

What to look out for in UK advertising law in 2019

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UK advertising and marketing law looks set to have another exciting year in 2019 with a number of new developments and ongoing hot topics likely to grab headlines in both the marketing press and mainstream media.

This article provides an overview of the key happenings that those advertising to a UK audience 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 a new five-year strategy for the Advertising Standards Authority (“ASA”) and the introduction of a new rule prohibiting harmful 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 other ongoing

and anticipated action by a number of UK regulators including the ASA, the Committee of Advertising Practice (“CAP”), Competition and Markets Authority (“CMA”), Information Commissioner’s Office (“ICO”), Gambling Commission and Portman Group.

Brexit will of course continue to attract huge attention in the UK and internationally throughout 2019. However, with no clarity yet over exactly what form Brexit will take, whether there will be a transition period and, if so, how long that would last, and speculation in some quarters that Brexit might be delayed or not go ahead at all, I have not covered any Brexit-related developments in detail in this article. Currently the UK is set to leave the EU on 29 March 2019 with no deal, albeit that the Prime Minister, Theresa May, is still trying to negotiate an agreement with the EU that the UK Parliament will approve, following its rejection of her initial

deal on 15 January 2019. It is worth remembering that if Brexit does go ahead The European Union (Withdrawal) Act 2018 will transpose into domestic UK law all directly applicable EU legislation which is in force in the UK immediately before Brexit in order to ensure legal continuity.

New ASA five-year strategy

In early November 2018 the ASA launched its new five-year strategy entitled “More Impact Online”. That strategy, which sets the ASA’s direction to 2023, clarifies its commitment to strengthening further the regulation of online ads, although it will of course continue to regulate ads in more traditional media too (e.g. TV, radio, print, cinema).

The new strategy reflects the increasing ad spend of businesses online, the fact that consumers are spending more time online and changes in the ASA’s workload.

Focus areas of the new strategy include prioritising the protection of vulnerable groups and appropriately limiting children and young people's exposure to ads for products where age-restrictions apply (e.g. alcohol and gambling).

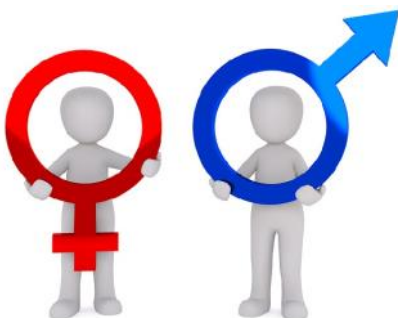
The ASA also plans to employ research, data-driven intelligence gathering and machine learning to identify which other advertising issues are the most important to tackle. This reflects the ASA's increasingly proactive approach as a regulator, with the latest statistics showing a 47% increase in the number of ads withdrawn or changed in 2017 compared to the previous year.

Further aspects of the new strategy include developing thought-leadership in cutting edge areas of online advertising, such as voice and facial recognition, machine-generated personalised content and biometrics. The ASA also intends to review whether its decision-making processes always allow it to act nimbly enough when regulating an increasingly online advertising world.

New rule on gender stereotyping in the CAP and BCAP Codes

In mid-December 2018 the Committee of Advertising Practice announced ads that depict harmful gender stereotypes would be banned following a public consultation.

A new rule in the CAP and BCAP Codes will come into force on 14 June 2019 and states that: "[Advertisements] must not include gender stereotypes that are likely to cause harm, or serious or widespread offence".



The introduction of the new rule and related guidance reflects concerns identified in ASA research that harmful stereotypes can restrict the choices, aspirations and opportunities of children, young people and adults, and that those stereotypes can be reinforced by appearing in advertising.

Scenarios that are likely to be problematic under the new rule include an ad where a man is depicted with his feet up while family members create a mess which a woman is then solely responsible for cleaning up. An ad that depicts a man or woman failing to achieve a task specifically because of their gender or that belittles a man for carrying out stereotypically "female" roles or tasks would also likely fall foul of the new rule. On a similar note, ads that seek to emphasise the contrast between a boy's stereotypical personality (e.g. daring) with a girl's stereotypical personality (e.g. caring) will clearly need to be handled with care.

CAP guidance also suggests that if an ad features a person with a physique that does not match an ideal stereotypically associated with their gender, it should not imply that their physique is a significant reason for them not being successful (e.g. in their romantic or social lives).

Finally, it is worth bearing in mind that although the new rule is clearly far-reaching in its likely impact, CAP has been keen to clarify its limitations too, perhaps as a result of misleading press articles suggesting that the rule marked the end of ads showing women cleaning or men doing DIY. For example, CAP has stated that the new rule is not intended to prevent the portrayal of glamorous, attractive, successful, aspirational or healthy people or lifestyles in ads, the depiction of one gender only, including in ads for products developed for and aimed at one gender, nor the inclusion of gender stereotypes in ads as a means to challenge their negative effects.

Crackdown on false faux fur claims

On 17 January 2019 the CAP Compliance team issued an Enforcement Notice on misleading "faux fur" claims relating to clothes and accessories following concerns that consumers are being misled by adverts for "faux fur" products which in fact contain real animal fur. Indeed, the previous week the ASA upheld complaints against two retailers, including online fashion giant Boohoo.com, for misleading consumers on this point.

CAP has highlighted that it does not think retailers and sellers are deliberately misleading consumers and that any issues typically derive from supply chain pollution or lack of education and enforcement. However, the buck ultimately stops with the advertiser, and retailers and sellers are expected to take steps to ensure they are abiding by the rules.



UK retailers, including sellers on UK-facing online platforms and marketplaces, are required to bring their advertising into compliance with the Notice by 11 February 2019. The CAP Compliance team will take targeted enforcement action after that date to ensure a level playing field. This could include referral to Trading Standards where advertisers are unwilling to comply and a consequent risk of fines and/or imprisonment.

New standards for on-screen text

In November 2018 the Broadcast Committee of Advertising Practice ("BCAP") announced that it would be applying new standards to the use of on-screen text in TV ads, which is typically used to communicate important qualifying information.

Typically that information will be the terms and conditions that apply to an advertised offer.

The announcement followed ASA research into this issue which found viewers can struggle to read and comprehend on-screen text. The ASA research identified a number of problems including difficulties reading superimposed text against a moving background, poor colour choices impacting on legibility, and text that was too small, squashed or not on the screen long enough.

The new standards published by BCAP are intended to address the concerns identified in the ASA's research. TV advertisers will be expected to sufficiently emphasise particularly significant qualifying information, adopt a stricter approach to ensuring an adequate contrast between superimposed text and the background, take greater care over typeface choices to avoid the use of stretched or elongated text, and allow viewers sufficient time to read on-screen text.

The new standards come into effect on 1 March 2019.

CMA action on various issues including social media influencers and online hotel booking websites

The CMA has a number of ongoing investigations which it will be progressing during 2019.

On 23 January 2019 the CMA announced that it had secured formal undertakings from sixteen (16) celebrities as part of its investigation into marketing by social media influencers. The celebrities in question include well-known faces including pop stars Rita Ora and Ellie Goulding, actress Michelle Keegan, vloggers Zoella and Jim Chapman, models Alexa Chung and Rosie Huntington-Whiteley and a number of reality TV stars from popular shows such as *Geordie Shore* and *Made in Chelsea*. They have all agreed to ensure that they will state

clearly if they have been paid or received any gifts or loans of products which they endorse on social media. Warning letters have also been sent to a number of other celebrities urging them to review their practices.

Clearly we may see further enforcement action from the CMA against social media influencers that fail to provide adequate disclosures, including potential court action, later in the year. The CMA has also indicated that it will be examining the role and responsibilities of social media platforms.

The CMA's investigation into online hotel booking websites is also likely to see major developments in early 2019 and is of significant interest from an advertising perspective. The investigation was launched in October 2017 amid concerns surrounding the clarity, accuracy and presentation of information on such websites. It is examining several practices including:

- how search results are ranked and to what extent they are influenced by factors that may not be relevant to the customer's requirements (e.g. the amount of commission a hotel pays the website);
- whether claims about how many people are looking at the same room, the number of rooms that may be left, or how long a price is available, create a false impression of room availability or rush customers into making a booking decision;
- whether the discount claims made on such websites offer a fair comparison for customers;

- the extent to which such websites include all costs in the price they first show customers or whether people are later faced with unexpected fees (e.g. taxes or booking fees).

The CMA announced in June 2018 that it had launched enforcement action against a number of online hotel booking websites, which could include securing legally binding undertakings or court action, and we can expect an update on that activity shortly.

The CMA also has open consumer law investigations relating to the care home sector, online gambling companies, anti-virus software and secondary ticketing websites (see below).

Potential fine for Viagogo for breaches of consumer law

In November 2018 the CMA secured a court order against secondary ticketing website Viagogo over concerns it was breaching consumer law. Unlike the other major secondary ticketing websites, Viagogo had previously refused to offer formal commitments to overhaul the way it does business, following a CMA investigation into the sector. Examples of problematic behaviour uncovered by the CMA included failing to tell purchasers of tickets if there was a risk they would be turned away at the door, failing to inform customers which seat in the venue they would get, and the provision of misleading information about the availability and popularity of tickets.



Although Viagogo indicated that it intended to comply with the court order, which set a deadline of midnight on 17 January 2019 for various changes to be implemented, the CMA announced on 24 January 2019 that it had serious concerns that important aspects of the order had not been complied with.

The CMA has raised these concerns with Viagogo and expects it to make any necessary changes without delay – if Viagogo fails to do so it could be held in contempt of court. This would potentially result in a hefty financial penalty, significant negative publicity and even custodial sentences for the company's directors. Taking this into account, however, it seems more likely that Viagogo will ultimately comply with the CMA's demands!

First ICO monetary penalty for marketing-related GDPR breach

Whilst the ICO has issued a number of monetary penalties since the General Data Protection Regulation ("GDPR") came into force on 25 May 2018, they have all related to breaches of data protection law that actually occurred pre-GDPR, meaning that other legislation applied, namely the Data Protection Act 1998. Naturally, it takes the ICO a considerable amount of time to conduct a formal investigation and decide on appropriate enforcement action, but we can be confident that its first monetary penalties under the GDPR will be issued in 2019.

Clearly there is a strong possibility that one or more of those monetary penalties will be for breaches of the GDPR that relate to marketing activities. Indeed, the ICO issued its first Enforcement Notice under the GDPR to Canadian analytics company AggregateIQ last year.

AggregateIQ came to the ICO's attention as part of its recent investigation into the use of data analytics to target political

advertising, which revealed that the company was heavily involved in targeting ads at prospective voters during the Brexit referendum campaign for various pro-Brexit organisations. The ICO has alleged that AggregateIQ processed personal data in a way that the data subjects were not aware of, for purposes that they would not have expected, and without a lawful basis for that processing. Although the data in question was gathered before 25 May 2018, the ICO is concerned about the continued retention and processing of the data after that date, hence the application of the GDPR. The Enforcement Notice makes it clear that if AggregateIQ fails to comply, it risks a monetary penalty under the GDPR.



It is worth remembering that whereas under the Data Protection Act 1998 the maximum fine that could be levied was £500,000, the most serious breaches of the GDPR can attract fines of up to €20,000,000 (around £17½m) or four percent (4%) of total annual worldwide turnover in the preceding financial year, whichever is higher.

Last month the French data protection regulator, the CNIL, fined Google a huge €50,000,000 (around £44m) under the GDPR for a lack of transparency, inadequate information and a lack of valid consent with respect to ads personalisation.



ICO direct marketing code of practice

On 12 November 2018 the ICO issued a call for views to assist its work on developing a direct marketing code of practice. Under the Data Protection Act 2018 the ICO is required to produce such a code providing practical guidance and promoting good practice in relation to direct marketing.

The new code will build on the ICO's existing direct marketing guidance and address issues such as transparency and lawful bases for processing, as well as the covering the rules on electronic marketing contained in the Privacy and Electronic Communications Regulations 2003 ("PECRs").

The call for views notes that the EU is currently in the process of replacing the e-Privacy Directive, which the PECRs derive from, with a new e-Privacy Regulation. However, the e-Privacy Regulation is still going through the EU legislative process and there is no certainty about its final content or when it will come into force. Moreover, whether it will apply at all in the UK depends on if and when Brexit occurs and whether there will be a transition period during which new EU legislation will continue to have effect in relation to the UK. The ICO's intention is therefore for the direct marketing code to cover only the current rules in the PECRs – it will produce an updated version, if necessary, once the UK position with respect to the e-Privacy Regulation is clearer.

The call for views closed on 24 December 2018 and is the first stage of the consultation process. A further consultation can be expected once a draft code has been produced, but there is certainly a possibility that a finalised code will come into force before the end of 2019.

Further crackdown on unhealthy food and soft drink advertising

In July 2018 we saw the first ASA adjudications under new rules introduced into the CAP Code the previous year to restrict the advertising of food and soft drinks products that are high in fat, salt or sugar (“HFSS”) to children. The rules state that such ads must not be directed at people under 16 through the selection of media or the context in which they appear and that no medium can be used to advertise HFSS products if more than 25% of its audience is under 16.



A number of leading food brands including McDonald’s, Burger King, KFC, Cadbury, Swizzels Matlow and Ferrero have had complaints upheld against them under the new rules and we can expect to see continued enforcement in the coming months. However, there are also several new potential developments for advertisers of unhealthy food and soft drinks products to look out for during 2019.

In late June 2018 the UK Government published the second chapter of its Childhood Obesity Plan, which contained a number of proposals relating to the advertising and marketing of unhealthy food and drink products. On 12 January 2019 a consultation was opened to consider restrictions on both volume-based price promotions of HFSS products (e.g. “buy one, get one free”) and the placement of HFSS products at main selling locations in stores (e.g. checkouts, aisle ends and store entrances).

The updated Childhood Obesity Plan also proposed a consultation on introducing a 9pm watershed on TV advertising of HFSS products and similar protection for children viewing adverts online, but this has yet to occur. It also suggested that the Government would be reviewing 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. Other aspects of the Plan resulted in recent consultations on ending the sale of energy drinks to children and mandating consistent calorie labelling for the out of home sector in England.

In a separate development Public Health England held a consultation during 2018 on proposed changes to the Department of Health’s UK Nutrient Profiling Model, which is used to assess whether a food or drink is an HFSS product or not. The proposed changes are intended to bring the Model into line with current UK dietary recommendations as the current version was developed well over a decade ago. The consultation closed on 15 June 2018 and it seems likely that we will see an updated Model published at some point during 2019.

Finally, following a public consultation the Mayor of London announced in November 2018 that ads for HFSS products would be banned on the entire Transport for London network from 25 February 2019.



Gambling Commission action over breaches of advertising law

On 31 October 2018 changes to the Gambling Commission’s Licence Conditions and Codes of Practice (“LCCP”) came into force relating to marketing and advertising, unfair terms and the handling of customer complaints and disputes.



The changes were introduced following a public consultation and mean that:

- it will be easier to take action, including imposing fines, against gambling businesses whose ads break the extensive rules in the CAP and BCAP Codes;
- firms will face action for advertising failings by third party affiliates;
- action can be taken against gambling firms that send “spam” marketing emails or texts;
- it will be quicker and easier to take action for breaches of consumer law (e.g. misleading practices or unreasonable restrictions on withdrawals); and
- firms will have to provide better complaints processes, including an eight (8) week deadline for complaints to be resolved.

Gambling firms have already been fined significant sums for breaches of UK consumer law relating to their advertising activities under previous versions of the LCCP, including ElectraWorks (fined £350,000), BGO Entertainment (fined £300,000) and Broadway Gaming (fined £100,000).

However, the introduction of these stricter new rules means it is likely we will see a Gambling Commission crackdown on this area during 2019.

It is worth bearing in mind that each year there are a large number of ASA adjudications that uphold complaints about gambling ads under the CAP and/or BCAP Code. Common issues include ads that appeal particularly to children, ads that glamourise gambling and promotional offers where the applicable terms and conditions are not disclosed clearly and prominently enough.



Clearly gambling operators need to sit up and take notice of the new rules, and in many cases improve their approach to advertising compliance, or otherwise risk significant financial penalties.

New edition of the Portman Group Code of Practice

The Portman Group, an industry body supported by the UK's leading alcoholic drinks producers, focuses on social responsibility issues surrounding alcohol, and has its own Code of Practice, which was introduced in 1996 and is currently on its fifth edition.

The Code of Practice regulates alcohol marketing that is not already subject to regulation by the ASA or Ofcom and covers areas such as packaging, product names, sponsorship, point-of-sale materials and brand merchandising. It is enforced by an Independent Complaints Panel ("ICP") which has found the packaging and/or marketing of more than one hundred and fifty (150) drinks to be in breach of the Code.

In April 2018 the Portman Group announced a major review of its Code of Practice and opened a ten (10) week public consultation on various potential changes. Those being considered include:

- giving the ICP further powers to rule against implications that alcohol consumption will "improve" physical or mental capabilities;
- establishing a new and credible definition for assessing complaints about irresponsible sampling promotions or packaging (e.g. single-serve, non-resealable containers) following the removal of daily guidelines from the Chief Medical Officer's lower risk drinking guidelines;
- strengthening the code to prohibit direct or indirect links with alcohol and illegal activity;
- amending the Code to protect those that are socially or mentally vulnerable;
- introducing a new rule with supporting guidance addressing serious and widespread offence, such as sexism in marketing.

The consultation also asked stakeholders to identify other issues or concerns especially around technology and the evolving marketing and consumer landscape.

The Portman Group has been reviewing the responses to the consultation and is expected to publish the sixth edition of the Code in Spring 2019.



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.

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