

ASA system submission to HM Treasury's consultation on the regulation of Buy-Now Pay-Later

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'
- 1.2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 59 years and the broadcast Advertising Code (written and maintained by BCAP) for 17, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.
- 1.4. As the UK's frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.
- 1.5. We use our convening powers to bring together the ad industry and media owners to set, maintain and police high standards. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.
- 1.6. The UK Advertising Codes are drafted and maintained by CAP and BCAP, supported by experts in our Regulatory Policy team. This authorship of the rules by the ad industry is an important part of our system. It means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. Many of the rules derive directly from legislation, of course. For example, the rules requiring ads not to mislead or be likely to mislead originate from UK consumer law. However, many do not, particularly those seeking to prevent harm, offence and social irresponsibility. Whichever the case, in setting the rules which govern UK advertising, CAP and BCAP have multiple checks and balances in place to ensure the process is transparent, open to scrutiny and follows the principles of good regulation. From calls for evidence and public consultations on rule changes, having an independent consumer panel advising CAP and BCAP, Ofcom signing off on BCAP rule changes and, ultimately, the ASA System's processes being open to judicial review. All to ensure the system is wholly accountable to everyone with a stake in advertising.

- 1.7. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided 722,523 pieces of advice and training in 2020.
- 1.8. The ASA system is providing this written submission in response to HM Treasury's consultation on the regulation of Buy-Now Pay-Later.

2. The ASA's remit and finance-related advertising

- 2.1. It is important that we set out to HM Treasury the ASA's remit over finance-related advertising and relationship with the Financial Conduct Authority (FCA). We have a very close working relationship with the FCA and they're an important regulatory partner. As mentioned in 1.4, working with them and other regulators is essential to consumer protection, and we place great emphasis on effective collaboration to avoid regulatory gaps.
- 2.2. Advertising of financial products is regulated by the FCA and the ASA, with a division in remit between the two regulators and between broadcast and non-broadcast marketing material.
- 2.3. Where a product falls under the regulation of the FCA (including pensions, investments, insurance, deposit and savings accounts, mortgages, consumer credit, peer to peer lending, credit brokerage and debt management providers) marketing communications in non-broadcast media also fall under their regulatory remit, and complaints about the technical elements of these ads are considered by the FCA.
- 2.4. The ASA considers any complaint about the non-technical elements of a non-broadcast ad for a regulated product, such as serious or widespread offence or social responsibility and considers all aspects of a complaint, including the technical elements, against an ad for a financial product which is not regulated by the FCA.
- 2.5. In broadcast media, the ASA considers all complaints about technical and non-technical elements of financial product ads, informing the FCA should any complaint be considered for investigation.

3. The ASA's work on Buy-Now Pay-Later advertising

- 3.1. As the consultation document acknowledges, the ASA has already intervened following complaints about ads for Buy-Now Pay-Later (BNPL) services and has published rulings on the potential for these ads to mislead consumers, to take advantage of consumers' inexperience of the product, and to be marketed in an irresponsible way by promoting excessive or unaffordable spending.
- 3.2. In 2020, we ruled against the BNPL provider, [Klarna Bank AB](#), for being socially irresponsible. The ruling centred on four Instagram posts by social media influencers that suggested that buying goods through Klarna's different payment schemes, including BNPL, could lift consumers' mood during the Covid-19 lockdown.
- 3.3. Similarly, a ruling against [Currys PC World](#) in 2021, was upheld because it implied that Christmas gifts bought on a BNPL scheme were likely to be better received because they would be more expensive / luxurious, than a gift purchased without BNPL credit. Set alongside the uncertainty of the Covid-19 pandemic on consumers' finances we considered the ad to be socially irresponsible.

- 3.4. A website ad by [Laybuy Holdings UK Ltd](#) claimed that with a small amount of information about a consumer, a credit check could be carried out to determine their suitability to use Laybuy's services and that this check would have no impact on a consumer's credit score. Following investigation by the ASA, Laybuy were unable to provide evidence that generally a consumer's credit score would always be unaffected by their search, and we concluded that the ad was misleading.
- 3.5. A poster for BNPL provider, [DivideBuy](#), was seen at the side of a football pitch and included the text 'A smarter way to pay'. The ASA found that the ad was socially irresponsible as we considered that the ad encouraged consumers to use credit for non-essential purchases when that may not be suitable for their circumstances. We also concluded that the ad did not make sufficiently clear, as required by our Codes, that it offered a form of credit.
- 3.6. As well as rulings that help frame responsible advertising, CAP [published guidance](#) in December 2020 on the advertising of delayed payment services. The guidance sets out how advertisers can prevent BNPL ads from misleading consumers. Most notably, it provides advertisers with comprehensive information to ensure that consumers fully understand that BNPL is a form of credit and that late payments could incur fees or other interventions.
- 3.7. Having identified BNPL as one of our three priority areas for our ongoing work into financial advertising, and in support of the findings of the FCA's [2021 Woolard Review](#), we are proactively gathering examples of adverts from both lenders, and importantly the merchants, of BNPL with a view to understand if the information on retailers' own websites, as part of the consumer's transactional journey, makes the implication of a BNPL agreement and its potential risks clear to the consumer.

4. The consultation proposals

- 4.1. We welcome the opportunity to respond to HM Treasury's consultation on BNPL service which have become increasingly available to customers at the 'checkout' of online retailers and are popular with younger consumers who may have less experience that these payments are a type of debt. It is vital that any future regulatory regime has appropriate regard to the effective safeguards our rules and guidance have in place to prevent consumers from being misled or harmed.
- 4.2. The ASA currently regulates 'non-technical' aspects of the creative content of non-broadcast BNPL advertising, and, under the Communications act and via contract with Ofcom, we are the frontline regulator for all aspects of the creative content of broadcast BNPL ads. We would be grateful to learn whether and, if so, how HM Treasury's proposals would affect these arrangements.
- 4.3. Currently, companies broking regulated credit need to be authorised, for example those offering car finance, store cards or comparison sites. Any complaints we receive about the technical aspects of these are therefore referred to the FCA. The consultation document suggests that because of the cost to BNPL merchants in applying for authorisation and the potential consumer detriment if they, consequently, choose not to apply, merchants would not need FCA authorisation as a broker, but instead would need promotions to be approved by an authorised person. We seek clarification on whether the information on a merchant's website would therefore be covered by the FCA rules, or because they are not authorised, whether the information (such that it constitutes a marketing communication directly connected with the supply or transfer of the BNPL product – bringing it in scope of the CAP Code) provided by the merchant would be considered by the ASA. The consultation suggests that 'higher risk'

merchants/services may be excluded from the proposed credit broking exemption, and we also ask for clarity on how advertising / promotions by these potential exceptions would be regulated.

- 4.4.** We welcome the consultation document's mention of the status of merchant information within the authorisation process. As noted in 3.7, the ASA is currently looking at retailers' own websites with a view to addressing how the BNPL option should be displayed. Whilst the regulation of lender screens is positive, we would not consider that these pre-contractual screens would be sufficient to mitigate risk if the merchant's own information was insufficient or misleading. We hope HM Treasury will look to any future recommendations by the ASA on merchants' own websites to remove the possibility of misinformation at any stage in a consumer's transactional journey.
- 4.5.** We also note, more generally, that the proposals look at information provided by merchants and lenders but don't mention any third-party agents, such as social media influencers. It would be welcome if the proposals made clear that they capture third party agents as is the case for other regulated products.

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