulated mortgages, home purchase plans and home reversion plans), unsecured consumer credit or consumer hire agreements, other forms of secured consumer credit or hire and credit-related activities, such as credit broking, debt counselling, debt adjusting and most insurance

BCAP understands that the reason for the categorisation stems from legacy wording within FSMA. 'Investment activity' was used as a catch-all term to cover anything related to activities involving financial risk in earlier legislation. That was unchanged when transposed into FSMA, and various categories have been added to the definition of 'investment activity' over time, including others that do not refer to investments in a conventional sense.

In the absence of clarification to the contrary within the BCAP Code, BCAP considers it must follow that the 'investments' referred to in rule 14.5.4 be interpreted to include all of those products within the scope of the FSMA definition of 'investment activity'. That would mean that some products unlikely to be regarded as investments, in a colloquial sense,

should be considered unregulated investments for the purposes of the rule and ads for those products should be restricted solely to specialist financial channels and programming. Although in theory there may be others, the only real-world example BCAP has identified that would be caught by this is unregulated buy-now-pay-later (BNPL) credit.

In that context, this outcome appears somewhat counterintuitive; an offer of credit to a potential borrower does not fit with a layperson's understanding of an investment. BCAP considers that an 'investment' is likely to be understood by an average consumer to denote some type of product or opportunity in which they can invest capital, with the intention of making a profit.

Current practice and rationale for not applying the restriction to all products falling within the FSMA definition

In practical terms, the position set out above does not reflect how the restriction in 14.5 is currently being understood and applied.

BCAP considers that applying a restriction to BNPL ads is unlikely to be proportionate and in line with the intended scope and purpose of the restriction.

The introduction to the Code section states:

Selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the Financial Services and Markets Act 2000 (FSMA).

This appears to refer to two discrete categories: high risk or specialist investments or any financial products or services that are not regulated or permitted FSMA. The latter is broader than just investments.

However, the wording of 14.5.4 is at odds with this, as it refers specifically to ads for investments not permitted or regulated under FSMA. The example provided is of an unregulated product that is presented as having investment potential.

The products listed explicitly under the rule are complex, specialist financial tools that are subject to client approval processes and risk warnings, due to the high level of risk at which an investor is placing their own capital.

Based on the above, the Executive considers it is unlikely that the restriction was envisioned to cover a product like BNPL, which is an interest-free loan, repayable over 12 months or less.

There are valid concerns about BNPL and its take-up among consumers in a high cost of living environment. Customers can incur late repayment fees and may see an impact on their credit score. It is therefore important that providers make clear they are offering a credit service, and communicate material information to consumers, as detailed in CAP's [guidance on delayed payment services](#).

But BNPL products are a mass-market product and do not present the same type and level of risks of those sorts of complicated investment products that the broadcast restriction rule

explicitly refers to, which put consumers at risk of losing all their money. BNPL credit services were exempted from regulation in part due to the relatively low level of risk they pose, as compared to credit that charges interest.

It is also important to point out that, although BNPL services have become more and more prominent and widely incorporated into online retail sites in recent years, unregulated interest-free credit is not new. A structurally similar form of credit has long been available in bricks and mortar stores. Such services would also come under the umbrella of unregulated 'investment activity': however, BCAP is not aware of the restriction being applied to such services, or of any argument that it should have been applied to them.

Therefore, BCAP proposes to take steps to clarify the scope of the restriction, such that it applies in practice to high risk/specialist or unregulated investments, and not to unregulated products that do not meet a similar risk level.

Other unregulated products excluded by the proposed amendments

BCAP is not aware of any other products that fall within the parameters of the definition of investment activity in FSMA, and that are also unregulated. If BCAP's assumptions about the intended effect and legitimate scope of the rule are correct then there is no reason to assume that other products not known at the present time should enjoy similar freedom to advertise.

BNPL regulation

BCAP notes the previous Government promised to regulate BNPL credit following the recommendations of the Woolard Review, however legislation was delayed and ultimately never laid. Labour have also pledged to bring forward legislation in this area, but details and timelines are not clear. BCAP has not seen anything to suggest that the plans to regulate the sector arise from a changed assessment of its risk profile that would warrant applying the kind of restriction that rule 14.5.4 was intended to impose, and that BCAP presently regards as inadvertent in its practical application to BNPL. BCAP will continue to monitor developments in this area.

Notwithstanding the regulatory status of BNPL credit, BCAP considers that the amendments proposed by this consultation would provide useful clarification and bring the rule in line with its intended scope to limit public exposure to ads for investments subject to high risk due to their nature, complexity, or lack of regulation and protection.

6. Consultation question

Proposed amendments:

Questions: Do you agree with BCAP's proposed amendments to Section 14, including rule 14.5.4 ?

Are there any unregulated financial products caught by the FSMA definition of 'investment activity' that would not be caught by BCAP's proposed revised definition of conventional investments, that, in your view, should not be advertised to a mass-market audience? If so, why?

7. How to respond and next steps

CAP and BCAP are committed to considering all responses carefully and with an open mind. CAP and BCAP would particularly welcome responses from stakeholders with an interest or expertise in games, apps, and digital purchasing.

The following summarises the consultation process and subsequent stages of CAP's consideration of the proposed changes to the Code:

- the consultation will run for six weeks, closing at 5pm on **31 October 2024**;
- CAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions they make; and
- the evaluation will be published on the CAP website when the outcome of the consultation is announced.

How to respond

CAP and BCAP invite written comments and supporting information on the proposals contained in this document by 5pm on **31 October 2024**.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing.

Please send responses to: AdPolicy@cap.org.uk

If you are unable to respond by email you may submit your response by post to: Regulatory Policy Team, Committee of Advertising Practice, Castle House, 37-45 Paul Street, London EC2A 4LS.

Confidentiality

CAP and BCAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses will be published with the outcome 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 email 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 nonconfidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

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