RPC

Commercial law snapshots

Autumn 2018

ADVISORY | DISPUTES | TRANSACTIONS

Autumn 2018

Contents

Contract terms

Draft Business Contract Terms (Assignment of Receivables) Regulations 2018

The question

How might the Government's proposed legislation regarding business contract terms prohibit or restrict the assignment of receivables under commercial agreements?

The background

In December 2014, the Department for Business, Energy and Industrial Strategy ('BEIS') published draft regulations, with the aim of challenging the prohibition and restriction of assignment of receivables under commercial agreements.

Following a consultation period, the 2014 draft was replaced with a revised set of regulations, released in September 2017, which were laid before Parliament. However, the September 2017 draft regulations were once again subsequently withdrawn, and eventually replaced with the current Draft Business Contract Terms (Assignment of Receivables) Regulations 2018 (the 'Draft Regulations'), published on 6 July 2018.

The guidance

The main purpose of the Draft Regulations is to allow businesses to assign receivables to finance providers under their commercial agreements. This, in turn, is designed to create flexibility for business, and importantly facilitate their access to finance.

The Regulations are drafted to provide that, to the extent that any term in a business contract prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract, or any other agreement between the same parties, it will be unenforceable under the Regulations.

Under previous drafts of the Regulation, such unenforceability did not extend to include terms which prevent the assignee of the receivable from determining the receivable's (i) validity; (ii) value; and, or (iii) ability to enforce it. However, such types of provision, such as confidentiality provisions, limit the appeal of assignment of the relevant receivables to a prospective assignee. As such, BEIS has tightened the Draft Regulation in this respect; any such provisions are now also unenforceable.

However, the Draft Regulations also provide for a widened list of excluded contracts, as compared to previous drafts. For example, exclusions to the rule now include contracts

entered into, about, or for the purpose of the transfer of all or part of a business (such as transitional services agreements). However, importantly, for such contracts to take advantage of the exclusion, they must include a statement to that effect. Other excluded contracts include contracts for financial services, contracts which concern interests in land, or contracts to which none of the parties to the contract are carrying on business in the UK.

Finally, the Draft Regulations do not apply if the assignor is (i) a large enterprise (as defined broadly in the Draft Regulations); or (ii) an SPV holding assets or financing commercial transactions involving incurred liability of the value of £10million or more.

Why is this important?

BEIS has received criticism from businesses on the basis that the Draft Regulations will nullify confidentiality clauses as between parties to the original contract, and make it difficult for businesses to limit risk, by dictating terms of assignment.

In particular, businesses are concerned such provisions could in turn lead to the disclosure of business critical information to third parties, or lead to receivables coming under control of a hostile third party or competitor. In addition, unfettered assignment could lead to difficulty with regard to preservation of key business relationships.

Any practical tips?

The Draft Regulations are still subject to affirmative procedure; follow their journey through Parliament closely, they may yet be amended!

However, if implemented, businesses can expect the Draft Regulations to apply to any relevant term in an applicable contract entered into on or after 31 December 2018; in other words, these Draft Regulations will apply to all contracts moving forward, unless an exclusion applies.

Should the Draft Regulations remain in their current form, check if your business can take advantage of the broadly constructed exclusions, whether on a wholesale basis (by virtue of the nature of your business), or on a contract by contract basis (by virtue of the nature of the relevant contract you intend to enter into). Remember that, to take advantage of the exclusion, it looks like you will need to include a statement to that effect.

Autumn 2018

UCTA

Goodlife Foods Ltd v Hall Fire Protection Ltd

The question

Will an exclusion clause which excludes any clam for negligence stand up to the UCTA reasonableness test?

The background

Goodlife produces frozen food and engaged Hall Fire as a special fire suppression contractor. The parties contracted under Hall Fire's standard terms and conditions, which included the following exclusion clause (clause 11):

"*We exclude all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for any reason.*"

Reference to Hall Fire's terms and conditions was made on Hall Fire's quotation to Goodlife, alongside a statement that Hall Fire accepted no liability for damages.

In May 2012, a frying machine caught fire and led to £6.6m damages (property damage and business interruption). This was 10 years after Hall Fire had installed their fire suppression system.

The decision

The Court of Appeal looked at whether:

- the exclusion clause (clause 11) was "particularly onerous or unusual";
- if so, had it been fairly and reasonably brought to the other party's (ie Goodlife's) attention;
- whether it was reasonable under UCTA?

Coulson LJ explained that "everything turns on the context", which in this case meant he interpreted clause 11 in Hall Fire's favour. Key elements of his reasoning were:

- clause 11 was not particularly "onerous and unusual", especially in the context of the limited contract sum paid to Hall Fire of £7,490 and Hall Fire not having any on-going maintenance obligations;

- the terms indicated that Hall Fire was prepared to accept wider liability if requested by Goodlife, subject to an increase in the contract price and suitable insurance;
- Hall Fire's terms and conditions were not out of kilter with other fire suppression contractors;
- even if clause 11 was onerous and unusual, it would still have been incorporated into the contract because it was printed in clear type and expressly referred to in Hall Fire's quotation to Goodlife;
- Goodlife let a year go by between receipt of Hall Fire's quotation/terms and conditions and issuing its purchase order to Hall Fire, so Goodlife had plenty of time to review the terms and seek advice;
- as to whether clause 11 stood up under UCTA, Coulson LJ considered the bargaining power of the parties to be equal and the fact that Goodlife knew (or ought reasonably to have known) of the clause and its impact. He also found that Goodlife could have gone elsewhere for the service and, importantly, that it was reasonable to expect Goodlife (as the party who would suffer loss) to be the party best placed to issue against that loss. Hall Fire's terms had even suggested that customers like Goodlife should review its insurance arrangements.

It followed that the Court of Appeal deemed the exclusion clause to be reasonable under UCTA .

Why is this important?

The case underlines the reluctance of the courts to interfere with contracts entered into between commercial parties of equal bargaining power. As Coulson LJ quoted from *Watford Electronic Ltd v Sanderson CFL Ltd*: "*Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that a term is so unreasonable that it cannot reasonably have been understood or considered – the court should not interfere*".

Any practical tips

If you are seeking to include broad exclusions in your standard terms of business, think very carefully about how you go about this. For example, consider:

- ensuring that the relevant clause(s) in your terms are visible and prominent, and not hidden;
- expressly referencing it in the upfront paperwork (as Hall Fire did with the reference to clause 11 on their quotation);
- including alternative liability provisions on request, such that the other party can effect alternative insurance arrangements. Think also about including an express warning on the other party to seek insurance against risks that are excluded or limited under the standard terms;

- looking at whether you can bench-mark your approach with other similar players in your market, and keep a record of this;
- making sure that you give the counterparty plenty of time to review your terms and conditions and to consider alternative arrangements (eg as to insurance cover).

Autumn 2018

UCTA

First Tower Trustees Ltd and other v CDS (Superstores International) Ltd [2018] EWCA Civ 1396

The question

Is a non-reliance statement subject to section 3 of the Misrepresentation Act 1967 and therefore also subject to the reasonableness test contained in the Unfair Contract Terms Act 1977 (**UCTA**)?

The background

The landlords, First Tower Trustees Ltd and Intertrust Trustees Limited, entered into the following lease agreements for warehouse premises (leases) with the tenant, CDS (Superstores International) Limited:

- a lease which contained the following non-reliance statement at clause 5.8: "The tenant acknowledges that this lease has not been entered into in reliance or wholly or partly on any statement or representation made by or on behalf of the landlord";
- an agreement for lease (Agreement for Lease) which contained the following non-reliance statement at clause 12.1: "The Tenant acknowledge and agree [sic] that it has not entered into this Agreement in reliance on any statement or representation made by or on behalf of the Landlord other than those made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written queries".

In their replies to pre-contract enquiries, the landlords stated that they were unaware of any environmental problems relating to the premises. After giving their replies, the landlords were put on notice that the premises contained dangerous amounts of asbestos. The landlords failed to pass this information on to the tenants before completing the leases.

The decision

At first instance, the judge found that:

- the tenant had entered into the leases on the basis of the landlords' misrepresentation that there were no environmental problems at the premises;
- both non-reliance statements were attempts to exclude liability for misrepresentation under section 3 of the Misrepresentation Act, and subject to the UCTA reasonableness test;

- the non-reliance statement in clause 5.8 of the Lease failed the UCTA reasonableness test, because it did not allow the tenant to rely on the landlords' replies to pre-contract enquiries. Clause 12.1 in the Agreement for Lease passed the UCTA reasonableness test, because it did allow the tenant to rely upon such replies.

The Court of Appeal unanimously upheld the High Court's findings in relation to the non-reliance statements.

Why is this important?

This case provides confirmation that a non-reliance clause is subject to section 3 of the Misrepresentation Act and consequentially, subject to the UCTA reasonableness test.

Any practical tips?

When seeking to include valid non-reliance statements, you should ensure that provisions are reasonable (by reference to UCTA).

Autumn 2018

Termination

Tees Esk & Wear Valleys NHS Foundation Trust v Three Valleys Healthcare Ltd and another [2018] EWHC 1659 (TCC)

The question

How much detail must be included within a notice for it to be valid?

The background

Tees Esk & Wear Valleys NHS Foundation Trust entered into a funders direct agreement (FDA) with the defendants and later served notice under the FDA. The giving of such notice was a condition precedent to terminating a private finance initiative (PFI) project agreement.

The Trust's right to terminate the project agreement was not disputed. However, a condition precedent was the provision of various notices to funders in accordance with the FDA, so that the funders could decide whether to step-in to the project company's place. The funders alleged that the Trust had failed to comply with its obligation under paragraph 3.2.2 of the FDA to serve a notice. The paragraph read:

"*…containing details of any amount owed by Project Co to the Trust, and any other liabilities or obligations of Project Co of which the Trust is aware (having made proper enquiry) which are: (a) accrued and outstanding at the time of the Termination Notice; and/or (b) which will fall due on or prior to the end of the Required Period, under the Project Agreement*."

The decision

The judge held that:

- whilst the notice listed some liabilities that were unquantified (marked "*TBC*"), the Trust was not required to provide quantum details of claims that did not give rise to an obligation to make payment or where the quantum had not yet been ascertained. The funders' liability to make payment if it stepped-in was limited to amounts that had been quantified;
- the Trust was not obliged to provide evidence of having made "*proper inquiry*". In any event, the impact of inadequate inquiries would have been to deprive the Trust of its right to terminate based on non-payment rather than to invalidate its notice under paragraph 3.2.2.

Why is this important?

This case highlights the potential implications of a notice provision being subject to a particular level of detail, when ultimately, such details may not be available at the time that notice is given. Such circumstances could then have unintended consequences and render other terms ineffective.

Any practical tips?

Parties negotiating step-in provisions must balance the need for detailed information regarding liabilities against the difficulty of ascertaining those amounts with any certainty at the time of the notice or within a limited timescale.

Autumn 2018

Termination

Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm)

The question

In which circumstances can you rely on a force majeure clause to terminate an agreement?

The background

The defendant had been granted concessions in two offshore petroleum fields by Ghana. It had hired a deep water semi-submersible rig from the claimant, for which it paid a daily rate. The defendant was required by the contract to provide drilling instructions to the claimant.

In 2014 Ghana and Cote d'Ivoire entered into a United Nations Convention on the Law of the Sea arbitration to resolve a dispute over the offshore boundary in their territorial waters. The tribunal issued a provisional measures order (PMO) requiring Ghana to take steps to ensure that no new drilling took place in the disputed area.

In December 2015 Ghana refused to approve the defendant's plan for the wider field for separate reasons. From October 2016 the defendant ceased to pay the daily hire rate and terminated the contract by reference to the force majeure clause, citing Ghana's drilling moratorium following the PMO.

The issues for determination were whether:

- the cause of the failure to comply with the contractual obligations amounted to force majeure;
- if the cause was force majeure, the claimant had exercised its reasonable endeavours to remedy or avoid the force majeure.

The decision

The defendant's failure to comply with its contractual obligation to provide drilling instructions to the claimant was caused by two matters; one a force majeure, the other not attributable to force majeure. Teare J concluded, citing the Court of Appeal's decision *Intertradex v Lesieur* [1978] 2 Llloyd's Reports 509 which establishes the position that a force majeure event must be the sole cause of the failure to perform an obligation, that there was no sole cause here.

While the PMO prevented the defendant from drilling a new well and completing it with the rig, Ghana's failure to approve the new drilling plan was a greater impediment to the defendant's plans. The PMO was a force majeure but the refusal of approval was not.

Why is this important?

This case highlights the importance of the wording of a force majeure clause and is a reminder that a force majeure event must be the sole cause of the failure to perform a contractual obligation, not just one cause.

Any practical tips?

When drafting a force majeure clause, it is important to ensure that the clause is sufficiently wide so as to incorporate all possible events and also to include other contractual protections which would enable termination when force majeure is not the sole cause of termination.

Autumn 2018

Implied terms

Bou-Simon v BGC Brokers LP [2018] EWCA Civ 1525, 5 July 2018

The question

When implying terms into a commercial contract, does the court look to what is fair or to the express terms agreed by the parties?

The background

Bou-Simon had been employed by BGC Brokers as a broker with the intention that he would become a partner. He was paid £336,000 under the terms of a loan agreement which provided that the sum would be repaid from any partnership distributions made to Bou-Simon. The agreement also provided that if Bou-Simon ceased to be a partner, any unpaid amounts would only be written off if he had served at least four years. A previous draft of the agreement had contained further repayment terms that had been deleted during the negotiations.

Bou-Simon resigned within four years. BGC claimed that the full amount of the loan became repayable pursuant to the express or implied terms of the agreement.

The decision

At first instance, the judge implied a term into the contract on the basis that any notional reasonable person would have regarded the agreement as providing for full repayment of the loan unless four years had been completed, and that without an implied term to such effect the contract would lack commercial or practical coherence.

The Court of Appeal concluded that the trial judge had implied the term to reflect the merits of the situation as it appeared to him at the time, rather than approaching the matter from the perspective of the reasonable reader of the agreement; knowing all of the provisions and the surrounding circumstances at the time that the agreement was made.

It was decided that it was not appropriate for the Court to apply hindsight and seek to imply a term in a commercial contract merely because it appeared to be fair or because the court considered that the parties would have agreed to such a term if it had been suggested to them.

Why is this important?

This case highlights the importance of considering the effects of the express terms and surrounding circumstances of an agreement when a contract is made, rather than attempting to rely upon implied terms.

Any practical tips?

When drafting agreements, make sure that the consequences of any breach or early termination are expressly set out to avoid the need to later rely upon uncertain implied terms, which may well be rejected by the court.

Autumn 2018

Copyright

Draft Directive on Copyright in the Digital Single Market approved by European Parliament: Amendments to Articles 11 and 13

The question

What is the current status of the draft Directive on Copyright in the Digital Single Market?

The background

In 2016 the European Parliament proposed legislation in an attempt to modernise copyright laws to keep up with the digital age.

The draft Directive contains two particularly controversial provisions:

- Article 11, referred to as the "press publishers' right", or "link tax", which would allow publishing groups (eg newspapers) to charge online content sharing service providers and platforms a fee for a licence to link to their content; and
- Article 13, which essentially reverses the established legal precedent that users, rather than online content sharing service providers, are responsible for content published online, shifting the burden to the platforms to ensure that the content they publish does not infringe copyright.

In July 2018 the European Parliament rejected the draft legislation, meaning that the draft Directive was once again up for debate and amendment.

As a result of the controversy surrounding Articles 11 and 13, the proposed Digital Copyright Directive was redrafted and Articles 11 and 13 (amongst others) were amended. The key effects of such amendments are that:

- draft Article 11 now includes additional wording which clarifies that the publishers' right should not restrict legitimate, private, non-commercial use of press publications by individual users. The amendments also make clear that the right will not extend to mere hyperlinks which are accompanied by individual words;
- draft Article 13 no longer applies to certain types of entities such as open source software developing platforms. The amendments also clarify that co-operation between platforms and rights holders should not restrict the use or availability of non-infringing works, such as parody, on online platforms.

The development

On 12 September 2018 the amended draft Directive was reconsidered by the European Parliament and MEPs voted in favour of the amendments. The draft Directive still has some way to go before being passed (and even then it remains to be seen how member states will implement the Directive), but it is one step closer to final approval.

What happens next?

The next stage is for the European Commission, European Council and European Parliament to informally negotiate on the current draft of the directive and attempt to reach agreement on the final wording of the text, which if agreed, will be passed back to the European Parliament in January 2019 for a final vote.

If the Directive is passed it must then be transposed into domestic law by each member state within 2 years. The extent to which the effects of the Directive are felt in the UK will therefore ultimately depend upon the Brexit deal reached in March 2019.

Practical tips

Keep watching! There is still a way to go before the Directive is implemented, if at all, and with European Parliament elections expected to be held in May 2019, MEPs will be paying attention to the voices of their constituents.

Autumn 2018

Trade marks

Frank Industries v Nike Retail [2018] EWHC 1893

The question

How careful do you need to be when utilising third party trade marks in advertising campaigns?

The background

Frank Industries is a ladies' sportswear brand based in Australia. It holds UK and EU trade marks consisting of the upper-case letters 'LNDR'. In January 2018, Nike launched its "Nothing beats a Londoner" campaign, in which it used the 'LDNR' sign (note the spelling difference) alongside its famous Nike Swoosh. Frank Industries issued a claim for trade mark infringement under the Trade Marks Act 1994 and the EU Trade Mark Regulation (2017/1001), as well as a claim for passing off. It also applied for an interim injunction to restrain the alleged infringing acts.

At first instance, the Intellectual Property Enterprise Court granted a prohibitory injunction and a mandatory injunction requiring Nike to, within 14 days, "take all reasonable steps to delete the signs LDNR…from social media accounts within its reasonable control" – including Twitter, Instagram and YouTube. The Court directed an expedited trial, and on this basis the duration of the interim injunction was limited to four months.

The injunction was appealed and the Court of Appeal upheld the prohibitory element of the injunction, but reversed the mandatory element. The mandatory requirements were considered too burdensome given the nature of the social media platforms. Nike was required to stop using LDNR, but was not required to re-edit YouTube videos or delete entire Instagram posts or Tweets.

Nike also brought a counterclaim against Frank Industries on the basis that the LDNR trademark was invalid.

The decision

The Intellectual Property Enterprise Court found for Frank Industries. The decision was threefold:

- the Court found that LNDR was sufficiently distinctive to be a valid trademark. There was no dictionary definition identified. Nike failed to establish that the average consumer would perceive it as meaning Londoner;

- the Court ruled that the trademark had been breached, which could encompass passing off. LNDR and LDNR were deemed to have a high level of aural and visual similarity. Given this and the fact that there were several accounts of actual confusion, the court found that it was likely that the average consumer could have been confused;
- the Court also ruled that Nike were unable to rely on the defence laid down in Article 14(1)(b) of the EU Trademark Regulation. Part of this test was to consider whether Nike had accorded with honest practices. Nike were considered not to have acted fairly. They had continued to attempt to use LDNR despite knowing that Frank Industries protested and that the use could be harming their goodwill permanently.

Why is this important?

This case shows that the court will consider the context in which a trade mark is used when considering consumer perception – both for validity and infringement. Hashtags on social media will not necessarily be conclusive.

The Court of Appeal decision also shows an understanding of the value of social media. In particular, from an injunction perspective, it provided practical and savvy alternatives to the High Court's suggested outright deletion of posts.

Any practical tips?

The case is an example of how an advertising campaign can be terminated early as a result of trade mark infringement. Nike's LDNR campaign was substantial and, until Frank Industries pitched up with their complaint, highly successful. There was advertising at Premier League football games, in a YouTube Film, a Nike LDNR award ceremony and even posts of Sir Mo Farah in a Nike LDNR T-shirt. So the pain felt by Nike went beyond damages for trade mark infringement, given the lost brand capital in what had been a successful campaign.

So the message is clear – if you're clearing copy, keep your eyes open and check for any possibility of trade mark infringement. This includes the use of abbreviations, which are now common in the context of social media posts – and the latter may slip more easily through the copy clearance process than more obvious/traditional full-word brand names.

Autumn 2018

IP ownership

Sprint Electric Ltd v Buyer's Dream Ltd and another [2018] EWHC 1924 (Ch), 30 July 2018)

The question

How does the use of personal services companies affect IP ownership?

The background

Dr Potamianos (DP) was recruited by Sprint Electric Limited (SEL) because of his particular expertise. He was required to work for SEL through a service company, Buyer's Dream Limited (BDL), for tax reasons. DP was later appointed as a director of SEL and entered into a second contract for services in 2000. He was effectively SEL's sole programmer, tasked with writing source code for various motor control algorithms.

In practice, BDL physically retained the source code, supplying only object code to SEL, subject to a single exception that was the subject of an assignment in 2007.

In 2012, Sprintroom Limited (SRL) was incorporated. SRL held a 100% shareholding in SEL whilst Dr Potamianos was a 40% shareholder in SRL. In 2015 disagreements about SEL's management emerged, and in 2017 DP was removed as a director from both SEL and SRL.

In joint proceedings, SEL made a claim in respect of the intellectual property in, and delivery up of, source code from DP and BDL. DP and BDL counterclaimed for an injunction on the basis that they owned the copyright.

The decision

The High Court decided that SEL owned the copyright in the documents and source code authored by DP as the true relationship between SEL and DP was one of employer and employee.

Why is this important?

This case uses an employment relationship to determine the ownership of source code and any intellectual property. However, what is material to such determination is the true construction of the parties rather than the relationship as it is on paper.

Any practical tips?

When drafting agreements with personal services companies, it is important to consider any relevant IP and include express provisions dealing with IP, as well as considering what

happens to such IP in the event that the agreed structure is deemed to establish an employer/employee relationship.

Autumn 2018

Data protection

European Parliament calls for suspension of Privacy Shield

The question

Is the EU-US Privacy Shield in danger?

The background

On 5 July 2018 the European Parliament issued a non-binding resolution calling for the European Commission to suspend the EU-US Privacy Shield if the US did not meet its requirements by 1 September 2018. The European Parliament was reacting to concerns that the Privacy Shield had not been implemented as agreed.

The Privacy Shield acts as a framework between the US and the EU to provide companies from both regions with a mechanism to meet data protection requirements when transferring personal data to the US.

In July 2016 the Commission declared the Privacy Shield provided an adequate level of data protection. Similarly in October 2017 an annual review of the Privacy Shield found that it worked well, yet there was room for improvement.

However, the European Parliament stated in the July resolution that "*a number of concerns remain regarding both the commercial aspects and the access by US public authorities to data transferred from the EU … [including] the lack of concrete assurances of not conducting mass and indiscriminate collection of personal data (bulk collection).*"

The concerns

The concerns can be summarised into four main areas:

- President Trump's 2017 Executive Order excluded non-US citizens from the protections of the USA Privacy Act;
- the Facebook-Cambridge Analytica data breach highlighted the lack of sufficient monitoring of the Privacy Shield in terms of data breach prevention;
- the US Act (US CLOUD Act) allows US national security and law enforcement agencies to access personal data across borders. The Safe Harbour Framework (the predecessor to the Privacy Shield), was struck down by the Court of Justice in 2015 due to similar concerns; and

- the European Data Protection Board raised concerns about the commercial aspects of the Privacy Shield and problems regarding the bulk collection of personal data by US authorities.

Why is this important?

While the resolution from the European Parliament is not binding, and the Privacy Shield remains in place for now, it does send a strong political message. The Commission will have to conduct a second review which is currently scheduled for October 2018. After which, if the Commission deems that the Privacy Shield does not adequately protect EU citizens' personal data, they have the power to cancel, suspend or amend the Privacy Shield. The situation is exacerbated by the current case for the invalidation of the Privacy Shield (initiated by Max Schrems) currently pending before the CJEU.

Any practical tips?

Developments will need to be monitored carefully for any organisation relying on data flowing freely between the EU and the US. Alternatives to the Privacy Shield should be investigated to ensure legitimate US transfers, which include the EU's model contract clauses. But the latter are of course also currently subject to invalidation claims by Mr Schrems. The future of international data transfers is looking far from rosy, and that's without even adding Brexit complications to the mix.

Autumn 2018

Data Protection

Sir Cliff Richard, OBE v BBC and Chief Constable of South Yorkshire Police [2018] EWHC 1837 (ChD)

The question

In what instances can journalists name the suspect of a police investigation? Do such suspects have a "reasonable expectation of privacy"?

The background

In August 2014 the BBC reported on a police search which had occurred at Sir Cliff Richard's apartment in Berkshire (carried out by South Yorkshire Police). The BBC's reporting revealed that Sir Cliff was being investigated in relation to the sexual assault of a child in the 1980s. Sir Cliff was never arrested or charged as a result of the investigation.

South Yorkshire Police had confirmed to the BBC that the investigation concerned Sir Cliff, they had provided advance notice of the search of Sir Cliff's apartment, and they had also facilitated the BBC's coverage and reporting on the day.

In May 2017 South Yorkshire Police reached a settlement with Sir Cliff, admitting liability in relation to his claim and paying Sir Cliff £400,000 for general and special damages. The police also made a payment on account of £300,000 costs for which they are liable.

Sir Cliff claimed that the BBC's reporting of the search was a serious invasion of his privacy, whilst the BBC contended that its reporting was justified under rights of freedom of expression and of the press. Sir Cliff also made a claim under the Data Protection Act 1998 but it was accepted that this added nothing to the claim for the breach of privacy claim.

The development

In July 2018, the High Court handed down its judgment in favour of Sir Cliff. The court awarded general damages to Sir Cliff of £190,000, along with aggravated damages of £20,000. It was also held that the BBC and South Yorkshire Police were jointly responsible for £185,000 of these damages (at 65% and 35% respectively). Further, the court found that the BBC's reporting has caused Sir Cliff to incur financial losses and expenses. There is a second trial scheduled to determine the remaining issues regarding special damages and any contribution payments.

In making its judgment, the court determined that a suspect in a police investigation generally has a 'reasonable expectation of privacy' in relation to such investigation and this expectation

generally endures even when a search of their property has occurred. Further, the fact that information regarding the investigation has reached the media does not change the presumptively private status of the suspect.

The BBC reporter who broke the story had received information from an unofficial source regarding the investigation, and in turn contacted South Yorkshire Police, suggesting a story would or may be published. South Yorkshire Police then confirmed the story, offered further information and offered to alert the BBC of the search. In these circumstances, the court held that the expectation of privacy remained intact:

"*…nothing was different when Mr Johnson acquired more information from (or had it confirmed by) SYP. He was acquiring private information in circumstances which did not destroy the privacy. It was not disclosed for good operational reasons. It was disclosed because Mr Johnson had wrongfully exploited the previously acquired confidential information to manoeuvre SYP into its further disclosures, which SYP misguidedly made*."

The court considered that if an anonymised report had been published, it would have contributed to a debate of general public interest, but the naming of Sir Cliff added nothing of material value to the reporting. The judge commented that if he was wrong about the naming of Sir Cliff adding nothing to the investigation, "it is heavily outweighed by the seriousness of the invasion".

On the issue of damages, the court rejected the BBC's argument that damages for misuse of private information should not include any compensation for damage to reputation; instead the damages award took account of the significant effect on Sir Cliff, including on his dignity, status, reputation, health and well-being. Sir Cliff's claim for aggravated damages was ultimately rejected, except for the BBC's decision to put its coverage forward for an industry award, which the court held merited aggravated damages of £20,000.

Why is this important?

The High Court's decision in this case sets a worrying precedent for journalists and news outlets; despite finding that what was broadcast about the search was accurate, the court held that the mere naming of Sir Cliff was unlawful. As such, even if the broadcast had been run with less prominence, it would have been unlawful. The new precedent set by the judgment represents a significant shift against the freedom of the press and their ability to report on police investigations. Media organisations will now be very reluctant to report information regarding police searches, and many may go unreported and unscrutinised.

Any practical tips?

Media outlets must now be very careful when considering reporting on police inquiries and investigations. The court's decision to rule in favour of Sir Cliff, despite recognising that 'the

case is capable of having a significant impact on press reporting' and the BBC's decision not to appeal the ruling, has left journalists and media outlets in a precarious position. Considering the high level of damages, organisations may well start adopting more cautious reporting strategies, but at what cost to press freedom?

Autumn 2018

Data protection

Yahoo! fined £250,000 under old DPA 1998 for 2014 data breach

The question

With the arrival of the GDPR, the focus on third party data processing agreements and ensuring they have the relevant controls in place has never been more intense. But how much do businesses need to focus on their intra-group processing agreements?

The background

On 22 September 2016 Yahoo! Inc. publicly announced for the first time that the personal data of 500 million user accounts had been removed from its US servers by hackers two years earlier in November 2014. The data included user's names, email addresses, telephone numbers, dates of birth, passwords, and security questions and answers. During this period Yahoo! UK Services Limited (Yahoo! UK) was the data controller for over 500,000 UK account users, whose personal data was held on the servers of Yahoo! Inc. as the data processor. The data breach has become notorious, both because of the extent of the breach and the two-year delay in reporting the attack.

The decision

The data breach was initially investigated by the US Securities and Exchange Commission who imposed a $35million (£26million) fine on Yahoo! A separate investigation was then carried out by the ICO which focused specifically on Yahoo! UK's liability for the data breaches of the UK accounts. The fact that the breach occurred under the systems of Yahoo! Inc. as data processor did not extinguish Yahoo! UK's liability as it was under an obligation as data controller to ensure that Yahoo! Inc. took appropriate measures to protect its users' personal data.

The ICO's investigation found that:

- Yahoo! UK failed to take appropriate technical and organisational measures to protect the data of its customers against exfiltration by unauthorised persons;
- Yahoo! UK failed to take appropriate measures to ensure that Yahoo! Inc. as its data processor complied with the appropriate data protection standards. Such measures include entering into a written contract or providing Yahoo! Inc. with instructions as to the necessary steps that must be taken to protect personal data or ensuring that such steps were adhered to; and
- the inadequacies found had been in place for a long period of time without being discovered or addressed.

In considering the financial penalty to be imposed, the ICO considered Yahoo! UK's shortcomings, including the fact that its technical and organisational safeguarding systems were materially inadequate to protect against data breaches, particularly given its resources and experience and also that the breach was undiscovered and unaddressed for a long period of time. The ICO also considered factors in Yahoo! UK's favour to mitigate the penalty such as its extensive steps to notify affected users and to inform them how they could protect their accounts. In the circumstances the ICO was satisfied that a fine of £250,000 was reasonable and proportionate under the DPA 1988.

Why is this important?

As the Yahoo! UK data breach occurred in 2014, the DPA1998 was applied as the GDPR does not apply retroactively. However, if the breach had occurred under the GDPR, Yahoo! UK would have found itself in a significantly different position.

The data breach was discovered in July 2016, 21 months after the breach occurred and even upon discovery Yahoo! UK waited a further 2 months before reporting the breach, on the commercial basis that Yahoo! UK was in acquisition negotiations with Verizon at the time. Under GDPR, such a delay would not be possible, regardless of the commercial impacts on the company. Amongst other provisions, Yahoo! UK would be in violation of the GDPR in that it failed to implement systems to identify data breaches in a timely manner and also that it failed to notify users of the breach within the requisite 72 hour period.

Despite the sanctions imposed on Yahoo! UK, the extent of the damage is significantly lower than it could have been under the GDPR. Under DPA1998 the maximum penalty for breach was £500,000, however, the GDPR allows for fines up to the higher of EUR €20 million or 4% of annual global group turnover. In 2015, Yahoo! global group revenue was recorded at $4.9bn. Taking a similar figure under the GDPR could have exposed Yahoo! UK to a fine of up to $198m.

Any practical tips?

The key message from this case is the need to ensure that data processing agreements are in place between group companies, and not just third party external processors. Often those intra-group agreements are overlooked. So while companies continue to invest substantial time and cost into updating their third party processor agreements, they must not overlook the dangers of failing to tend to their own backyard – ie their own intra-group data transfers. Clearly this is even more crucial in the post-GDPR world with its potentially eye-watering levels of fines.

Autumn 2018

Online Platforms

Online advertising and intellectual property: new industry Memorandum of Understanding

The question

How is industry responding to the threat of advertising on websites and apps which infringe copyright or disseminate counterfeit goods?

The background

A variety of interested parties (including advertisers, agencies, advertising platforms and publishers) have signed a voluntary memorandum of understanding (MoU) to try and minimise the placement of advertising on websites and mobile phone applications that infringe copyright or disseminate counterfeit goods.

Online advertising is a major source of income for IP-infringing websites. The misplacement of ads has been identified as an important problem, with brands themselves often unaware of where their ads are being placed. The presence of ads for well-known brands or payment services on apps or sites that infringe intellectual property rights often leads consumers to believe that sites they are visiting are legal when they are not.

MoU aims

The MoU includes commitments from the parties to minimise the placement of advertising on sites and apps that infringe third party IP, and to also remove advertising if the advertiser becomes aware that their advertising is live on such sites and apps.

The aim of the MoU is to (i) strengthen IP protection; (ii) reduce the harm caused by IP infringement; (iii) uphold fundamental rights; and (iv) ensure fair competition across the market. The MoU further aims to support and complement initiatives against IP infringements in the relevant member states. Based on their own individual policies and assessment criteria, the signatories agree to limit the placement of advertising on other websites and/or mobile applications, which have no substantial legitimate uses.

The MoU is without prejudice to any other initiatives aimed at minimising the placement of advertising on those platforms that infringe IPR.

MoU commitments

Individual signatories to the MoU who are directly responsible for the placement of advertising, commit to enact reasonable measures to minimise the placement of advertising on websites or mobile applications that:

(a) have no substantial legitimate uses; and
(b) have been found by regulators or law enforcement bodies to infringe IP and disseminate counterfeit goods on a commercial scale.

They also commit to adopt publicly available IP policies which include general information on the measure, tools and safeguards put in place.

Those signatories that operate in the field of buying, selling or brokering the sale/purchase of advertising space commit to the inclusion in their contracts with advertisers or other media buyers of an obligation that requires the use of tools and safeguards designed to ensure that advertising is not placed on platforms that fall under (a) or (b) above. Moreover, brokers of advertising sales/purchase also commit to adopt IP policies and to make these publically available.

Associations that are signatories undertake to use their best efforts to dissuade their members from: (i) offering or buying advertising space on the platforms described in (a) and (b) above; and (ii) allowing their services to be used in connection with the placement of advertising on platforms such as those described in (a) and (b) above. Associations also commit to encourage their members, where appropriate, to sign the MoU individually.

All signatories must ensure that they act in a manner than upholds the commitments made in the MoU. They must not enter into any discussion, activity or conduct that violates applicable competition law – this includes engaging in any kind of collective action with other signatories that could have the object or effect of disadvantaging other players in the market.

Monitoring

A key aspect of the MoU is that the signatories agree to monitor and measure the effectiveness of the MoU by reporting their efforts to enact their commitments and to also monitor the impact of the MoU on the online advertising market. Signatories commit to inform other signatories as well as the EC on (i) the definitive means that they have in place to comply with the commitments set out in the MoU; and (ii) the estimated effectiveness of such means.

Additionally, signatories will collect and collate information that is relevant to the online advertising market in order to discuss and ascertain the impact that the MoU has had on the wider market.

Why is this important?

By signing the MoU, various market leaders in this field (including Google, World Federation of Advertising and ISBA) have committed to taking active steps to meet the challenges posed by IP-infringing websites and apps. This is against the backdrop of existing initiatives tackling IP infringement in Member States, as set out under EU and/or national law. The latter provides a legal framework under which the MoU can operate while also establishing a basis for potential legislative change based on the findings of the MoU after the initial 12 month period.

Any practical tips?

Find out if your organization has signed up to the MoU. If it has, understand the commitments that this brings. For example, you will need to ensure that your contracts with advertisers and media buyers etc include obligations that reflect these commitments – such as the use of tools and platforms to block advertising appearing in IP-infringing sites.

Autumn 2018

Online platforms

European Commission proposes Regulation to increase fairness and transparency

The question

What steps is the EU taking in response to concerns over the growth in power of online intermediation services?

The background

On 26 April 2018, as part of its Digital Single Market initiatives; the European Commission adopted a proposal for a Regulation on "promoting fairness and transparency for business users of online intermediation services".

The proposed Regulation aims to improve the functioning of the Digital Single Market and to create a fair, transparent and predictable business environment for smaller businesses and traders when using online platforms and search engines.

The reason for this EC proposal is that whilst there are enough marketplaces out there that no single one could be considered to be a monopoly, they are perceived as being so big and all pervasive compared to the retailers that trade on them that the EC is concerned that they could dictate unfair rules and policies. The EC notes the dependency of small businesses on marketplaces, citing this as the driver for the legislation alongside their perception that these businesses do not have effective means of complaint and redress.

Additionally, the commission has concerns over the ranking of websites by search engines, including websites though which businesses offer goods and/or services to consumers. The rankings have an impact on consumer choice and the commercial success of business websites. The issues here are exacerbated by the lack of regulatory framework targeted at preventing some of these practices or at providing effective redress.

Among other things, the proposed new Regulation would:

- increase transparency by requiring providers of online intermediation services to ensure that their terms and conditions for professional users are easily understandable and easily available;
- help companies resolve disputes more effectively by making providers of online intermediation services set up an internal complaints-handling system; and
- set up an EU Observatory to monitor the impact of the new rules.

The development

Article 114 of the Treaty on the Functioning of the European Union constitutes the legal basis for this initiative. The objective of Article 114 is to approximate provisions in Member States and to ensure that coherent, non-discriminatory rules are applicable throughout the EU. The application of common rules throughout the EU avoids discrepancies between member states and ensures legal certainty. As such it was found that this initiative contributes to the establishment and good functioning of the internal market promoting fairness and transparency.

It was realised that a legislative instrument was the only mechanism that could effectively address the development of further issues in this sphere. A regulation is the preferred mechanism as it is directly applicable in all member states.

Scope

The proposed Regulation applies to online platforms that facilitate direct transactions between business users and consumers (providers of online intermediary services) such as online market places, online software application stores, and online social media. The scope of the proposal was extended to also cover search engines, although the obligations applicable to search engines are limited to transparency regarding rankings.

With regards to social media, it was noted by the commission that certain providers incorporate different online intermediation services within one and the same digital environment, all of which is intended to fall under the scope of the proposed Regulation.

Proposed rules

The Regulation will lay down obligations for providers of online intermediation services as well as search engines to provide business users and corporate website users with more transparency. Part of this attempt to increase transparency under the Regulations is that providers of online intermediation services would be required to ensure that their terms and conditions for professional users are easily understandable, easily available for business users, and that there are objective grounds for suspending or terminating the services. The Regulation will apply to all terms and conditions that are not individually negotiated.

A breach of these increased transparency measures would result in the contractual terms and conditions becoming non-binding on the business users. Providers of online intermediation services will be required to provide business users a statement of reasons that lead to a suspension or termination of a contract.

Additionally, there is an overriding provision for search engine providers to be more transparent about how search results are ranked (in particular the methodology behind the ranking of commercial websites). Search engine providers will also need to set out in their

terms and conditions the main factors determining the search ranking of goods and services. Providers of search engines would be required to set out for commercial users the main parameters determining the ranking. Furthermore, the terms and conditions would have to include a description of the 'technical' and 'contractual' access of business users to 'personal data' (or other type of data) that business users or consumers provide to online intermediation services or that are generated through the provision of those services.

Service providers will also be required to set up an internal system for handling complaints accessible to users. It will be a requirement for businesses to handle complaints swiftly and effectively communicate to the user. Information regarding the complaints handling system will be required to be included in the provider's terms and conditions.

Why is this important?

There are far reaching consequences for non-compliance with the Regulations. Most notably, non-compliant terms and conditions will not be binding on business users, meaning that providers will need to ensure that terms and conditions are appropriately re-drafted or updated to reflect compliance with the Regulations.

Regarding transparency around rankings and data use, providers are generally happy to disclose high level information regarding ranking of search engine results. However, there is some concern that any regulatory pressure to increase transparency of search engine ranking information may lead to the potential for the manipulation of algorithms – the inner workings of which are often a platform's most closely guarded secrets. Finding the right balance may well prove very difficult.

Autumn 2018

ASA

Influencer disclosures: remember #ad! – Daniel Wellington

The question

What disclosures need to be made in influencer marketing to ensure ads are easily identifiable?

The background

Louise Thompson, a television personality, posted an image of herself on Instagram wearing a Daniel Wellington watch, with the caption: "*sippin' [sic] on yummy coconuts 3x size of my skull! Wearing my @danielwellington classic petite Melrose 28mm watch and matching cuff… you can get 15% off using the code 'LOUISE'.*"

The images featured Ms Thompson drinking from a coconut while wearing a Daniel Wellington watch, with the watch featured prominently in the centre of the image.

The complaint

The Consumer Protection from Unfair Trading Regulations 2008 prohibit misleading omissions in advertising, such that if a commercial practice fails to identify its commercial intent, unless this is already apparent from the content, it is likely to be misleading.

The CAP Code reflects these requirements. CAP Rule 2.1 states that marketing communications must be obviously identifiable as such. Further guidance from the ASA states that it must be obvious to the consumer that a commercial relationship exists between the advertiser and the social media influencer.

The complainant challenged whether or not the post was obviously identifiable as a marketing communication.

The response

Ms Thompson stated that the correct hashtag was not included and that the post had since been amended.

Daniel Wellington AB went on to explain that they had a written contract with Ms Thompson which stated that the inclusion of terms of disclosure such as "#sponsored" or "#ad" should have been used to make it directly clear that the posts were ads for Daniel Wellington. They explained that in the caption of the post, the influencer stated her personal discount code

which could be used on purchases from Daniel Wellington's official website, and the watch and cuff had a central position in the image so that the post was dedicated to the Daniel Wellington brand. They further highlighted that they expected all of their brand ambassadors who marketed Daniel Wellington products to ensure that they complied with applicable rules regarding marketing and that they took responsibility for designing their social media posts they had agreed to.

The decision

The ASA noted that a commercial relationship existed between Daniel Wellington and Ms Thompson which consisted of a contractual agreement, under which Ms Thompson agreed to promote Daniel Wellington products by posting on her Instagram account and was paid in return.

The details of the contract specified time periods of posts, restrictions on posting about other brands as well as granting Ms Thompson a personalised discount code to share with her followers. All of this highlighted a significant degree of editorial control over the content, which led the ASA to conclude that both Ms Thompson and Daniel Wellington were jointly responsible for ensuring that the promotional activity undertaken by Ms Thompson was compliant with the CAP Code.

It was noted that while the post differed in some aspects from her usual posts, and contained some elements that indicated that there may be a commercial relationship between Ms Thompson and Daniel Wellington, such as the handle "@danielwellington" and a personalised discount code, the ASA did not consider this to go far enough, in terms of the context of the post, to establish that the post was advertising content.

Therefore, in the absence of a clear identifier such as "#ad", the post was not obviously identifiable as a marketing communication and it breached the CAP code.

Why is this important?

The case highlights the importance of properly identifying advertising content and how #ad has pretty much become one of the settled means for disclosing advertising content by influencers. This remains a hot topic for the ASA, who are currently conducting a review of how paid-for influencer and native advertising is sign-posted online. It is also now a target for the CMA, which has also launched its own investigation (in August 2018) into influencer marketing to gather more information on whether social media stars are being transparent about sponsored posts. This has included the CMA actively seeking undertakings from these stars to try and prevent their followers from being confused over their brand relationships.

Any practical tips?

Daniel Wellington appear to have instructed their collaboration partners to use appropriate wording to clarify that their uploaded content was advertising. It is not clear from the ruling if this was clearly signalled in the contract itself – which is clearly a good step (preferably in bold highlight) at the top of the contract. Consider also providing training to influencers and checking their posts to ensure they are disclosing in the right way. On-going monitoring through signing up to the influencer's posts is a simple way of keeping an eye on a brand ambassador, and ensuring that he/she is on the right disclosure track.

Autumn 2018

ASA

HFSS ruling: Ferrero UK (aka Zoella and Nutella)

The question

When engaging influencers to promote a high in fat, salt or sugar (HFSS) product, how can advertisers help ensure that they will not be promoting this product to children?

The facts

A range of social media ads for Ferrero (including a YouTube video, Instagram post, tweets and an Instagram post) were placed between the 3 – 7 February 2018. The ads featured the following selection of posts:

(a) an Instagram post, posted by PointlessBlog, on 3 February 2018 contained an image of Alfie Deyes and Zoella with a selection of pastries, cakes and fruits. Accompanying text stated "Currently having a massive @Nutella brunch! look how amazing it looks! Get involved this Monday using #WorldNutellaDay. I'm going to be on the hashtag looking through to see all of your recipes";

(b) the YouTube video, posted by PointlessBlog, on 4 February 2018 featured Alfie Deyes, his family and Zoella eating a brunch to celebrate World Nutella Day, which included various foods made with Nutella;

(c) the first tweet from PointlessBlog, posted on 5 February 2018, stated "#WorldNutellaDay is finally here!! Make sure you're using the hashtag, so I can see what you've made! Here's what we made in celebration". An embedded video titled "NUTELLA BREAKFAST PARTY" was the same video as ad (b);

(d) Zoella posted on Instagram on 5 February 2018 an image of a selection of pastries, cakes and fruits and three small jars of Nutella. Accompanying text stated "Had the breakfast of all breakfasts at the weekend with @pointlessblog and the rest of the fam celebrating #WorldNutellaDay. Can breakfast be like this everyday please?";

(e) the second tweet from PointlessBlog, posted on 7 February 2018, stated "Wishing I could have this brunch all over again! #WorldNutellaDay", and was accompanied by the same image as in ad (a).

The complaints

In 2007 the advertising of HFSS products aimed at children under 16 was prohibited. In 2017 the ASA expanded these rules to cover non-broadcast media including online and social media. CAP Code rule 15.18 prohibits product advertisements that are directed at people under 16 though the selection of media or the context in which they appear. Additionally, no

medium should be used to advertise HFSS products, if more than 25% of its audiences are under 16 years of age.

Three complainants challenged where the ads posted on social media from PointlessBlog and Zoella were promoting a HFSS product to children.

The response

Ferrero stated that they place a significant amount of importance on the selection of vloggers whose audience demographic did not exceed the percentage of audience under 16 years of age per CAP Code rule 15.18. They explained further that only a small percentage of PointlessBlog and Zoella's followers were in the 13 to 17 age bracket.

Ferrero said that they include language that is designed to proactively guide influencers towards creating content that was in line with all aspects of the CAP Code. The influencers were contractually obliged to ensure that the content created was addressed towards an adult audience and did not include any exhortation directed at children or of appeal to children. Ferrero considered that they had taken all reasonable steps to ensure that the content posted by PointlessBlog and Zoella was in compliance with the CAP Code.

Additionally, and perhaps their most persuasive point, Ferrero provided data to the ASA showing that the percentage of PointlessBlogs followers on YouTube who were registered on the platform as between 13 and 17 accounted for only 17.6% of his total followers. The percentage of the vlog's UK followers in that age bracket who viewed ad (b), PointlessBlog's YouTube video ad, was 18.6%. Ferrerro also provided data which showed that the percentage of Zoella's UK followers on YouTube who were registered on the platform as between 13 and 17 years of age was 21% of her total followers.

Additionally, Ferrero were able to highlight that, globally, PointlessBlog's Instagram followers who were registered as between 13 and 17 years of age comprised 20% of his total followers. Zoella's followers in the same age bracket comprised 17% of her total followers.

Zoella noted that she was engaged by PointlessBlog to assist with his engagement with Ferrero. She herself did not have a direct relationship with, or any obligations to, Ferrero. However, Zoella did still take necessary steps to review her following to ensure that her involvement in the campaign did not breach the CAP Code.

The decision

The ASA did not uphold these complaints.

It found that the content did not focus on themes likely to be of particular appeal to under 16's. It considered that the content would not be of greater appeal to those under 16's than those

over the age of 16. Furthermore, the ASA assessed each ad's compliance with the Code based on the specific ways in which consumers interacted with the different platforms, the targeting tools available on each platform and the data relating to the age profile of the influencers audience.

The ASA further noted with regards to the YouTube posts, that less than 25% of PointlessBlog's registered UK subscriber base and users who view the post while logged in were registered as being under 18 and therefore an even smaller proportion were under 16. The ASA also clarified that while they could not establish the age of the viewers that 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 the post while not logged in and those that were logged in.

Moreover, for those posts that were non-paid for posts ((a) and (d) above), neither the influencer nor Ferrero would have been able to utilise the age restrictions or interest based targeting available on Instagram for paid-for ads. The same applied for the twitter posts posted by the influencers ((c) and (e) above).

In addition to the above, it was considered that the advertiser has used the most robust demographic data available to them and had ensured that they were responsible when targeting their advertising. The ASA concluded that, in association with PointlessBlog and Zoella, Ferrero had taken reasonable steps to target the ads appropriately and therefore did not breach the CAP Code.

Why is this important?

This is a helpful decision for both advertisers and online platforms. It shows how much emphasis the ASA places on demographic data and how reasonable inferences can be made across platforms, as well as across both users that are logged into a platform, and those that are not. The latter is a particularly useful development.

The ASA noted the reasonable steps taken by both Ferrero and the influencers; including the inclusion of language in the contract between Ferrero and PointlessBlog that obliged PointlessBlog to ensure that in his performance of the Contract he was creating content that was in line with the CAP Code specifically regarding the addressing of the content to an adult audience.

Furthermore, in the current HFSS advertising climate, with a proposal for a 9pm watershed on HFSS advertising amongst other developments in this area, it is important for advertisers and influencers to ensure that they are targeting their advertising towards the appropriate demographic, and to be able to present such demographic data to regulators if necessary. Moreover, highlighting positive use of targeting tools available via each social media platform

on which the ads appears should go a long way to demonstrating to regulators that an advertiser has acted responsibly with regard to HFSS products.

Any practical tips?

Advertisers should ensure that when engaging influencers they incorporate language that obliges influencers to create content that is in line with the CAP Code. Not only does this mean appropriate advertising disclosures so that any content is recognisable as an ad, but also specifically obliging the promotion of any HFSS products only to an adult audience (or at least a 16+ audience). Taking these obligations into the influencer contract, and highlighting them separately in correspondence with the influencer, may also prove important.

Furthermore, utilising appropriate age targeting tools on each social media platform will help ensure that HFSS ads are not directed at an under-16 audience. It will also show to regulators that the advertiser is utilising the tools available to ensure compliance with HFSS regulations.

Autumn 2018

ASA

ASA ruling on prize promotions: Highland Spring

The question

What information must be made available to prospective participants of a prize promotion in order to avoid unnecessary disappointment?

The background

A prize draw (seen on 23 February 2018 on the label of a Highland Spring water bottle) offered entrants the chance of an 'instant win'. The label stated: 'Win prizes with H20omph, 10,000 to be won'. Further text on the label stated:

'Open 01/02/18 - 30/06/18. Enter online "instant" win at www.highlandspring.com/H20omph & enter details, bottle batch code and time stamp. Prizes: 50 3-night stays for 4 (2 adults, 2 children 2-11 yrs) in an unusual location; 50 train journey experiences (2 adults); 9,900 experiences for 2-4D cinema, aqua assault course or Segway. Restrictions apply. Not all prizes may be won. Retain bottle to claim. No purchase necessary, NI and ROI only. Bonus draw 01/07/18-31/12/18. Ts&Cs on website.'

The complaint

The complainant challenged whether the promotion was misleading, on the basis that he/she understood than an entrant's time stamp would have to correspond with the "moment" randomly selected by a computer system.

The response

Highland Spring made the following statements:

- there were ten thousand prizes available to be won from 1 February 2018 to 30 June 2018, with a final 'bonus draw' between 1 July 2018 and 31 December 2018;
- entrants needed to submit a promo code found on their bottle, which consisted of a time code and batch stamp;
- the promo code needed to be submitted during a winning "moment", being a second-long period selected at random, to win a prize;
- the terms and conditions were provided on the bottle, and full terms and conditions were available on the promotional website. The relevant section in the full terms and conditions stated: *'Prizes are allocated randomly to predetermined winning moments ('Winning Moments') via a secure, independently verified computer system. The entry submitted at the relevant Winning Moment will win a Prize.*

Although all Prizes are available to be won, there is no guarantee they will all be won'; and

- there was an expectation that consumers would read the terms and conditions of a promotion and the packaging stated prizes were available to be won, but not guaranteed.

The development

The complaint was upheld.

The CAP Code states marketers must be seen to deal fairly and honourably with participants and potential participants, and must avoid causing unnecessary disappointment. Further, marketing communications must communicate all applicable significant conditions or information was likely to mislead participants.

The ASA noted that the back of the label stated 'not all prizes may be won', but the short terms and conditions on the label did not give any information regarding how the promotion would work or explained how likely a participant was to win a prize. The ASA considered that the information provided on the label meant the most likely expectation was that the bottle batch code would determine whether a prize would be won, and not all prizes would be won because not everyone with a winning code would claim their prize.

The ASA understood that neither the batch code nor any other information on a specific bottle determined whether a participant won a prize. A prize was instead awarded if a participant entered their details at exactly the same second as randomly determined by a computer. Each prize was linked to a 'winning moment' and if no participant entered their details during a 'winning moment', the relevant prize would not be won.

Therefore, the ASA considered that it was possible that the number of prizes which would be won could be significantly lower than 10,000 and the chances of winning a prize were much lower than the information on the label suggested. The ASA further considered that terms relating to the awarding of prizes were likely to significantly influence a consumer's understanding and decision to participate in a prize promotion. As such, it was not sufficient for significant conditions to only appear in the full terms and conditions available on the website.

As the bottle's label did not make it clear how prizes would be allocated or to otherwise manage prospective participants' expectations of the likelihood of winning, the ASA considered the promotion was misleading and that it had caused unnecessary disappointment for participants.

Why is this important?

Despite the packaging stating not all prizes may be won, and the full terms and conditions being provided on the promotional website, the ASA considered that this was still not enough information to avoid unnecessary disappointment to participants. The ASA confirmed all significant conditions need to be communicated to prospective participants in order for them to understand how prizes will be allocated and to decide whether to participate in the prize promotion.

Any practical tips?

Ensure that all significant information is communicated to prospective participants, particularly on labelling/short form terms and conditions. Where a prize promotion utilises specific mechanics to allocate prizes that may affect a participant's decision to enter the promotion, promoters need to ensure that these are communicated to participants, or to otherwise manage participants' expectations of the likelihood of winning.

Autumn 2018

ASA

The ASA's ruling on Amazon's "one day delivery" service for Prime customers

The question

Will a 'One-Day Delivery' claim be misleading if not all products under the relevant service are delivered the next day?

The background

Following receipt of 280 complaints from disgruntled Amazon customers, the ASA has reprimanded Amazon, ruling that claims relating to its "One-Day Delivery" service, when presented as a benefit to taking up Amazon Prime membership, are misleading. The ASA told the e-commerce giant that going forward it will need to make clear to its customers that some 'Prime' labelled products are not available for next day delivery.

The ruling related to various claims on Amazon's website regarding its "One-Day Delivery" service seen in December 2017. In particular, Amazon's home page featured the claims "One-Day Delivery for Christmas" and "get unlimited One-Day Delivery with Amazon Prime", with the latter accompanied by a link to the 30 day free Amazon Prime trial. A webpage providing information on the Amazon Prime service also included the claim: "Unlimited One-Day Delivery on millions of eligible items at no extra cost. Depending on the time of day that you place your order and your delivery address, if in stock it'll be dispatched that same day and delivered the next day." The ASA also noted other claims related to the "One-Day Delivery" service on various Amazon webpages, often accompanied by text and links prompting customers to take up a free 30-day Amazon Prime trial.

Amazon explained that the One-Day Delivery service at no charge was one of a number of benefits offered to Prime members, ie Prime members were able to select the One-Day Delivery option for free, whereas normal customers would have to pay a flat fee per order if they wanted this service. Amazon stated that they thought customers were likely to understand that:

- the option was only available on a selection of items and that the various ads did not promise a particular speed of delivery of a particular product; and
- individual forecast delivery dates were displayed for each product and that customers would need to check the individual items to find out whether One-Day Delivery was available and what the delivery date to their selected address would be at the particular time that they placed an order.

Amazon did not believe that the speed of a future order could form part of a customer's decision about whether or not to sign up to the Prime service. They also said that they did not think that a customer's later disappointment about the speed of a One-Day Delivery order should render their marketing misleading.

Amazon provided the ASA with various information and data relating to forecasted delivery dates communicated to customers as well as the figures for their on-time deliveries during 2017. They stated that customers were provided with a forecast delivery date throughout the customer journey (including in the search listings, product listing page and confirmation emails). Amazon supplied the percentage of orders with a forecast delivery date of 1 day after the order was placed. The data supplied covered orders placed at various times of the day, from before 2pm to before 8pm. The figures showed that the later in the day that an order was placed, the less likely it would be that the forecast delivery date displayed to the customer would be the next day. Amazon stated that their "About One Day Delivery" webpage made clear to customers that the time of day that the order is placed affects whether or not dispatch will occur the same day (which in turn would impact on whether the delivery occurred the next day).

Amazon explained that for a delivery to be recorded as 'on time' it would need to have been received by the customer one day after it was dispatched. This was confirmed in the UK Help page of their website (two clicks away from the Home page). The dispatch date would also depend on a number of factors, including item type, storage location and delivery location. Additionally, Amazon said that there could be a number of reasons for late deliveries and that these were often outside of their control (eg bad weather, carrier failure and human error). They supplied data which demonstrated that weeks with lower on-time deliveries coincided with snow and ice in the UK.

The decision

The ASA upheld the complaints against Amazon.

In reaching its decision, the ASA confirmed that the term "One-Day Delivery" in the context of the various claims on Amazon's website would be understood by consumers that all Prime labelled items would be available for delivery by the end of the day after the order was placed, provided that the customer did not (1) order too late in the day; or (2) order for a Sunday delivery.

The ASA accepted that the inclusion of forecast delivery dates for specific items (often in the search listings and throughout the customer journey) meant that customers were unlikely to be misled when purchasing a specific item. However, the ASA found that the presentation of the One-Day Delivery claim as a benefit of Amazon Prime membership elsewhere on the website

was likely to cause consumers to make a transactional decision in relation to taking up a Prime membership.

The ASA reviewed the evidence and data provided by Amazon and considered that there was a small, but significant, proportion of Prime orders which were not forecast for delivery the subsequent day (including in circumstances where orders were placed before 2pm). This meant that there were a significant proportion of Prime labelled items which were not available for delivery the next day after placing an order. The ASA therefore concluded that the claim for One-Day Delivery could not be supported and was misleading given the proportion of Prime labelled items which were not in fact available for delivery the next day.

The ASA also noted the information provided on the various Amazon webpages. They said that the reference to being delivered one day after dispatch was unlikely to be of use to consumers because it did not tell them how soon after placing their order they would receive the product. They also commented that in any event many consumers would not actually visit those webpages before making a decision on whether or not to purchase an Amazon Prime subscription.

Why is this important?

It's easy to see why e-commerce businesses would want to present a speedy delivery service as part of their offering to help them to remain competitive. However, retailers should take care to ensure that they can fully support any claims that they make in their advertising, particularly when the claims are presented absolutely. That's not to say that all deliveries would need to be on time to avoid the claim being considered misleading, but retailers will need to have sufficient data to demonstrate that a significant proportion of deliveries are within the advertised timeframe. A complaint against Royal Mail Group in March 2018 relating to their Two Day Delivery "Express48" service was not upheld by the ASA because Royal Mail was able to supply data which showed that the service had a success rate of 97-24-98.37%.

The decision also makes clear that delivery timescales are a feature capable of influencing a transactional decision by consumers. In this instance, the ASA confirmed that the claim was likely to cause consumers to make a transactional decision in relation to whether or not to purchase Amazon Prime. Whilst not expressly stated in the adjudication, this language would suggest that an unsupportable delivery claim could also amount to a breach of the Consumer Protection from Unfair Trading Regulations 2008 in addition to the CAP Code.

Any practical tips?

Take care when making claims about delivery dates, particularly where these are presented in your advertising as an incentive to customers to encourage them to purchase from you. If you do want to include claims about delivery timescales you will need to ensure you hold robust data to support them! Do not assume that you can rely on clarifications or qualifications later

in the customer journey, even if they are very clearly presented before a customer actually makes a purchase. In the Amazon decision it is worth noting that the inclusion of the forecast delivery dates which were communicated throughout the customer journey when purchasing specific items was insufficient to prevent the claims from being considered misleading elsewhere (eg on the Amazon home page).

Autumn 2018

ASA

ASA ruling on significant information: I Can Have It Ltd

The question

Is including significant information on a competition landing page enough? Or do you need to include this information in an individual competition listing? And how clear do you have to be if there is no closing date about how a competition is administered and the potential length of each competition?

The background

Four competitions listed on the website 'www.icanhaveit.com' were seen on 28 November 2017. These were competitions for: (a) a Ford Ecosport Titanium; (b) a Microsoft Surface Pro 4, which was labelled as 'New' and text stated 'play to win the latest from Microsoft: the Surface Pro 4 128GB'; (c) a Canon EOS7D Digital SLR; and (d) a Citroen C4 Cactus. All four competitions included a link labelled 'Need Help – How to Play', which when clicked caused a pop-up box to appear which stated '3 Simple Steps Pick a Category Answer a Question Pick a number Correct answer + lowest unique number wins Watch Video'.

The complainant, who had paid to enter a number of competitions in 2016, challenged whether the competition breached the CAP Code as they were still being promoted.

The response

I Can Have It stated the relevant competitions were not date driven, and were instead driven by the number of tickets sold. As such, they could not provide fixed end dates of the competitions as they were dependent on the popularity of the relevant prize. It was explained that the four to six month competition period referenced in the FAQs section of the website was only an indication of what was expected, and not a guarantee. I Can Have It stated that their website explained 'everywhere' that a competition closed when all tickets had been sold. They further explained that they were unable to put a closing date on any competition and did not have the information in order to base an estimated closing date. It was confirmed that as at June 2018, competition (b) had closed but the other adverts had only sold a few hundred tickets. I Can Have It stated they would amend the website to show the opening date and a live update of how many tickets had been sold for each listing.

The decision

The complaint was upheld.

The ASA understood consumers would access the competitions via a page which stated 'each competition has many prizes to choose from and a limited number of tickets. When all the tickets in a competition are played, the competition closes and the winner is announced'. The ASA considered consumers would therefore understand there were a limited number of tickets, and the competition would end when all the tickets were sold. However, that information was not included on the specific listings of individual competitions. Instead, the 'Need Help – How to Play' link on individual listings meant that consumers would understand from individual listings that to enter they needed to purchase a ticket, answer a question and select a number.

The ASA noted the FAQs stated competitions could last up to four to six months, but also that the complainant had entered a number of competitions in 2016 which were still being promoted in November 2017. The 'winners' page on the website stated none of the high value items had been won, and the ASA further noted that there had only been six winners in 2016 and one winner in 2017 (but no winners of high value items). The ASA noted that the competition for the Microsoft Surface Pro 4 had closed in June 2018, but the other three competitions had only sold a few hundred tickets and were still open.

The ASA considered that as competitions could be open for years before all tickets were sold, the lack of clear information regarding the length of the competition and no information about the number of tickets sold, plus the absence of any closing date meant that consumers were disadvantaged as they could not make an informed decision about whether or not to purchase a ticket. As such, the ASA concluded that the ads omitted significant information about how the competitions would be run and their likely closing dates, and were therefore misleading.

Why is this important?

The ASA considered that the competition access page on the I Can Have It website made it clear that there were a limited number of tickets and a competition would end when those tickets had been sold. However, because the individual competition listings did not include this information, the ASA considered that consumers were at a disadvantage and significant information had been omitted, meaning the adverts were misleading. This highlights the importance of including all significant information on the relevant pages, and not just a cover page.

Any practical tips?

Ensure that specific pages or listings for promotions include all significant information (in this case, if competitions are likely to run for a long time, include this information in each ad) in order not to be considered misleading. It is not enough to have a landing page which sets out such information; instead, it must be restated for each individual promotion/competition.

Autumn 2018

ASA

Fairly administering a prize promotion: Walkers Snacks Ltd t/a Quaker Oats

The question

What steps are needed for a prize promotion to be fairly administered in accordance with the terms and conditions of the promotion?

The background

A TV ad, Facebook post and website ad were run for Quaker Oats' 'show us your oats' competition:

- the TV ad featured four people sharing their different oats recipes, and a voice-over sated: "your recipe, your rules. Share your ideas for the chance to win £10,000 every week with Quaker. Come on, show us your oats";
- the image on the Facebook post featured the text "SHOW US YOUR OATS to WIN £10,000 every week create, snap & upload a photo of your unique bowl for a chance to win" and an image of a bowl of oats being captured on a mobile phone; and
- the webpage www.quaker.co.uk featured the same text and image as the Facebook post, along with an online entry form.

The complaints

The ASA received six complaints challenging whether the promotion was fairly administered in accordance with the judging criteria. One of the complainants challenged whether the promotion was in breach of the Code as they believed the prize was not awarded in accordance with the terms and conditions.

The response

Quaker Oats stated consumers were invited to submit a photo of their dishes via Facebook, Instagram or online and each week valid entries were judged according to set criteria, with the winner being announced on Facebook, Instagram and the website. Entries were also published online. It was confirmed that the promotion was open to everyone in the UK and Republic of Ireland over 18, except for those set out in the exclusions in the terms and conditions (such as employees of the promotor). Quaker Oats further contended that a robust and fair approach was taken for the judging of the entries, with entries being judged under four criteria clearly set out in the terms and conditions, being that images should: (a) be practical to make; (b) display a balanced range of toppings; (c) display a balanced range of flavours; and (d) be visually appealing. Each criterion constituted 25% of the final score of each image.

Quaker Oats confirmed that because one of the criterion related to the visual appeal of the image, the application of such a criterion could have contributed to winning entries having a professional appearance. Further, the standard of images was generally very high and entries needed high scores in all four categories to win, which may have further led to winning entries having a 'quality' or 'professional' appearance. The TV ad featured entries in which care had been taken over the visual appeal of the images, and Quaker Oats considered this was an accurate representation of the nature of the promotion and the judging criteria which would be applied. Further, once a provisional winner had been selected, an external agency was used to conduct verification checks to ensure the selected winner and entry complied with the terms and conditions (including checks for photo editing, image searches for any prior publication and confirming no employment of the provisional winner by the promoter).

Quaker Oats explained that following the announcement of the winner for the fifth week of the competition (whose entry was checked and verified), the relevant image appeared on the blog of another individual. Following investigations and discussions with the winner, it was confirmed that the image belonged exclusively to the winner, who had been helped by a friend who subsequently featured the image on their blog and there was no evidence the image had been posted online before entering the promotion. Quaker Oats recognised this situation could cause some participants to be disappointed and so an additional winner was selected for that week who also received a prize of £10,000.

Clearcast had assessed the TV ad to ensure it complied with the BCAP code, and the competition was set up to follow the terms and conditions of the promotion.

The development

The complaints were not upheld.

The ASA noted that one of the judging criteria referred to the visual appeal of entries, and that complainants noted that the winning entries appeared to be professional quality images submitted from industry professionals. The ASA considered that even though the TV ad portrayed entries being captured using a smartphone, that did not preclude participants from using other devices to take an image, such as a high resolution camera.

The ASA considered that it would be reasonable to expect that winning entries would be of a high visual quality and the terms and conditions of the promotion did not state that industry professionals would be excluded from entering the competition. As such, the ASA concluded the promotion was conducted in accordance with the judging criteria and was fairly administered.

The ASA acknowledged that in one instance during the promotion, further investigation were required to ensure the winning entry complied with the terms and conditions of the promotion,

and it was confirmed that there had been no breach of the terms. Nevertheless, Quaker Oats took further steps in announcing an additional winner to ensure no unnecessary disappointment was caused to consumers. As such, the ASA concluded the promotion was not in breach of the Code.

Why is this important?

This ruling highlights the importance of setting out clear terms and conditions when running a prize promotion; the terms and conditions of the prize promotion clearly declared visual appearance as a judging criterion, which the ASA confirmed meant winning entries would likely be of a 'quality' standard. Further, industry professionals were not explicitly excluded from taking part in the promotion. The ruling also demonstrates how, by taking proactive steps to verify promotion entries and address any possible unnecessary disappointment, regulatory action may be avoided when running a prize promotion.

Any practical tips?

Take care when drafting and reviewing prize promotion terms and conditions; well-drafted terms will help avoid the wrath of the ASA following any complaints regarding fairly administering promotions. Further, a proactive approach to verifying prize promotion entries and checking any possible breaches of the promotion's terms will enable you to minimise the risk of complaints and a regulatory investigation. In addition, these steps should help you avoid having to offer up an additional prize (or prizes) to avoid causing disappointment by other entrants.

Autumn 2018

ASA

Gambling acts of "particular appeal" to children: ProgressPlay Ltd t/a m88.com & TGP Europe Ltd

The question

How easy is it for gambling websites to stray into creating content which is of "*particular appeal*" to children and therefore banned under the CAP Code?

The background

The CAP Code states at Rule 16.1 that "*marketing communications must be socially responsible, with particular regard to the need to protect children…*". Additionally, Rule 16.3.12 states that marketing communications for gambling must not "*be likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture.*" Gambling ads therefore must not appeal more strongly to under-18s than they do to over 18's.

The complaints

ProgressPlay Ltd t/a m88.com is a gambling website which in January 2018 promoted three different games: Fairytale Legends Red Riding Hood (which showed an animated image of a wolf and a pixie); Fairytale Legends Hansel and Gretel (which showed an animated image of a forest); and Fairies Forest (which showed an animated image of a fairy in a forest).

In a separate complaint, two online gambling websites run by TGP Europe (www.fun88.co.uk and www.letou.co.uk) were seen in January 2018 promoting eight games that featured animated content that included animated images of "fairy-tale" type characters as well as various animated images of Santa clause and other Christmas/winter characters. Five of the ads featured on www.fun88.co.uk and three of the ads featured on www.letou.co.uk.

The complainants challenged whether or not the use of the animated characters meant that these ads were likely to be of particular appeal to children, and therefore in breach of the CAP Code.

The response

m88.com explained that their games, and their graphics, were thoroughly reviewed in order to ensure that there was nothing within them that was likely to be of particular appeal to children. Any images that were considered problematic were altered or removed altogether. If m88.com could not remove graphics in certain games, they would not launch the game on their website.

In respect of the ads, m88.com was of the view that, of the three ads, none contained any content that was likely to be of particular appeal to children and therefore the removal of the images was not necessary.

In their complaint, TGP Europe stated that they had removed the advertised games before details of the complaint were received. However, TGP Europe went on to state that assessing whether or not a gambling ad had particular appeal to children was highly subjective, and disagreed that anything to do with Santa Claus was automatically of greater appeal to children than to adults. Additionally, TGP argued that the themes of castles and dragons were currently very popular due to a famous TV program aimed at adults.

The decision

Throughout their assessment the ASA judged each advert using the test of whether or not each advert is likely to appeal more strongly to under 18's than over 18's.

In their assessments across both complaints, the ASA placed a lot of emphasis on (i) the subject matter (eg Little Red Riding Hood) being highly popular amongst children and (ii) the design and graphics of the characters shown. It was noted prominently throughout both assessments that the animated characters were highly stylised, with exaggerated facial features and large eyes, some of which resembled similar characters from films/TV programmes aimed at under 18s, particularly children. The ASA concluded that such ads were indeed likely to be of particular appeal to children.

The ASA did find that two of the ads of TGP Europe did not feature animated images that were likely to be of appeal to under-18's and therefore concluded that these did not breach the CAP code. One of these adverts for 'Secret Santa Online Slot' featured a generic Christmas environment that did not associate Santa Claus with today's youth culture. Additionally, the ASA considered that the concept of a secret Santa was much more associated with adults than to under 18's. Furthermore, the second advert for 'Santa's Wild Ride' featured a standard image using a mild colour scheme that did not feature any graphics that would be of particular interest in today's youth culture. Due to this, the ASA considered that this ad was unlikely to appeal more strongly to under 18's than to over 18's.

Why is this important?

The rulings reinforce how the ASA will assess ads that could potentially be of interest to children and the elements it will focus on when making its decisions. This approach builds on precedents set in rulings such as *Bear Group Ltd, 27 May 2015* and *Ever Adventure IOM Ltd, 30 September 2015*, which featured colourful and exaggerated cartoon-style graphics.

Additionally these rulings show advertisers that more care needs to be taken when it comes to the content of advertising materials. As well as the content, the names of the games that are being advertised can also be a source of contention with the ASA.

Any practical tips?

Don't appeal to kids when creating gambling content! Whether it's the design of cartoon graphics which appeal to children, or the use of stories and themes (eg fairies), it's critical to approach these with care. Anything which strays into the popular-with-children category is likely to eventually land you with an upheld ASA adjudication – and potentially wasted game development costs if the infringing elements are embedded in the game itself.

Autumn 2018

ASA

Ruling on Mondelez UK Ltd t/a Cadbury and Swizzels Matlow

The question

When engaging influencers to promote a high in fat, salt or sugar (HFSS) product, how can advertisers ensure that they will not be promoting their product to children?

The facts

On 22 March 2018 Cadbury and the National Trust for Scotland ran a website for a joint promotion, which featured downloadable content for Cadbury. There were three main elements:

(a) 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" written on it, using the Cadbury logo. Further down the page, website visitors could download a storybook and an activity pack;

(b) the storybook featured an image on its cover of the Easter bunny wearing a purple waistcoat, holding a purple egg. The story featured children on an Easter egg hunt looking for purple Easter eggs that were hidden by the bunny who lived in a purple warren with a purple chest full of purple Easter eggs; and

(c) the activity pack, titled "eggciting activities" featured an image of a rabbit holding a Cadbury branded purple egg on its first page, with smaller Cadbury branded purple chocolate eggs.

The complaints

In 2007 the advertising of high in fat salt and sugar (HFSS) products aimed at children under 16 was prohibited. In 2017 the ASA expanded these rules to cover non-broadcast media including online and social media. CAP Code rule 15.18 prohibits product advertisements that are directed at people under 16 though the selection of media or the context in which they appear. Additionally, no medium should be used to advertise HFSS products, if more than 25% of its audiences are under 16 years of age.

The Obesity Health Alliance challenged whether the ads were for HFSS products that were directed at children.

The response

Cadbury stated that all their promotional campaigns were targeted at parents and adults rather than children. The ad was part of the Cadbury website and advertised their partnership with the National Trust for Scotland, specifically the Cadbury Easter Egg Hunts and trails that took place at National Trust for Scotland's properties.

Cadbury explained that the website was advertised only in media targeted to adults: Facebook and Instagram ads targeted to users registered as over 18 and categorised as a 'Parent'; ads on a parent-targeted section of a news website; and in a TV ad which had not been shown around programmes for under 16s or programmes likely to appeal particularly to under 16s. Due to this, it was the belief of Cadbury that only adults were likely to have visited the website. They noted that the website and the content on it were aimed a parents and adults as inspiration and tools for them to use with their families in the lead up to and across the Easter weekend. They said the website and its content were not of particular appeal to children and the content was designed for adult family members considering whether or not to take the family on an outing.

Cadbury highlighted that the content on the website was designed to encourage families across the nation to spend some time together over the Easter weekend. Additionally, Cadbury maintained that the downloadable storybook was designed as a book for the family to enjoy together

The decision

The ASA upheld the complaints in relation to ads (b) and (c) only.

The CAP code requires that HFSS product ads cannot be directed at children though their choice of media or the context in which they appear. No medium should be used to advertise HFSS products if more than 25% of the audience would be under the age of 16.

Ad (a) was a section from the Cadbury website, which featured Cadbury Easter-themed chocolate products and branding, all of which were HFSS. However, the website was focused on providing information regarding a Cadbury-sponsored Easter Egg Hunt at National Trust Properties and the website was directed at adults through its content and presentation. It was not directed at children through the selection of media or context in which it appeared. Furthermore, data from Cadbury showed that over a third of visitors had done so through the National Trust website, a third through search engine results and a quarter arrived on the website directly. The ASA therefore decided it was unlikely that over 25% of its visitors were under the age of 16.

Ad (b), the storybook, featured Cadbury's purple throughout, including a border with Cadbury milk 'splash' on each page. The final page stated "Cadbury wishes you a happy Easter" on their purple background. Given the products were identifiable as Cadbury; the storybook was an HFSS product ad under the Code.

Ad (c), the activity pack, also featured Cadbury's branding and images of Easter-themed HFSS products. Consequently, this was also an HFSS product ad under the Code.

The ASA acknowledged that the storybook and activity pack were accessible only through the website, and would likely be used by children under the supervision of an adult. However, both were created for children and would be given to children to use. The ASA concluded that ad (b) and (c) were both directed at children, and breached CAP Code rule 15.18. Both ads had to be removed in the form complained about.

Why is this important?

The ruling gave some indication as to what the ASA will and will not tolerate when it comes to HFSS advertising, particularly with assets created specifically for children.

The decision comes amid separate UK government talks on the potential ban of junk food advertising on TV before 9pm, and an announcement by CAP that they will be reviewing how effective the rules have been. It is clear that HFSS advertising will continue to be a contentious topic, and strict enforcement is almost certain to continue.

Any practical tips?

Advertisers should ensure that a cautious approach is adopted when promoting HFSS products. Promotional material aimed at children should use minimal branding if it is an HFSS product. If there is the possibility that the ad for the HFSS product could be accessed by children, then utilising age targeting tools on each media platform should help ensure that it will not be directed at an inappropriate audience.

Autumn 2018

Advertising

The Breaching of Limits on Ticket Sales Regulations 2018

The question

What are the new rules banning the automated purchasing of tickets in the UK for reselling at a higher price?

The background

The Breaching of Limits on Ticket Sales Regulations (the Regulations) came into force in July 2018. The Regulations seek to criminalise the use of automated software ('bots') by ticket touts to bypass security measures and purchase larger volumes of tickets for UK recreational, sporting or cultural event tickets than permitted by the event organisers, and then to sell these on for inflated prices.

The development

The Regulations apply where:

(a) tickets for a recreational, sporting or cultural event in the UK are offered for sale;
(b) a purchase is made wholly or partly by a process that the purchaser makes using an electronic communications network or electronic communications service (the meaning of which is set out in s.32 of the Communications Act 2003); and
(c) the offer is subject to conditions limiting the number of tickets a purchaser may buy.

Where the above conditions are satisfied, the Regulations create a new criminal offence for a person:

- to use software that is designed to enable or facilitate completion of any part of a process within (a) to (c) above; and
- to do so with intent to obtain tickets in excess of the sales limit, with a view to any person obtaining financial gain.

The Regulations make it clear that for the purpose of this offence, it does not matter whether the offer in (c) above is made, or anything is done to obtain tickets, either inside or outside of the United Kingdom. The Regulations also set down the applicable sanction for the new offence to be 'a fine' in England and Wales, and a fine not exceeding £50,000 in Scotland.

Why is this important?

The purchase of tickets using bots and the tickets then appearing almost immediately on re-selling websites for vastly inflated prices has been a prevalent issue for many years. Whilst this is very frustrating for the consumer, there has been little regulatory or industry action on the issue until recently.

In 2018, many events (particularly in the music industry) have been refusing entry to audience members who have purchased tickets from re-selling websites. Whilst these steps have angered many paying customers, it shows that event organisers and indeed the artists themselves have decided to take action against the use of bots and the re-selling of tickets.

Now, the Regulations have brought the legal framework in line with the prevailing industry attitude, providing a criminal offence for purchasers using software to facilitate the purchasing process with the intent of breaching sales limits and gaining financially. Whilst it remains to be seen how effectively the Regulations will be implemented, and how easy it will be to prove the use of such software, the passing of the Regulations shows definitive steps towards increasing legal protection for both consumers and event organisers.

Any practical tips?

If you operate in the sphere of ticket selling or re-selling, you need to become familiar with the Regulations and be sure that you do not fall foul of the new offence they introduce. Further, for re-selling platforms, the government may yet introduce further obligations to identify individuals who they believe may be breaching this new offence, and so this may place further practical obligations on website operators further down the line.

For event organisers, the new offence provides some further protection, but the event needs to include a ticket sales limit in order for the Regulations to bite; be sure to include such a limit in any terms and conditions of sale.

Autumn 2018

OFCOM

Restriction on "political advertising" – Saudi Centre for International Communication

The question

When will an advert fall foul of the prohibition on political advertising?

The background

During an official visit to the UK by Crown Prince Mohammed bin Salman in March 2018, the Saudi Centre for International Communication placed a TV ad on Sky on behalf of the Kingdom of Saudi Arabia for its Vision 2030 strategy. The ad was part of a wider campaign during the Crown Prince's visit.

The advert was broadcast on the Sky 1 channel 56 times during the three days of the Crown Prince's visit. It comprised a series of images and footage of historic and contemporary Saudi Arabia which included: cityscapes; women driving; cinemas; entertainment; cultural events; industry; the Vision 2030 logo; members of the Saudi Royal Family; and the flags of Saudi Arabia and the UK. These were accompanied by the following voiceover:

“Things are undoubtedly changing in Saudi Arabia. Economy and daily life are shifting quickly. Saudi women have been allowed to drive and cinemas are set to open again this year, after a 35-year ban. The entertainment sector is bracing itself for a new era – one of concerts and cultural events. The Kingdom is reducing its reliance on oil by investing in various projects to achieve the 2030 vision of turning Saudi Arabia into a hub connecting three continents. Led by King Salman and Crown Prince Mohammed Bin Salman, these action-oriented goals are within reach. Key world partnerships are at the heart of this shift, mainly with the United Kingdom. Our longstanding relationship brings increased prosperity and security for both countries”.

Ofcom received three complaints from viewers who complained that the ad was political advertising, in breach of the Communications Act 2003 (the Act) and as reflected in the UK's Broadcasting Code (the BCAP Code). In most circumstances the BCAP Code is enforced by the Advertising Standards Authority, but Ofcom retains responsibility for enforcing the rules on political advertising.

The development

The complaints were upheld.

Ofcom held that the ad infringed the Act, on the basis that it breached the prohibition on political advertising. Under the Act, an ad contravenes this prohibition if it is "an advertisement directed towards a political end" (section 321), which is defined as including "influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy".

Ofcom found that the ad did not fall within the exemption for ads of a "public service nature" inserted by or on behalf of a government department (ie where the intention is to inform and educate the public by providing information that is in the public interest). To the contrary, Ofcom held that the ad's primary purpose appeared to be to "promote the Kingdom positively to the UK audience and to endorse the benefits of maintaining a relationship with the Kingdom at a time of heightened public controversy in the UK". In reaching that decision Ofcom considered the ad's content and context, in particular the fact that the ad's broadcast coincided with the official visit to the UK by the Crown Prince.

As to whether the ad constituted political advertising, Ofcom rejected submissions that the ad was primarily concerned with trade between the UK and the Kingdom. Instead it found that the focus was "on the longstanding relationship between the UK and the Kingdom of Saudi Arabia generally…". Ofcom noted that the ad made no express reference to trade but rather referred to issues which were a matter of public controversy at the time of the broadcast, for example freedom of speech and women's rights. Ofcom stated that the ad "appeared designed to promote positively the Kingdom of Saudi Arabia and to persuade UK viewers of the benefits of the UK maintaining a relationship with it, at a time when such a relationship was a matter of contention". For those reasons Ofcom took the view that the ad was intended to influence public opinion in the UK on matters of public controversy.

Why is this important?

The decision presents certain difficulties for advertisers, not least because the ad in question was pre-approved by Clearcast (the UK's TV clearance body). As Clearcast argued in its submissions to Ofcom, the decision presents a significant challenge to its future pre-clearance work, not least as advertising which at the point at which it is cleared may not be controversial, but may become so by the time at which the ad is broadcast.

The decision also raises challenges for governments, companies and individuals alike who may find themselves the subject of public controversy, given the wide-ranging definition of "political advertising" under the Act.

Any practical tips?

Beware the broad definition of 'political advertising' in the Act! Remember that this goes much further than 'politics' in the traditional sense, but extends to "influencing public opinion on a matter, which in the United Kingdom, is a matter of public controversy" (section 321).

Ofcom makes clear in its decision that "context is crucial". When planning an advertising campaign which has the potential to excite public controversy, marketers should carefully consider the timing and content of their ads to avoid falling foul of the prohibition on political advertising. In this case, if the TV ad had focused more on trade between the UK and Saudi Arabia and less on matters of heightened public controversy (eg women drivers), it may have had more chance of surviving when assessed under section 321. It might have helped also if the ad had not been compressed into a particularly tight time-frame (during the Crown Prince's visit), but had been broadcast for a longer period around his visit.

Autumn 2018

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