

Tough times for UK junk food advertisers as the regulatory screw tightens

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It may only be mid-July, but it certainly looks like 2018 will be a year that UK junk food advertisers will want to forget. Recently introduced restrictions on the advertising of such products to children in non-broadcast media have been publicly enforced by the Advertising Standards Authority (“ASA”) for the first time, yet continuing concern about childhood obesity levels is driving calls for further regulation. This is despite the UK already having some of the most restrictive rules in the world when it comes to junk food advertising.

This article summarises four ASA adjudications which applied the new restrictions on non-broadcast ads to some popular online advertising techniques. It also examines some tough talking in the second chapter of the UK Government’s Childhood Obesity Plan, which was published in late June. That document threatens bans on junk food TV ads pre-9pm and the use of price promotions to

market such products, amongst other proposals. Several other recent developments are discussed including a proposed ban on ads for unhealthy food and soft drink products on the Transport for London network and potential changes to the Department of Health’s UK Nutrient Profiling Model.

First adjudications under new CAP Code rules on junk food advertising

Earlier this month the ASA finally issued its first adjudications under new rules regulating the advertising of unhealthy foods and soft drinks to children in non-broadcast media.

The rules in question are contained in the CAP Code, which governs UK non-broadcast advertising, and state that advertisements for food and soft drink products classified as high in fat, salt or sugar (“HFSS products”) must not be directed at people under 16 through the selection of media or the context in which they appear.

Furthermore, no medium can be used to advertise HFSS products if more than 25% of its audience is under 16. Whether a food or drink is an HFSS product or not is assessed by reference to the UK Nutrient Profiling Model.

A key reason that the new rules were introduced was that there was a clear disparity in the way that broadcast and non-broadcast adverts for HFSS products were being regulated. Since 2008 the BCAP Code, which governs UK broadcast advertising, has stated that HFSS products may not be advertised in or adjacent to TV programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16. However, until the new CAP Code rules came into force on 1 July 2017, there were no similar restrictions on non-broadcast advertising, including online media.

The situation was attracting increasing amounts of criticism, particularly given the shift towards online viewing of audio-visual content via websites like YouTube. Note that both the CAP and BCAP Codes contain longstanding rules regulating the content of HFSS product ads, for example by banning ads that condone or encourage poor nutritional habits or an unhealthy lifestyle in children.



Whilst it took the ASA just over a year to publish an adjudication under the new rules, it certainly made up for lost time by publishing four in the same week. The adjudications involved complaints against Cadbury, Cloetta, Swizzels Matlow, and Ferrero, all long-established players in the UK confectionery market.

Cadbury adjudication

This adjudication related to a website for a joint Easter Egg Hunt promotion by Cadbury and the National Trust for Scotland.

The website featured the heading “Enjoy Easter Fun” and an image of a rabbit holding an Easter egg wrapped in purple foil with the words “Join the Cadbury Easter Egg Hunt” and the Cadbury logo on it. This was surrounded by smaller purple Cadbury-branded chocolate eggs and Easter bunnies. Text underneath stated “Looking for a way to make Easter magical? You’ve found it! Read on for tips, treats and fun things to make and do”.

Further down the page website visitors could download a storybook and an activity pack. The storybook was titled “The Tale of the Great Easter Bunny” and featured an image

on its cover of the Easter bunny wearing a purple waistcoat and holding a purple egg. The story itself involved children on an Easter egg hunt looking for purple Easter eggs that were hidden by the Easter bunny. The final page stated “Cadbury wishes you a Happy Easter”. The activity pack was titled “Eggciting activities” and featured similar imagery to the website and storybook including Easter bunnies and purple eggs.

The Obesity Health Alliance challenged whether the website, storybook and activity pack advertised HFSS products and were directed at children in breach of the new CAP Code rules.

The ASA considered that the website itself was primarily focused on providing information about Cadbury -sponsored Easter Egg Hunts at National Trust properties and was directed at adults through its presentation and content. It was therefore not directed at children through the selection of media or context in which it appeared. The ASA noted that it had only been advertised in media targeted at adults and that data from Cadbury showed that just over a third of website traffic came via a link from the National Trust website, a third did so through search engine organic search results and just under a quarter arrived at the website directly. While Cadbury was not able to provide data showing the demographic profile of visitors to the website, the ASA considered it was unlikely that over 25% of its visitors were under the age of 16.

In relation to the storybook and activity pack, the ASA considered that both were specifically created as content for children under 16 and would be given to children to use even if they were initially downloaded by an adult. They were therefore classed as HFSS product ads that had been directed at children through the selection of media and, in contrast to the

website, were found to be in breach of the CAP Code.



Cloetta adjudication

Chewits are a brand of fruit-flavoured chewy sweets particularly loved by children. This adjudication related to four posts on the Chewits’ “Chewie the Chewitsaurus” Facebook page which featured cartoon images of Chewie, the longstanding Chewits mascot, and the Chewits brand logo. The posts were centred around various events such as GCSE results day, the start of a new school year, Roald Dahl Day and International School Libraries Month, and encouraged users to like and share them.

The Children’s Food Campaign, which had lobbied strongly for the introduction of the new CAP Code rules, challenged whether they had been breached.

The ASA noted that a small percentage of Facebook users who had liked or followed the Facebook page were registered as under the age of 16 on Facebook. This meant that the ads would have been “pushed out” to the Facebook newsfeeds of some Facebook users who were registered as under 16, as well as being visible on the Facebook page to users in that age bracket who had not liked or followed the page. The ASA considered that the ads had therefore been directed to some children aged under 16. In addition, the posts would also have been visible to the friends of those who had liked or shared the posts, which all four posts specifically encouraged, which meant they may have been further pushed out to children under 16.

The ASA considered that Cloetta should have taken reasonable steps to ensure that the ads were not directed at any children aged under 16. There were several options offered by Facebook in this regard. The audience for the posts could have been restricted by setting an age restriction for the entire Facebook page or the individual posts themselves based on the registered age of the Facebook user. Advertisers were also able to target their posts to the newsfeeds of certain groups of people based on their interests, although that did not prevent people outside those interest-based groups from seeing those posts on the relevant Facebook page.



In the ASA's view, as the Facebook page related specifically to an HFSS product, Cloetta should have prevented Facebook users registered as under 16 from viewing it. In addition, as it is well known that many younger social media users misreport their age to appear older than they are, the ASA also considered that Cloetta should have used interest-based factors to ensure that the ads were only targeted to appear in the newsfeeds of those aged 16 or over. Given that Cloetta had not used any of the tools available to them to restrict the audience of the posts, the ASA concluded that they had not taken reasonable steps to target the ads appropriately and upheld the complaint.

Swizzels Matlow adjudication

This adjudication related to the advergame app "Squashies World" from Swizzels Matlow, which

promoted their "Squashies" range of sweets.

In the game, which featured various imagery of Squashies products, players matched pairs of Squashies by flicking them towards each other, at increasing levels of difficulty. When players first opened the app after downloading it text stated "Squashies World You must be 16 years or over to play this game. Enter your Date of Birth". Players had to select the day, month and year of their birth before continuing to establish that they were 16 or over. The advergame was downloadable from the Google Play and Apple app stores, which were linked to via the www.swizzels.com website.

Again, it was the Children's Food Campaign that challenged whether the advergame breached the CAP Code, alleging that it was an ad for HFSS products that was directed at children.

The ASA noted that the game had been promoted through Swizzels Matlow's social media for Squashies, on its website and on packaging. On the app stores the game was rated as suitable for ages 3+ and 4+, suggesting that it was suitable for children under 16. Whilst the language used to describe the app was not particularly aimed at children, the ASA considered that the images of the colourful, cartoon-based gameplay that were featured and the overall description of the game were likely to appeal to them. The game itself was brightly coloured, had a cartoon-style and some of the earlier levels were very simple, all of which the ASA felt would make the game particularly appealing to children. It also noted various review comments which referred to children enjoying the game.

When visiting the page on the Swizzels website which described the app and linked to the app stores,

website visitors were told they must be over 16 to view the page and asked to enter their date of birth. A similar age-gate mechanic also applied the first time the app was opened after it was downloaded. However, the ASA noted that it was possible to re-enter new dates of birth after an ineligible date was entered, and therefore considered that the age-gate was in most cases unlikely to deter children under 16 from continuing.



The ASA concluded that the app was not directed at children under 16 through the selection of media, but recognised that it did have considerable appeal to children under 16. Given the media used to promote the game, particularly the marketing on Squashies packs, and the likelihood that the age-gates would not deter those under 16 from downloading and playing the game, it was likely a significant percentage of its audience was under 16. In that context, it was incumbent on the advertiser to demonstrate that children under 16 did not constitute more than 25% of the audience of the app. Swizzels Matlow had failed to provide any audience data to demonstrate this, and so the ASA ruled that the CAP Code had been breached.

Ferrero adjudication

This adjudication related to a range of social media ads for Nutella, the famous hazelnut cocoa spread. The ads comprised of a YouTube video, Instagram post and two Tweets from PointlessBlog, which is run by popular vlogger Alfie Deyes, and an Instagram post by his girlfriend Zoe Sugg (a.k.a. "Zoella"), who is also a



Nutella-themed brunch hosted by Alfie and Zoella to celebrate World Nutella Day and featured video footage and video images from the brunch.

Three complainants, who believed that PointlessBlog and Zoella were popular with children under 16, challenged whether the ads breached the new CAP Code rules.

The ASA reviewed the overall context in which the ads appeared and found that the content on PointlessBlog and Zoella's YouTube and social media channels consisted of videos, photos and posts about the lives of Alfie Deyes and Zoella. While they would be of appeal to some under 16s, the ASA considered that they would not be of greater appeal to them than those aged 16 or over, as they did not focus on themes likely to be of particular appeal to under 16s nor feature under 16s.

In relation to the YouTube ad, the ASA understood that less than 25% of PointlessBlog's registered UK subscriber base and users who

viewed his videos while logged in were registered as being under 18, and so an even smaller proportion would be under 16. Although the ASA noted that many people used YouTube when they were not logged in, they did not have a basis on which to believe that there would be a significant difference between the demographic profile of users viewing PointlessBlog's videos while not logged in and his logged in or subscribed viewers.

With respect to the Instagram posts, the ASA considered that consumers were likely to be signed in to their Instagram account when using the platform. As the posts in question were non-paid for, they would have only been seen by the followers of Pointless Blog and Zoella respectively and in the feeds of any followers who had re-grammed the posts. However, the age restrictions and interest-based targeting settings available in relation to paid-for Instagram ads were not an option. The ASA noted that less than 25% of both vloggers' followers worldwide were registered as under 18,

matching the age profile of their YouTube audiences.

There was no data available in relation to the age breakdown of PointlessBlog's Twitter followers and, as the tweets were non-paid for, it was not possible to utilise any age restrictions or interest-based targeting on the platform. Although recognising that many people used Twitter when they were not logged in, the ASA noted that Twitter's overall demographic data showed that 81%-91% of UK Twitter users were aged 18 and over. Moreover, it considered that Ferrero had used the most robust demographic data available to it – that relating to UK subscribers/viewers of the PointlessBlog YouTube channel and the worldwide followers of the PointlessBlog Instagram page – when determining whether it was appropriate to place the ads in PointlessBlog's Twitter feed.

The ASA concluded that Ferrero had taken reasonable steps to target the ads appropriately and had not breached the CAP Code.

Government childhood obesity strategy

In late June the UK Government published the second chapter of its Childhood Obesity Plan.

The first chapter was published in August 2016 and resulted in several developments, most notably the introduction of the Soft Drinks Industry Levy, which is commonly known as the “sugar tax” and came into force on 6 April 2018. The second chapter is considerably more ambitious and includes the following proposed actions in relation to advertising and marketing:

- a consultation before the end of 2018 on introducing a 9pm watershed on TV advertising of HFSS products and similar protection for children viewing adverts online;
- a consultation before the end of 2018 on legislation to ban price promotions, such as buy one get one free and multi-buy offers or unlimited refills of HFSS products, in the retail and out of home sector (e.g. restaurants, cafes and takeaways);
- a consultation before the end of 2018 on legislation to ban the promotion of HFSS products by location (at checkouts, the end of aisles and store entrances) in the retail and out of home sector; and
- a consideration of whether relying on CAP to draw up the rules for online advertising on a self-regulatory basis continues to be the right approach for protecting children from HFSS product advertising or whether legislation is necessary.



In addition to action in relation to advertising and marketing, the document proposes a number of other measures, including consultations before the end of 2018 on the introduction of legislation ending the sale of energy drinks to children and mandating consistent calorie labelling for the out of home sector in England.

Other developments

In addition to the recent ASA adjudications and the Government’s proposals, there have been several other developments so far in 2018 that those advertising HFSS products should be aware of.

The new CAP Code rules for HFSS product ads may only have been in force for just over a year, but the Committee of Advertising Practice (“CAP”), which writes the Code, has announced that it is to conduct a review of how they have been working so far. CAP will publish the conclusions of its review in the autumn, which may include additional steps that it considers necessary to achieve the rules’ objectives. The review will include a number of elements, including media monitoring to assess key media environments popular with children, proactive enforcement work to address problems identified through that monitoring, an analysis of ASA complaints data, rulings and any subsequent enforcement actions, and an analysis of stakeholder submissions. Interested parties wishing to make a submission should do so by 31 July 2018.

Earlier in the year the Broadcast Committee of Advertising Practice (“BCAP”), which writes the BCAP Code, announced a call for evidence to assist in its regulation of TV advertising for HFSS products. It considered that this would be helpful due to recent calls for tougher advertising restrictions for junk food ads on television. The call for evidence closed on 16 May 2018 and BCAP is expected to publish its

analysis in the autumn.



Public Health England (“PHE”) held a consultation earlier this year on proposed changes to the UK Nutrient Profiling Model. They were asked to review and suggest changes to the model by the Department of Health to bring it into line with current UK dietary recommendations, given that the current version was developed back in 2004/2005. PHE proposed several amendments to the model to take into account updated UK dietary advice, such as the percentage of total dietary energy that should come from free sugars, the amount of fibre that should be consumed and recommendations on total daily energy intake. The consultation closed on 15 June 2018 and PHE is currently analysing the feedback received.



Finally, it is also worth noting that as part of the Draft London Food Strategy the Mayor of London proposed consulting with industry and other stakeholders on a ban on the advertising of HFSS products across the Transport for London estate, including on the London Underground. The Draft London Food Strategy was subject to a public consultation, which closed on 5 July 2018, and the responses are currently being reviewed.

What should advertisers of HFSS products do?

Clearly it is an increasingly tough time to be advertising HFSS products in the UK.



The first ASA adjudications on the new CAP Code rules make it clear that the ASA is placing a strict burden of proof on advertisers. For example, filtering out users who have told social media platforms they're under 16 is unlikely to be sufficient on its own. Instead, advertisers will also be expected to show that they've used available targeting tools to direct ads away from those whose interests suggest they are younger than they claim. The rulings also highlight the range of online activity that is caught by the new rules, from websites and Facebook pages to advergames and influencer marketing. Given that childhood obesity is such a hot topic, any ASA adjudications under the new rules will no doubt attract significant negative publicity. Advertisers of HFSS products should therefore take the opportunity to consider their own non-broadcast marketing activities, particularly in online environments, in light of the guidance provided by the four adjudications.

The second chapter of the Government's Childhood Obesity Plan suggests that we are likely to see a further crackdown on the advertising of HFSS products to children. Advertisers should certainly keep their ear to the ground and consider responding to any consultations on the proposed new restrictions such as banning TV ads for HFSS products before 9pm. It may offer some comfort that in a

recent opinion piece, Guy Parker, the Chief Executive of the ASA, seemed sceptical about whether further restrictions on advertising would be beneficial. He pointed to the fact that existing tough restrictions had already delivered substantial reductions in the number of TV ads for HFSS products seen by children, yet this didn't seem to have moved obesity rates. However, it appears that the Government has identified taking action on childhood obesity as a potential vote-winner, and will no doubt be keen to avoid a repeat of criticism that the initial proposals in the first chapter of its Childhood Obesity Plan did not go far enough, so at least some additional restrictions seem likely.

Advertisers should also keep a close eye on the outcome of PHE's consultation on an updated UK Nutrient Profiling Model. Naturally, if the model changes, then so does the definition of an HFSS product, meaning that food and soft drink manufacturers will need to reassess their product offerings. The updated model proposed in the consultation would reportedly see more foods and soft drinks high in total sugars, and high in free sugars in particular, being classified as HFSS. It would also see slightly more food and soft drinks high in saturated fat classified as HFSS, while the mitigating impact of fibre content would be reduced in some cases. The consultation paper notes that most fruit juices would be classified as HFSS under the proposed new model due to their free sugars content, while some breakfast cereals that are not currently categorised as HFSS would be for the same reason.



If that wasn't enough to keep track of, then HFSS product advertisers also need to be mindful any activity by CAP and BCAP following their reviews of the rules in their respective Codes, as well as the final version of the London Food Strategy.

In light of all these developments, I don't think anyone could blame advertisers of HFSS products for reaching for a large portion of chocolate, cake or ice cream and indulging in some comfort eating!



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