

## ONLINE ADVERTISING PROGRAMME – UK GOVERNMENT PROPOSES INCREASED REGULATORY OVERSIGHT

The UK Government is consulting on increasing regulatory oversight across the advertising supply chain in an effort to improve transparency and accountability. This could impact not only advertisers but also intermediaries and publishers, with options ranging from maintaining the existing self-regulatory framework through to full statutory regulation.

### The Rise of Online Advertising and Digital Regulation

Digital advertising is increasingly becoming part of everyday life as consumer habits move online. The rapid growth of the online advertising industry has meant that regulatory protections have failed to keep pace appropriately to address the potential harms arising from advertising.

As a result, the Government has launched a consultation on proposed reforms to the regulatory framework governing digital advertising in the UK (the **Consultation**) in the context of its Online Advertising Programme (**OAP**). This also follows the Call for Evidence undertaken by the Government in 2020 which resulted in the majority of stakeholders calling for significant regulatory reform, on the basis that the current regulatory system is insufficient.

The Government has stressed the need for a coherent, innovation-friendly approach to digital regulation and the proposals for reform are intended to “*encourage the use of tech as an engine for growth in order to drive prosperity and create competitive and dynamic digital markets*”. The Consultation acknowledges that regulatory solutions will need to successfully reflect the main market dynamics, and be flexible and proportionate for the different market participants.

The proposed reforms will complement the Government’s work to establish a pro-competition regime for digital markets overseen by the Digital Markets Unit sitting within the Competition and Markets Authority (**CMA**) (see our [client briefing](#)). In line with this, the Consultation relies heavily on the analysis and conclusions of the CMA’s market study into online platforms and digital advertising, concluded in July 2020.

The Consultation seeks views from the industry on whether the current self-regulatory system is fit for purpose and is open until 1 June 2022.

### Key issues

- The UK Government considers that the ASA’s self-regulatory model has failed to adequately address harms caused by the rapid growth of online advertising.
- In particular, the self-regulatory model mainly deals with advertisers rather than every actor in the marketing and advertising supply chain.
- The proposed reforms include various measures designed to improve transparency and accountability, and options under consideration include expanding the existing self-regulatory remit, and introducing a statutory regime and regulator.
- The proposed reforms complement the new pro-competition regime under the Digital Markets Unit as well as the forthcoming Online Safety Bill, which seeks to protect individuals from user-generated illegal and harmful online content.
- The Consultation seeks views by 1 June 2022.

## **The Current Regulatory Landscape in the UK**

As discussed in previous [Talking Tech articles](#), advertising in the UK is regulated by the independent Advertising Standards Authority (**ASA**), responsible for the day-to-day enforcement of (1) the UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing (the **CAP Code**); and (2) the UK Code of Broadcast Advertising (the **BCAP Code** and together the **UK Codes**). The UK Codes set certain rules and standards which businesses must comply with when advertising or marketing their products or services in the UK.

The CAP Code, written and maintained by the Committee of Advertising Practice (**CAP**), is most relevant to digital advertising. The overarching aim of the CAP Code is to ensure that all UK non-broadcast ads (including online advertising) are responsible, accurate and not misleading, harmful or offensive. Businesses should ensure that they can substantiate any claims made in their marketing communications, including (without limitation) comparisons, pricing information and green labels, which should not mislead or distort reality.

Although the CAP Code has no statutory underpinning, and neither the CAP nor the ASA directly interpret or enforce the law, compliance with the CAP Code is mandatory for all businesses that advertise in the UK or directly market to UK consumers. The UK Codes and the advertising-specific rules contained therein sit alongside wider UK legislation, with the most relevant to the online advertising market being consumer, competition and data protection regulations. The UK Codes complement existing laws in the UK and exist to encourage and support compliance with applicable law.

If a business fails to comply with the rules set forth in the CAP Code, the ASA can rely on certain sanctions including **'naming and shaming' advertisers**, denial of media space, disqualification from awards, targeted ads against the defaulting business, preventing ads appearing in search engine results and more. Moreover, other UK regulatory authorities (e.g. Trading Standards) may impose additional sanctions, including fines and, for the most serious cases, imprisonment. At present, responsibility for advertising falls primarily to the businesses that are advertising and sometimes to those involved in preparing or publishing the communication (e.g. marketing consultants). However, there are limited circumstances in which online service providers may also fall within the ASA's remit.

The Consultation is seeking views on whether this regime is effective and proposes a number of new measures to prevent harms.

## Rationale for Intervention

The Consultation identifies both ‘legal harms’ and ‘illegal harms’ which may potentially damage trust in, and the sustainability of, the UK consumer market. The Consultation proposes a comprehensive taxonomy of harms which are further delineated by consumer harms and industry harms (see box to the right). The Consultation considers the full taxonomy of harms to fall into scope for consideration and potential action under the OAP, and seeks to design a regulatory framework that will be robust enough to respond to this spectrum of harms.

These include harmful content and harmful targeting, with particular concern for harmful content targeted at vulnerable groups (e.g. the elderly; disabled people; children):

- Examples of content-related harms include fraudulent ads and scams created by ‘bad actors’ (e.g. criminal enterprises), non-identified ads from influencers (see our article: [Influencer Marketing: Advertising and marketing on social media in the UK](#)) and legal but potentially distressing or harmful content and themes, such as body image.
- With respect to the increased prevalence of targeted advertising, the Consultation recognises this as a “*double-edged sword*”. Targeting increases the efficacy and relevance of advertising but can also allow deliberate or inadvertent targeting of vulnerable groups (e.g. gambling addicts). The Government also highlights potential harm from the “*intricacy and opacity*” of placing targeted ads through intermediaries. For example, ad fraud, such as artificial traffic, makes it more difficult for businesses to obtain accurate data in connection with their marketing campaigns.

The Consultation identifies several issues with the current self-regulatory system relating to accountability and transparency, for example:

- Generally, primary liability resides with the principal business seeking to advertise its products or services and not with all businesses across the marketing and advertising supply chain. Accordingly, businesses may be responsible for the targeting and placement of their ads conducted by unaccountable intermediaries and platforms on the business’ behalf and without their oversight.
- There is no central body which collects and disseminates data on harms caused by advertising campaigns, adding to a general lack of transparency in a complex and rapidly evolving market.
- Consumers are unclear how and with whom to raise complaints in connection with advertisements.
- There are insufficient processes in place for preventative action.

## Proposed taxonomy of harms

### Illegal content

- Ads for illegal activities, products or services (consumer harm)
- Malicious advertising (consumer harm)
- Fraudulent advertising and counterfeiting (consumer harm)
- Fake endorsements (consumer harm)
- Misleading ads (consumer harm)
- Non identified ads (consumer harm)

### Legal content

- Offensive ads (consumer harm)
- Ads for products or services deemed to be harmful, but not illegal (consumer harm)
- Ads that are seen to contribute to body image concerns (consumer harm)

### Targeting / Placement

- Mis-targeting (consumer harm)
- Discriminatory targeting (consumer harm)
- Targeting vulnerable people (consumer harm)
- Brand safety including mis-targeting (industry harm)
- Ad Fraud e.g. fake traffic (industry harm)
- Inaccurate audience measurement (industry harm)

## Options for Regulatory Reform

The Consultation proposes several options for regulatory reform, ranging from a self-regulatory approach to a fully statutory regime (see box to the right).

The assessment of the new Online Platforms and Networks Standards (**OPNS**) proposal being developed by the ASA to bring consistency to the way in which actors in the supply chain are held accountable will be an important factor in deciding whether a self-regulatory system is sufficient or if a statutory backstop may be necessary.

### New measures for actors across the advertising supply chain

In addition, the Government is considering new rules for intermediaries, platforms and publishers which will sit alongside the rules for advertisers. In particular, the Consultation proposes a range of different measures relating to transparency and accountability that would target the various parties involved in the advertising supply chain, including record keeping, high-risk advertising self-declarations, pre-vetting, identity verification and publisher on-boarding policies.

### Increasing transparency through information sharing duties

The OAP intends to open channels of communication and incentivise information sharing, including by imposing the following duties:

- Transparency with the regulator – obligations on publishers, platforms and intermediaries to share information with the regulator regularly and on request.
- Transparency across the supply chain – standards for the reporting of online viewing to internet users and all parties in the advertising supply chain.
- Transparency to the public – annual/regular reporting on problematic ads and action taken to promote transparency to the public.

### Funding for a new regulatory framework

As acknowledged in the Consultation, the proposed new measures and tools and the creation of any statutory regulator will require additional funding. Under Options 2 and 3, the Government proposes to introduce a statutory levy on companies to fund any new statutory regulator which will oversee them.

## Making your views heard

Stakeholders including advertisers, publishers and advertising intermediaries are invited to submit their views on the proposals until 1 June 2022. Details can be found at the following:

<https://www.gov.uk/government/consultations/online-advertising-programme-consultation/online-advertising-programme-consultation>.

## Proposals for Regulatory Reform

### Option 1 – Self-regulatory approach

Expanding the ASA's scope to include intermediaries, publishers and platforms as well as advertisers (e.g. through the OPNS proposals).

### Option 2 – Introducing a statutory regulator to backstop more fully the self-regulatory approach

Backstopping the ASA's powers (the OPNS Code and potentially the CAP Code) with a newly appointed statutory regulator who could enforce more stringent sanctions, e.g. following serious or repeated breaches.

### Option 3 – Full statutory approach

Appointing a statutory regulator that would put in place new measures and use statutory enforcement powers.

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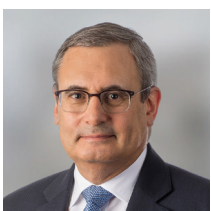
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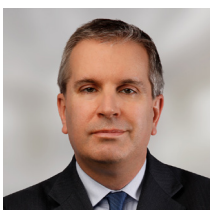
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