

# What to look out for in UK advertising law in 2018

Mark Smith, Founder & CEO

29 January 2018

**PURDY**  
**SMITH**



UK advertising and marketing law looks set to have a particularly exciting year in 2018 with a plethora of interesting developments in the pipeline.

This article provides an overview of the key happenings that those advertising in the UK should be watching out for in the year ahead – some will be of interest to those operating in particular sectors, while others will clearly have a wider impact.

Developments that are discussed include new rules on the sexualisation of children and gender stereotyping in the CAP and BCAP Codes, the UK's self-regulatory advertising codes that cover non-broadcast and broadcast advertising respectively. The article also examines a variety of ongoing and anticipated action by various UK regulators including the Advertising Standards Authority ("ASA"), Committee of Advertising Practice

("CAP"), Competition and Markets Authority ("CMA"), Information Commissioner's Office ("ICO") and Gambling Commission. The impact of the General Data Protection Regulation ("GDPR"), which comes into force on 25 May 2018, and plans for a new e-Privacy Regulation are also considered.

Brexit will of course continue to grab headlines in the UK and internationally throughout 2018, but with the formal exit date currently being set at 29 March 2019, and a lot of uncertainty regarding the form that the UK's future relationship with the EU will take, I have not covered any Brexit-related developments in detail in this article. Furthermore, the EU has recently indicated that it expects a transition period to apply from 29 March 2019 until 31 December 2020 during which EU rules and regulations, including any changes adopted after March 2019, would still apply in the UK.

## **New rules on the sexualisation of children in ads**

On 2 January 2018 new rules in the CAP Code and BCAP Codes relating to the sexualisation of children in advertising came into force. They are intended to strengthen existing rules to protect under 18s, taking into account links between premature sexualisation and harm, and will be of particular interest to brands in the fashion industry.

The BCAP Code previously had a specific rule prohibiting the portrayal of children in a sexual way. There was no such rule in the CAP Code, albeit that complaints about sexual portrayals of children were dealt with under the CAP Code's general social responsibility rules.

The new rules bring the CAP and BCAP Codes into line with one another and go even further than the previous BCAP Code rule by protecting all those under 18 rather than only under 16s.

Under the new rules marketing communications must not portray or represent anyone who is, or seems to be, under 18 in a sexual way. The only exception is for marketing communications whose principal function is to promote the welfare of, or to prevent harm to, under 18s, provided any sexual portrayal or representation is not excessive.

### **New rules on gender stereotyping in ads**

In December it was confirmed that new rules will be introduced into the CAP and BCAP Codes in 2018 to ban harmful gender stereotyping in advertising.

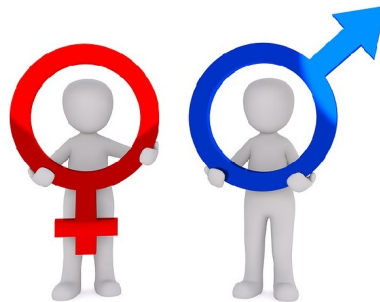
The news followed last summer's publication of the ASA's Depictions, Perceptions and Harm report on gender stereotyping in advertising. The report welcomed the ASA's track record of banning ads on the grounds of inappropriate sexualisation, objectification and for normalising unhealthily thin body images. However, it suggested that stronger regulation was needed where ads featured stereotypical gender roles or characteristics which could be harmful, including ads which mocked people for not conforming to gender stereotypes.

CAP is currently developing the new rules, together with related guidance on the depiction of gender stereotypes in ads, and intends to openly consult on the new standards in spring 2018.

CAP has provided reassurance that the new rules will not ban all forms of gender stereotypes, so there will be no automatic ban for ads showing a woman cleaning or a man doing DIY. However, subject to context and content considerations, certain types of depictions are likely to be problematic, including the following:

- an ad that shows family members creating a mess which a woman has sole responsibility for cleaning up;

- an ad that suggests a specific activity is inappropriate for boys because it is stereotypically associated with girls, or vice-versa; and
- an ad that features a man trying and failing to undertake simple parental or household tasks because of stereotypes associated with his gender.



### **Changes to broadband speed claims in ads**

In November the ASA announced a major change to the way that broadband speed claims for residential broadband services can be advertised, which will take effect from 23 May 2018.

From that date numerical speed claims in broadband ads should typically be based on the download speed available to at least 50% of customers at peak time and described in ads as "average". The current position is that advertised "up to" speeds should be available to at least ten percent (10%) of customers, but this approach was felt to be misleading consumers, as the speeds being advertised were not typically achievable for the vast majority of customers.

If marketers wish to make speed claims on a different basis, for example because of the type of technology they have used, they will need to hold evidence to show that their approach is not likely to mislead consumers.

In addition, the ASA has updated its guidance on broadband speed claims more generally – businesses working in this space should be sure to take a closer look at the new version.

### **First ASA adjudication on new CAP Code rule banning unhealthy food and drink ads in children's media**

In July 2017 a new rule came into force in the CAP Code banning the advertising of food and drink that is high in fat, salt or sugar ("HFSS") in children's media.

Rule 15.18 states that HFSS product advertisements must not be directed at people under 16 through the selection of media or the context in which they appear. Further, no medium should be used to advertise HFSS products if more than 25% of its audience is under 16 years of age.

We are still waiting for the first ASA adjudication under this new rule and it seems very likely that it will arrive at some point in 2018. There are after all some prominent pressure groups and charities, including the Children's Food Campaign, that actively lobbied for the new rule to be introduced and will be keen to see that it is enforced. Food and drink advertisers take note!



### **Potential removal of CAP and BCAP Code prohibition on e-cigarette health claims**

Last autumn a public consultation was held on a proposal to remove the current prohibition in the CAP and BCAP Codes on health claims being made for e-cigarettes.

The consultation followed a call for evidence in 2016 in which most respondents argued that improvements in e-cigarette products and the positive view taken by a number of public health stakeholders with respect to their relative safety versus smoking

tobacco warranted the axing of the prohibition.

It should be remembered that even if the removal of the prohibition is approved, any claims would be restricted to the limited number of media channels where ads for e-cigarettes are lawful. Furthermore, advertisers would of course need to have robust substantiation that any claims made were true for the e-cigarette product being advertised.



### **General Data Protection Regulation (“GDPR”) comes into force**

Naturally, the coming into force of the GDPR on 25 May 2018 will have a major impact on UK advertising and marketing practices.

Such is the scale of the GDPR that it is not appropriate to cover all of its requirements in this article. However, there are several key steps that marketers should be taking in preparation for the GDPR coming into force, which are worth highlighting here.

Marketers should be reviewing their privacy notices and consent collection mechanisms over the coming weeks, ensuring that they comply with the stricter requirements of the GDPR. They should also be identifying the lawful basis or bases on which they process personal data for marketing purposes under the GDPR. Where marketers intend to rely on consent as the lawful basis for processing, they should consider whether any existing consents need to be refreshed so that they meet GDPR standards, otherwise they will not be able to rely on those consents going forwards.

Marketers will also need to consider the expanded rights of data subjects under the GDPR and increased accountability requirements that may require improved recordkeeping by their organisation. Those involved in processing children’s data or profiling activities will need to consider the specific rules in the GDPR affecting those areas.

### **Further development of the e-Privacy Regulation**

On 10 January 2017 the European Commission published its proposal for an e-Privacy Regulation, which would replace the existing e-Privacy Directive.

The Directive regulates a number of areas, including the use of cookies and other online tracking technologies and the rules around nuisance calls and spam texts and e-mails, and therefore the e-Privacy Regulation that will replace it is clearly of significant interest to marketers. The proposed Regulation is currently going through the EU legislative process and is therefore subject to change.

It was originally intended that the e-Privacy Regulation would come into force at the same time as the GDPR, but that was always a very optimistic timetable that was highly unlikely to be achieved. Earlier this month the rapporteur for the European Parliament on the e-Privacy Regulation indicated that it is hoped that the trilogue discussions between the European Parliament, Council and Commission will begin after the summer recess. During these discussions the various EU bodies will attempt to reach agreement on a huge range of suggested amendments to the draft Regulation.

All this means that we are unlikely to see the e-Privacy Regulation come into force until 2019 at the earliest, but we will hopefully get more clarity on its likely final form as 2018 progresses.

Naturally, if the Regulation enters into force post-Brexit and after any related transition period then the UK would not be bound to follow it, unless it was somehow made a condition of the exit deal struck between the UK and EU. However, the ICO has previously indicated that it sees international consistency around data protection as crucial, and that Brexit leaves the underlying reality on which data protection policy is based largely unaffected. Hence even if the UK does not follow the letter of the e-Privacy Regulation, it is likely to implement similar measures in due course, not least to secure smooth data flows between the UK and EU.

### **Further ICO action on nuisance calls and spam e-mails and texts**

The ICO was very active throughout 2017 with respect to issuing monetary penalties for nuisance calls and spam e-mails and texts and this is set to continue in 2018.

In late November the ICO indicated that it had already issued over £2m in fines this financial year and that another £1.4m of fines was in the pipeline.

This is clearly a priority area for the ICO which has fined a variety of companies over the past year from specialist telemarketing operations and smaller businesses to household name brands such as Moneysupermarket.com, Morrisons, Flybe and Honda.



## Continued crackdown on gambling advertising

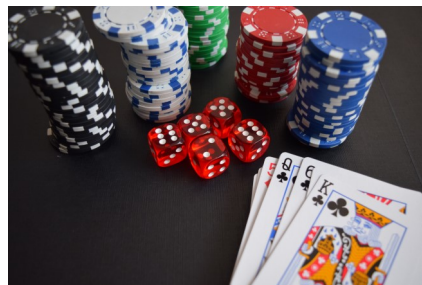
There was a heavy crackdown by several regulators in the gambling space in 2017 which shows no signs of slowing down as we move into 2018.

The Gambling Commission issued its first fines in relation to misleading advertising last year with three (3) gambling operators receiving fines of between £100,000 and £300,000 in relation to advertising failings. Back in June the CMA announced that it was launching enforcement action against several online gambling operators suspected of breaking consumer law, including in relation to sign-up promotions. In addition, there was a plethora of over twenty (20) formal ASA adjudications in relation to gambling ads during 2017, while gambling advertising continued to be a hot topic in the press.

On 31 October 2017 the UK government published a consultation that covered proposals relating to gaming machines and social responsibility measures for the industry as a whole to minimise the risk of gambling-related harm. The consultation included a section seeking input on a package of measures designed to address concerns about gambling advertising, including new CAP guidance designed to protect both those at risk of problem gambling and children and young people, additional powers for the Gambling Commission in this area (see below) and a major responsible gambling advertising campaign. The consultation has now closed and the government is currently analysing the feedback received.

Earlier this month the Gambling Commission announced a consultation on proposed changes to its Licence Conditions and Codes of Practice ("LCCP") which are aimed at ensuring gambling operators are being fair and open with

consumers. The LCCP set out the requirements gambling operators must meet in order to hold a licence with the Gambling Commission. The proposed changes include making compliance with the CAP and BCAP Codes a social responsibility code requirement of the LCCP, as is already the case for the laws relating to misleading marketing practices, meaning that breaches could be subject to the full range of the Gambling Commission's regulatory powers, including significant fines. A new social responsibility code provision requiring gambling operators to prevent consumers from receiving 'spam' marketing by e-mail or SMS is also suggested. Other elements of the proposals are focused on ensuring that operators comply with consumer protection laws and improving consumer complaints handling. The consultation closes on 22 April 2018.



### First use of enhanced consumer measures by the CMA

Enhanced consumer measures ("ECMs") are flexible enforcement measures that were made available to UK consumer regulators through the coming into force of the Consumer Rights Act 2015.

ECMs widened the orders that enforcers of UK consumer laws can seek in the civil courts, giving the flexibility to seek orders aimed at achieving one or more of: (a) redress for consumers who have suffered loss from breaches of consumer law; (b) remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches; or (c) remedies to give consumers more

information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses. Any measures sought must always be just, reasonable and proportionate.

Despite the fanfare that greeted their introduction and it being over two (2) years since the Consumer Rights Act came into force, ECMs are yet to be used. However, in its draft annual plan for 2018/19 the CMA has indicated that it will aim to use ECMs for the first time, so we could well see them finally utilised later this year, perhaps in the context of the CMA's ongoing consumer protection action in relation to care homes, secondary ticketing websites, hotel booking websites, online gambling operators or an online dating company. In each case, at least some of the problems identified by the CMA involve misleading advertising issues, including potentially misleading information on availability, questionable discount claims and hidden charges.

*Businesses with queries about UK advertising and marketing law or that require further information on any of the issues discussed above are welcome to get in touch by e-mailing me at [mark.smith@purdysmith.com](mailto:mark.smith@purdysmith.com).*

*For those that need a comprehensive update on recent developments, I am running a half-day advertising and marketing law seminar in London in May in conjunction with MBL Seminars. More details here: <http://bit.ly/2CwddMs>. Note that there is a charge to attend.*

*Furthermore, if you'd like to receive Purdy Smith's helpful legal updates and hear about our upcoming events via e-mail you can sign up to our regular newsletters by using the form provided on our blog at [www.purdysmith.com/blog.html](http://www.purdysmith.com/blog.html).*