Autumn 2019

Contents

Commercial – reasonable endeavours

Gaia Ventures Limited v Abbeygate Helical (Leisure Plaza) Limited [2019] EWCA Civ 823

The question

What constitutes "reasonable endeavours"?

The key takeaway

Positive action must be taken to fulfil a "reasonable endeavours" obligation.

The background

Gaia Ventures Limited (**Gaia**) and Abbeygate Helical (Leisure Plaza) Limited (**Abbeygate**) entered into an agreement regarding the re-development of an ice rink and loading bay of the Leisure Plaza in Milton Keynes.

Abbeygate was obligated to make a £1.4m overage payment to Gaia, once the planning permission and other conditions had been granted, but only if this occurred by the longstop date which was 10 years away. The agreement stipulated that Abbeygate would use "*reasonable endeavours*" to guarantee full title to the land "as soon as reasonably practicable". However, Abbeygate only came to an agreement on the leases four days after the longstop date, meaning that no payment was due to Gaia, which inevitably started a dispute between the two parties.

At first instance, the judge found that Abbeygate had failed to fulfil its obligation to Gaia. He stated that what was important was "*whether the relevant step was feasible, and then whether in all the circumstances, it was reasonable to take it (or unreasonable not to take it), balancing the risk of adverse consequences against the obligation to perform the promise*". He found that Abbeygate had deliberately taken advantage of delays and had not taken any positive action to perform the obligation so that they would avoid paying the overage fee. Finally, citing *Alghussein v Eton*, he held that in this case, using reasonable endeavours excluded the developer's capacity to delay fulfilling the conditions in order to wait for financing.

The decision

Abbeygate appealed on the basis that a reasonable endeavours clause should not prevent a business from acting on its own commercial interests. However, the Court of Appeal determined that Norris J was correct to conclude that Abbeygate had "manipulated" the conditions in order to avoid paying the overage fee.

Patten LJ looked at whether there was an objective justification for time that it took for Abbeygate to satisfy a condition. Males LJ answered the question succinctly in saying that Abbeygate "*devoted its energies to ensuring that the outcome would not be achieved until after the date when it would escape liability to make the overage payment*".

Slightly differing from the judge, the Court of Appeal found that it was too far-reaching to suggest that issues of profitability should not be considered when deciding what a reasonable step to take would be.

Why is this important?

This decision shows that an obligation to use reasonable endeavours includes an obligation to act positively to perform the obligation, and parties should not purposefully act in a way to avoid the relevant outcome.

Any practical tips?

Where possible, include specific obligations to stipulate the required steps, and how and when a party should comply with their obligations. "Reasonable endeavours" obligations can then bolster those specific obligations. If you are contractually obliged to take reasonable endeavours, make sure that you pursue a positive action and are not seen to be attempting to frustrate the commercial outcome.

Autumn 2019

Commercial – breach of confidence

Racing Partnership Limited v Done Brothers

The question

Can information that derives from a public sports event be subject to an obligation of confidentiality to the event organiser?

The key takeaway

Although the information was visible to potentially thousands of people, the Court found that the information was confidential because there was a substantial commercial value in the information and a company/person had the ability to control its dissemination via exclusive channels so as to exploit that value.

The background

The Racing Partnership Ltd (**TRP**) produced live betting and horse racing data collated at racecourses under agreements with the course owners and sold it to off-course bookmakers. Arena Leisure Ltd (**Arena**) was the owner of six racecourses (the **Arena Racecourses**).

Until 1 January 2017, Sports Information Services Ltd (**SIS**) had the right, under an agreement with Arena, to collate and distribute race-day data (such as changes in jockeys and state of the course) and Betting Shows (ie Betting Prices when transmitted off-course) from the Arena Racecourses.

After January 2017, SIS continued to provide information comprising of race-day data to two major off-course bookmakers, Ladbrokes Coral and Betfred. SIS obtained that information from the Tote (Successor Company) Ltd (the **Tote**). The Tote had permission to collect race-day data, but this was only for a pool betting service.

TRP and Arena claimed against SIS for: infringement of copyright; infringement of database right; breach of contract; and breach of confidence.

The decision

The judge held that the race-day data had the necessary quality of confidence. Despite the fact that the information was publically available, the ability to collect it and distribute it could be and was limited by Arena.

The Court took into account the commercial value of the information and relied on the decision in *Douglas v Hello! Ltd (No.3)* [2008]. The Court was satisfied that the information had been imparted with an obligation of confidence and that SIS did or should have known that confidentiality attached to it and that there was an unauthorised use of this information.

Why is this important?

According to the Court, what mattered was whether the collection and dissemination of the information could be controlled. If so, an obligation of confidence could be imposed and the commercial value of the disclosure of that information protected.

This confirms that event organisers have the ability to protect the value of their information against unauthorised distribution.

Any practical tips?

If you are operating restricted access events and/or have information that you license or distribute, you should have contractual terms to control how your information may be used and confirm that such information is confidential and that further disclosure or use is not permitted.

Autumn 2019

Commercial – electronic execution

Law Commission - Execution of documents

The question

Following its review and consultation, what's the Law Commission's position on electronic signatures?

The key takeaway

Electronic signatures can be used to execute documents validly, including where there is a statutory requirement for a signature.

The background

On 4 September 2019, the Law Commission published its final report detailing its review into the electronic execution of documents. The final report was the culmination of the Law Commission's review into, and consultation regarding, electronic signatures, the aim of which was to address legal uncertainties surrounding validity of electronic signatures, and to ensure that legislation was sufficiently certain and flexible to accommodate the ever changing digital environment.

The Law Commission confirmed that an electronic signature is capable in law of being used to execute a document (including a deed), provided that the signatory intends to authenticate the document and that any relevant formalities, such as the signature being witnessed, are satisfied. However, where an electronic signature requires witnessing, the requirement that a deed must be signed "in the presence of a witness" still requires the physical presence of that witness.

In terms of form, the Law Commission noted that electronic equivalents of non-electronic forms of signature held to be valid by the Courts, such as signing with an "X" or with initials only, were likely to be legally valid. Further, the Law Commission noted that the Courts have previously accepted various forms of electronic signatures, including a name typed at the bottom of an email, or clicking an "I accept" tick box on a website, as valid.

The recommendations

In recognising that some practical difficulties remain in respect of the validity of electronic execution, the Commission also made the following recommendations:

- **the creation of an industry working group** – convened by Government to consider practical issues relating to electronic execution, this working group would also provide guidance regarding use across a range of commercial transactions, and where electronic execution is undertaken by vulnerable individuals
- **video witnessing for deeds** – the working group would also consider solutions to any obstacles to video witnessing of electronic signatures in respect of deeds and attestation, with a view to legislative reform to allow for the same
- **a review of the law of deeds** – to consider if the concept of a deed remains fit for purpose, as well as specific issues such as witnessing and delivery
- **codification of law regarding electronic signatures** – in order to improve the accessibility of the law.

Why is this important?

In an increasingly technology-focussed legal landscape, the Law Commission's final report provides further clarity that parties can take advantage of the ease and efficiency offered by electronic execution.

Any practical tips?

Whilst electronic signatures will usually be sufficient, note that it is suggested that the execution of a deed still requires the physical presence of the witness – so traditional execution may be more straightforward. If dealing with other jurisdictions or foreign counterparties, also bear in mind that different rules may apply.

Autumn 2019

Commercial - rectification

Rectification of contracts: how to assess parties' intention (Court of Appeal)

The question

What is the correct test to be applied in deciding whether the written terms of a contract may be rectified because of a common mistake?

The key takeaway

For a written contract to be rectified on the basis of a common mistake, a party must show either:

- that the document fails to give effect to a prior concluded contract; or
- the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. It is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord".

The background

FSHC Holdings Limited (**FSHC**) was the holding company of a large corporate group. In 2012, FSHC had agreed to provide security in connection with a transaction for a corporate acquisition in which Glas Trust Corporation Limited (**Glas**) was the security agent.

Such security was intended to be by way of assignment of the benefit of a shareholder loan. It transpired in 2016, however, that by an oversight, FSHC had not actually executed the relevant assignment. Instead of producing new documentation, FSHC suggested that two deeds (Intercompany Receivables Security Assignments (**IRSAs**)) were created and these IRSAs were executed on 18 November 2016, with the intention that they would provide the missing security.

By acceding to the IRSAs, FSHC assumed additional obligations which were not required under the original 2012 transaction.

The decision

At first instance, the judge granted rectification of the IRSAs. This was granted on the basis that the actual common intention of the parties had been to execute a document that had the sole purpose of providing the missing security.

On appeal, Glas argued that the existence and nature of a common intention for the purposes of rectifying a common mistake had to be determined by reference to what an objective observer would have thought the common intention of the parties would have been. The parties' communications did not provide any information from which an objective observer would conclude that there was a common intention.

FSHC argued that, even if an objective test were applied, the first instance judgment was correct, arguing that it only needed to be shown that the document failed to give effect to what the parties had subjectively intended (following the Court of Appeal's binding decision in *Britoil Plc v Hunt Overseas Oil Inc* [1994]).

The Court of Appeal considered it was a "classic case for rectification" and dismissed the appeal. The Court held that whether the parties had a common intention in respect of a particular matter should depend on their subjective intentions, which is shown by an "outward expression of accord".

The Court of Appeal therefore upheld the decision granting rectification of the IRSAs on the basis that they did not reflect the parties' subjective common intention.

Why is this important?

The Court of Appeal's decision is a useful clarification of the test for rectification and the basis on which the Court will assess the common intention of the parties, ie on a subjective basis together with an indication of the parties' agreement on the issue in question.

Any practical tips?

Ensure that the written documents reflect the agreement that was reached!

Retain records of the transaction, in particular correspondence and notes of discussions between the parties in relation to key commercial issues.

Autumn 2019

Commercial – effective notice

Stobart Group Ltd & Stobart Rail Ltd v Stobart & Tinkler [2019] EWCA Civ 1376

The question

Was notice of a tax claim under a share purchase agreement effectively given?

The key takeaway

Notices given pursuant to commercial agreements must be drafted in full compliance with the terms required by such agreements.

The background

Stobart Group Limited acquired Stobart Rail Limited from Stobart & Tinkler pursuant to a share purchase agreement dated 7 March 2008 (the **SPA**).

The SPA stated that the sellers would not be liable for tax claims unless the purchasers had given written notice of such a claim within seven years of completion (Schedule 4, paragraph 6.3 of the SPA). The purchasers were also required to notify the seller's representatives of any claim or circumstances which may give rise to a claim as soon as reasonably practicable (Schedule 4, paragraph 7.1 of the SPA).

"Tax claim" was defined in the SPA as a claim by Stobart Group as buyers against the sellers. "Claim" was defined in the SPA as a potential claim by HMRC or other tax authority against Stobart Rail Limited.

On 13 March 2008 HMRC issued a claim against Stobart Rail Limited for unpaid national insurance contributions. Stobart Group's solicitors notified Stobart & Tinkler of HMRC's claim in accordance with paragraph 7.1 on 9 April 2008.

The seventh anniversary of completion fell on 4 April 2015. On 24 March 2015, Stobart Group Limited purported to formally notify the tax claim to Stobart & Tinkler under paragraph 6.3.

Stobart & Tinkler sought summary judgment in the proceedings commenced by Stobart Group and Stobart Rail, on the basis that the tax claim had not been notified in time. The High Court granted Stobart & Tinkler's application: it determined that the letter sent in March 2015 was not an effective notice under paragraph 6.3, but a notice of a potential claim under paragraph 7.1.

The decision

The Court of Appeal determined that the March 2015 letter purporting to notify the tax claim was ineffective, and dismissed the appeal.

When construing unilateral notices, the Court held that the subjective understanding of the actual recipient was not relevant; the test is how a reasonable recipient with knowledge of the objective contextual scene would have understood the notice to operate.

The Court held that a reasonable recipient of the March 2015 letter, with knowledge of the factual context, would not have understood it to be a notification of a tax claim for the purposes of paragraph 6.3. This is primarily on the basis that the letter made no reference to a tax claim, did not refer to a claim being made under paragraph 6.3, and gave notice in terms of a potential claim.

Why is this important?

This decision is a reminder of the importance of paying close attention to the wording of notices to ensure that they are clear and unambiguous, such that a hypothetical reasonable recipient would understand how the notice was intended to operate.

Any practical tips?

When providing notice pursuant to specific provisions of agreements, it is imperative that the specific requirements of that provision be strictly observed. The notice should make clear which provisions of the agreement are being relied upon and make any claim in unequivocal terms. Check (and check again) that any claim has been formulated in accordance with the appropriate defined terms of the agreement. The notice must then be in the required form and served in accordance with the contractual requirements.

Particular attention should be paid where there is potential overlap between similar provisions, to ensure that notice is not mistakenly presumed to have been provided under a different provision.

Autumn 2019

Commercial – set off

Summary judgment granted on basis of "no set off" clause - AMC III Purple BV v Amethyst Radiotherapy Ltd [2019] EWHC 1503 (Comm)

The question

Will the courts give effect to "no set off" clauses and do they exclude both legal and equitable set off?

The key takeaway

A properly drafted "no set off" clause can prevent a defendant from relying on legal or equitable set off as a defence to claims for payment.

The facts

The AMC Group (**AMC**) provided mezzanine finance to Amethyst Radiotherapy Limited (**Amethyst**), a company operating radiotherapy centres. AMC provided a £21m loan in 2014 under a mezzanine facility agreement (the **Mezzanine Agreement**), and a further £4m loan in 2015 under a supplemental facility agreement (the **Supplemental Agreement**) to assist Amethyst's expansion plans.

Amethyst failed to pay the interest payable under both agreements as well as the principal under the Supplemental Agreement. As a result, AMC applied for summary judgment seeking: (i) a declaration that Amethyst had defaulted under the loan agreements; and (ii) an order for payment of outstanding interest and principal.

Amethyst resisted AMC's application on the basis of equitable set off in respect of its own alleged claims. In response, AMC relied on the "no set off" clauses in each of the Mezzanine Agreement and Supplemental Agreement to rebut Amethyst's defence. The relevant clauses were:

- "*All payments to be made by the Borrower under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim*" [This is an LMA standard form provision]
- "*Each payment to be made by the [Borrower] under this Agreement will be made in full, without any set-off or deduction*".

The decision

It was held that, even if Amethyst had valid cross claims against AMC, they were not entitled to set them off against interest or principal payments because the "no set off" clauses successfully excluded both equitable and legal set off.

The judge's reasoning was based on the Court of Appeal's decision in *Caterpillar (NI) Ltd (formerly known as FG Wilson (Engineering) Ltd) v John Holt & Company (Liverpool) Ltd* [2013] EWCA Civ 1232, where a "no set off" clause with similar wording was held to have excluded both legal and equitable set off.

The judge focused on the language of the clauses, highlighting that the use of the word "any" meant that equitable as well as legal set off must be excluded. The judge also took the phrase, "payments shall be calculated and be made without…set off" to preclude Amethyst from arguing that the clause only applied to sums which were due (and therefore rejected the argument that neither the interest, nor principal payments were due as they were subject to equitable set off).

Why is this important?

The case is a useful reminder of the Court's willingness to give effect to "no set off" clauses and grant summary judgment for payment claims, even if there are counterclaims.

Any practical tips?

Consider the use of "no set off" clauses in agreements generally, and in particular how they tie into the particularities of recovering (or withholding) payments. These provisions are typically favourable for the service provider/payee, and are restricted by the customer/paying party.

Autumn 2019

Commercial – restrictive covenants

Supreme Court affirms blue pencil test and severs offending words from restrictive covenant - Tillman v Egon Zehnder Ltd [2019] UKSC 32

The question

To what extent can a Court sever part of a restrictive covenant in an employment contract?

The key takeaway

The Supreme Court has broadened the circumstances in which part of a restrictive covenant can be severed; but parties should still seek to ensure covenants protect a legitimate business interest and are not overly broad.

The background

Egon Zehnder (**EZ**) is a global specialist executive search business. EZ recruited Mary-Caroline Tillman in 2004 into a senior role. She then rose steadily through the ranks of the organisation and, by 2012, Ms Tillman was joint global head of the company's financial services practice and a shareholder in the Swiss holding company.

Ms Tillman's contract of employment contained a number of restrictive covenants. The particular covenant which became the subject of the dispute was a six-month non-compete clause under which Ms Tillman promised that she would not:

"*directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the company or any group company* …"

On 30 January 2017, Ms Tillman and EZ parted ways. Ms Tillman then informed EZ that she intended to join Russell Reynolds Associates (**RRA**), a competitor of EZ. She planned to start work on 1 May 2017, when the non-compete covenant would still be running. Ms Tillman alleged that her non-compete promise was void in restraint of trade, arguing that the words "*interested in any business*" captured a minority shareholding in a company and that this made the covenant too broad.

The High Court disagreed with Ms Tillman and granted EZ an injunction restraining her from joining RRA for the life of the covenant. Mann J held that "*interested in*" in the restriction did

not capture a minority shareholding in a company and, therefore, the clause was not too broad.

On appeal, the Court of Appeal disagreed with Mann J and decided that a minority shareholding was indeed caught. EZ argued that, in that case, the offending words should be severed from the clause so that the parties' bargain that Ms Tillman would not work for RRA for six months could be upheld. The Court of Appeal refused severance meaning that the whole covenant would fall and Ms Tillman would be free to work for RRA. EZ appealed to the Supreme Court.

The decision

Having decided that the restraint of trade doctrine was engaged and agreeing with the Court of Appeal's construction of the clause (ie that it would cover holding a minority shareholding), the Supreme Court turned to the question of severance to determine whether the covenant could be saved.

In overruling the Court of Appeal, Lord Wilson, with whom the other judges agreed, decided to overturn previous case law in *Attwood* (that held that severance was only available where a single covenant was "*in effect a combination of several distinct covenants*" and where the part severed was merely trivial or technical) and allow the words "*interested in*" to be severed from the covenant, upholding the remainder of the covenant in EZ's favour.

Following *Egon Zehnder*, the three criteria for severance are:

- that the unenforceable provision can be removed without adding to or modifying the remaining wording (the "*blue pencil test*")
- that the remaining terms continue to be supported by adequate consideration
- that the removal of the unenforceable provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.

Why is this important?

The Supreme Court has endorsed a modern approach to severance. This is not, as some commentators have perhaps suggested, a charter for employers to draft sloppily with impunity. On the contrary, severance is only available if the Court is satisfied that what remains makes sense, has consideration and is still (in the broadest sense) the bargain the parties entered into.

The burden remains on the employer to prove its legitimate business interest and that the covenant (absent any offending words) is reasonable and not a different promise. This strikes

the right balance between the competing doctrines and sensibly reflects the changed (and changing) nature of the working world.

Any practical tips?

The key, when drafting post-employment restrictive covenants is to ensure that measures taken to protect legitimate business interests are restricted to what is reasonable. Ultimately, EZ wanted to stop Ms Tillman from working for a competitor rather than stop her from holding a minority shareholding in another business. Consider (and regularly reassess) whether the covenants are appropriate to protect the business and reflect the employee's (changing) role. Also, seek to draft separate covenants as far as possible.

Autumn 2019

IP - copyright

Copyright Directive: CJEU rules on implementation and interpretation of copyright exceptions in Article 5(3)

The question

How should copyright exceptions to authors' exclusive rights to reproduce or communicate their works be implemented and interpreted?

The key takeaway

The CJEU's ruling clarifies the application and interpretation of the copyright exceptions and should limit attempts to expand them on the basis of freedom of expression or freedom of the press.

The background

Article 5(3) of the Copyright Directive (2001/29/EC) (the **Copyright Directive**) sets out exceptions and limitations to authors' exclusive rights to reproduce their works, communicate their works to the public, and to prohibit their reproduction by others. These include exceptions for:

- reporting current events for an informatory purpose, provided the source (including author's name) is indicated (insofar as it is possible to do so) (*Article 5(3)(c)*)
- quotations for purposes such as criticism or review, relating to a work that has already been lawfully made available to the public, where the use accords with fair practice, and provided the source (including author's name) is indicated (insofar as it is possible to do so) (*Article 5(3)(d)*).

A dispute arose between Mr Beck, a member of the German parliament, and Spiegel Online (an internet news portal) concerning the publication of a 1988 manuscript, which Spiegel made available online via hyperlinks. Mr Beck brought a successful claim for copyright infringement, which Spiegel appealed.

On appeal, the German Federal Court referred several questions to the Court of Justice of the European Union (**CJEU**) concerning the scope of the exceptions provided for under the Copyright Directive, particularly concerning the implementation and interpretation of Art 5(3)(c) and (d).

The decision

As regards the interpretation and implementation of Art 5(3)(c) and (d), the CJEU ruled as follows:

- the Copyright Directive does not fully harmonise the exceptions and limitations to an author's exclusive rights – Member States enjoy discretion in transposition and application of the Directive into national law
- freedom of information and freedom of the press, as enshrined in the Charter of Fundamental Rights of the EU (the **Charter**), do not justify derogation from an author's exclusive rights beyond the exceptions already provided for by the Directive
- national courts must ensure that interpretation of Art 5(3)(c) and (d) fully adheres to the fundamental rights enshrined in the Charter
- Article 5(3)(c) precludes a national rule restricting the application of the exception or limitation in cases where it is not reasonably possible to make a prior request for authorisation from the author, before using a protected work to report current events. The provision does not require the right holder's consent
- Quotations for the purpose of Article 5(3)(d) need not be inextricably integrated by way of insertions of footnotes – quotations will include hyperlinks to the quoted work, which can be downloaded independently
- In respect of Article 5(3)(d), that a work has already been "*lawfully made available to the public*" means that the work was previously made available with the rights holder's authorisation or in accordance with a non-contractual licence or statutory authorisation.

Why is this important?

The CJEU's ruling provides clarification as regards the application and interpretation of the copyright exceptions in the context of the fundamental freedoms enshrined in the Charter and should prevent any attempt to justify expansion of the scope of the copyright exceptions on the basis of freedom of expression or freedom of the press.

Any practical tips?

The media and publishers (including online) should ensure they apply a strict interpretation of the Art 5(3) copyright exceptions, to their content, and bear in mind that the author's rights may prevail over rights to freedom of information and/or freedom of the press.

Autumn 2019

Data protection

ICO update on Adtech Real Time Bidding Report

The question

What can businesses do to minimise the regulatory risks of processing of personal data in relation to real time bidding (**RTB**)?

The key takeaway

The ICO's main concerns are based around the data supply chain and the lack of clarity and transparency granted to individuals. Market participants now have six months to review their practices and implement the changes recommended by the ICO.

The background

The ICO set out to investigate the risks posed by RTB in relation to data protection due to RTB's complexity and scale.

After analysing the position, the ICO decided that the issues which were highlighted would not be addressed without its intervention. However, the ICO has stated that it intends to allow businesses a period of approximately six months to adjust their practices.

There are two themes which can summarise many of the ICO's observations and concerns, namely (i) matters relating to the data supply chain and (ii) transparency and clarity.

The guidance

In particular, the ICO highlighted the following seven practices, which are often overlooked by businesses in the RTB market:

- do not share individuals' special category data unless you have their explicit consent. Explicit consent should be sought whether the information is processed directly or by inference. Special category data is information relating to health, religion, political views, sex life, race and ethnicity
- consider whether your lawful basis for processing holds out. The scenarios when businesses can rely on the "legitimate interests" basis are limited. This basis can only be used where there is a minimal privacy impact, the use of personal data is proportionate and individuals would not be surprised by the processing or likely to object. It is unlikely that these conditions will be satisfied in the case of RTB

- make sure your privacy notices are transparent and clear (ie ensure to give individuals sufficient information relating to the processing of their data). This is difficult for businesses engaging in RTB because of the complexity of their data supply chains, meaning that it is difficult for them to explain how their processing operations work and who the businesses share individuals' data with, among other things
- do not create or share individuals' profiles in a way which is "disproportionate, intrusive and unfair". Such profiles are repeatedly shared without the concerned individual's knowledge
- make sure to use the correct legal basis for the placing of cookies/other tracking technologies. The ICO states that businesses are often unclear about the rules governing the placing of cookies, including the requirement that individuals must give prior consent for their use
- comply with the key data protection principles, especially relating to international transfers of data, data minimisation, data retention and technical and organisational measures. RTB contains a risk of "data leakage" and as such, businesses should pay particular attention to the GDPR's accountability principles, which require processes and policies to be put in place
- complete a Data Protection Impact Assessment (**DPIA**).

Why is this important?

Data processing relating to RTB is one of the ICO's regulatory priorities. To avoid any potential future adverse findings by the ICO, businesses should take heed of the ICO's recommendations.

Any practical tips?

It goes without saying that you should aim to bring your business in-line with the ICO's recommendation by December 2019, if possible. However, you may also consider engaging with the ICO to "have your say" while it is in the process of deciding its future approach to RTB. Finally, check out IAB Europe's "Transparency and Consent Framework (TCF) 2.0". This is the most comprehensive effort yet in finding solutions for the adtech industry. See www.iabeurope.eu.

Autumn 2019

Data protection

ICO issues record fine against British Airways

The question

What did it take for the ICO to issue its largest ever fine against British Airways?

The key takeaway

The ICO is embracing multi-million pound fining levels for GDPR breaches, in this case £183m vs British Airways and (in a separate investigation) £100m vs Marriott. The days of the £500k cap under the old Data Protection Act are well and truly over. It's time to check and double-check your data security processes.

The background

The data breach occurred after users of the British Airway's website were diverted to a fraudulent website, which collected details of roughly 500,000 customers in June 2018, merely weeks after the introduction of the GDPR. This occurrence is primarily attributed to weak security provisions, which allowed the attackers to access consumer details. The stolen data consisted of log-in details, card numbers (including expiry dates and security codes) and travel details, as well as basic consumer information such as names and addresses.

The ICO, acting on behalf of the other EU member state data protection authorities, was notified of the incident in September 2018. It appears that the details were extracted at the point of their entry into the British Airways website or app and then sent onto a third party. Websites that have embedded code from external suppliers are particularly at risk to this particular kind of incident, referred to as a "supply chain attack". British Airways co-operated with the ICO's investigation, no doubt hoping to avoid such a large fine – on the basis that the ICO had previously stated that "*companies who are … cooperating with EU regulators can expect to engage the advisory and warning end of our toolkit*".

The decision

Unfortunately for British Airways, cooperating was not enough to avoid a gargantuan fine of £183.39m, or around 366 times more than the ICO's previous largest fine of £500k (the top cap under the old Data Protection Act). In the words of technology correspondent Rory Cellan-Jones, this will "*send a shiver down the spine of anyone responsible for cybersecurity at a major corporation*".

The proposed fine amounts to 1.5% of British Airway's worldwide annual turnover in 2017. Initially this seems substantial, however in the light of the maximum permissible penalty, which is limited to 4% of the annual turnover of the preceding financial year, the proposed fine is still far off from the worst case scenario for British Airways. The extent of the final penalty will only be known after British Airway's effort to make an appeal has gone forward.

Why is this important?

This decision is a clear indication that we are now well and truly living in a post-GDPR world where multi-million pound fines are likely to become the norm. Marriott has also recently been fined a whopping £99.2m. But it could be that the ICO is only just starting to flex its muscles. As Mathematician Clive Humby said way back in 2006, "*Data is the new oil*". It seems that legislation has now caught up, by sanctioning breaches with the value it holds.

Any practical tips?

Maintaining effective cyber-security is no longer simply important, it's absolutely critical. Ignore it by failing to keep up with the latest IT defences and you could be exposing your company to the biggest threat that it's ever faced - namely an angry, GDPR-empowered ICO armed with multi-million pound fines.

Autumn 2019

Data protection

ECJ rules on Facebook "Like" button

The question

Does a Facebook "Like" button make a website operator a joint data controller?

The key takeaway

Confirming the opinion of the Advocate General (see Summer 2019 snapshots), the European Court of Justice (**ECJ**) has confirmed that, if you operate a website with a Facebook "Like" button, you could be a joint data controller with Facebook. This is the case even if the operator does not have access to the personal data.

The background

A German consumer protection association (**VNRW**) took action against a fashion website, Fashion ID, in the German courts. Fashion ID installed a Facebook Like button on its website, meaning that when an individual visits its website, that individual's personal information is automatically transferred to Facebook Ireland, whether or not they have clicked on the Like button and irrespective of whether they have a Facebook account.

VNRW sought an injunction against Fashion ID. It alleged that the fashion website's use of the Like button breached German data protection law (which implemented European Data Protection Directive (95/46/EC). This is because Fashion ID transmitted personal data to Facebook Ireland without individuals' consent and without informing the individuals (eg as to the purpose of the data processing).

The guidance

On referral from the German court, the ECJ considered Article 2(d) of the Data Protection Directive (95/46/EC), which gives a broad meaning to the term "controller". According to the Directive, a controller determines (alone or jointly) the purposes and means of processing personal data.

The ECJ clarified that the fact that an actor (eg a website operator) does not have access to the relevant personal data is not a barrier to finding that they are a controller. The ECJ also noted that joint liability as controllers should not always be equated with equal responsibility between controllers. In particular, operators might be involved at different stages of processing and might be involved in the processing to varying degrees, meaning that their liability should be assessed in light of the relevant circumstances.

Consequently, the ECJ found that Fashion ID was not a joint controller in relation to the processing undertaken by Facebook after the transmission of data. This is because the court found that it was impossible that Fashion ID determined (at the outset) the purposes and means of this stage of Facebook's data processing.

However, Fashion ID was a joint controller in respect of the operations involving the collection and disclosure of personal data to Facebook, because Fashion ID and Facebook both determined the means and purposes of those operations. In relation to individuals with no Facebook profile, the ECJ found that operators have more responsibility as the simple addition of the Like button on the website triggers processing of these individuals' data by Facebook.

Where data is processed pursuant to a legitimate interest, the ECJ confirmed that, in the case of join controllers, a legitimate interest should be pursued by both Facebook and the website operator.

The ECJ stated that website operators must provide information to individuals (such as the identity of the controller and the purpose of the processing) at the time their data is collected. Additionally, website operators must obtain prior consent in relation to the operations for which it is joint controller (eg the collection and transfer of data to Facebook).

Why is this important?

The ECJ has confirmed that website operators may be liable for breaches of data protection rules in relation to the use of the Facebook Like button on their websites.

Any practical tips?

If you are a website operator, review your website's privacy policies to ensure that individuals are informed about how their data is processed, collected and transferred to social media platforms, the type of data collected and the purpose of the processing.

The roles, liabilities and responsibilities of the website operators and social media platform should also be described in the agreement between the parties.

The issue of how consent should be given was not clarified by the ECJ and should be considered by website operators going forward, especially as the ECJ ruled that operators cannot rely on plug-in providers to obtain consent.

Autumn 2019

Data protection

New EDPB guidelines on processing personal data through video devices

The question

How does the GDPR apply to the use of video devices?

The key takeaway

Businesses that use CCTV and other video monitoring should check that their current practices are compliant with data protection laws.

The background

In July 2019 the European Data Protection Board (**EDPB**) published their guidelines on data processing in relation to the use of video devices. The public were able to submit their comments on the consultation version of the guidelines until 9 September 2019.

These guidelines come within the context of increased concern from the EPDB about the use of personal data obtained from videos. The EPDB has stated that a significant amount of personal data is being generated and stored and there is growing concern over the potential for misuse – for example, using the data for purposes beyond security which data subjects may not expect (eg marketing or employee monitoring). The introduction of facial recognition technology presents additional privacy challenges, as does combining surveillance systems with other technology (eg biometrics) which make it harder for individuals to remain anonymous.

The guidance

Exemptions

The guidelines explain that there are a number of scenarios where video footage does not fall within the scope of the GDPR. These include videos where individuals cannot be identified (for example their face or number plate is blurred), or the footage is for law enforcement activity or personal use.

Specific GDPR requirements for use of video devices

In cases where the exemptions do not apply, the guidelines set out a number of key requirements:

- if video devices are being used to monitor a large public area, a data protection impact assessment (**DPIA**) must be carried out (Article 35(3)(c))
- if video devices are being used to monitor individuals on a regular or systematic basis, a data protection officer must be appointed (Article 37(1)(b))
- every camera in use must be for a specific purpose which is recorded in writing (Article 5(2))
- data subjects must be made aware of the purpose for which they are being recorded and this information must be provided a transparent manner. This will usually involve a installing prominent sign with initial information and then offering more detailed information in an accessible manner (for example, via a link or telephone number).

Legal bases for processing

As with other types of processing, the use of personal data obtained through a video device must have a legal basis. For video devices the EPDB states this is most likely to be a legitimate interest or a task carried out in the public interest.

A legitimate interest must be balanced with the rights of data subjects. Factors that are particularly relevant for this balancing exercise include:

- the size of the area being monitored
- the number of data subjects being monitored, and
- the reasonable expectations of the data subject in relation to the processing of their data (for example, the EDPB states that individuals would usually expect not to be monitored in leisure areas such as gyms and restaurants).

If a data subject objects to the surveillance, there must be *compelling* legitimate interest in order to continue. This could potentially include situations involving a threat such as criminal activity. However, the interest will only be a legitimate reason to continue the monitoring if it relates to a current (rather than a speculative) threat.

In line with the principle of data minimisation, personal data collected should also be processed only to the extent necessary. For example, if audio recordings and facial recognition are not required, these video functions should be disabled. The recording should also not take place at times of day or in areas which are not necessary or relevant for the purpose.

In some exceptional cases the data processor may rely on the consent of an individual as their lawful basis. However, in order to be valid, consent must be freely given, specific, informed

and unambiguous. Power imbalances, such as those between an employee and an employer, are likely to negate consent.

Particular care must be taken where special category data is being recorded (for example, facial recognition via biometric data might fall within this ambit). In order to process this more sensitive type of information you are likely to have to rely on the consent of the individual. If you are capturing and analysing the image of anyone who has not properly consented, this will be a breach.

The EPDB also provides some helpful examples of ways to protect processed data – compartmentalising it during storage and transmission, using an integrity code, prohibiting external access and storing raw data on a different platform to biometric templates.

Why is this important?

The guidelines published by the EPDB provide greater clarity on the application of the rules on video recording. The examples given are helpful in terms of demonstrating what data controllers need to be considering. Above all, the guidelines emphasise that every situation needs to be considered on its own merits. Now would be a good time for businesses to start assessing (or re-assessing) their practices to ensure that they are working towards the required standards.

Any practical tips?

If you want to use the footage from a video device, ensure that you can justify it with an appropriate legal basis. Only use the video device in the areas and at the times necessary. Provide clear signs which explain to data subjects why they are being recorded and make sure that detailed information on the use of the video devices is available.

Finally, keep an eye out for any updates to the EDPB guidelines following the close of the consultation – there will likely be some fine tuning. Assessments that involve subjective considerations like the reasonable expectations of a data subject are always going to be difficult to interpret, so hopefully more examples to expand our understanding of this concept will follow.

Autumn 2019

Data protection

EE fined £100k for sending unsolicited marketing texts

The question

What happens when a customer service message also includes promotional material? Do the electronic marketing rules under the Privacy and Electronic Communications Regulations (**PECR**) kick in?

The key takeaway

Beware texts and emails which provide service information and also include a marketing or promotional element. If you haven't got the requisite marketing consents, you will be exposing yourself to a hefty fine.

The background

EE sent batches of messages to customers between 17 February and 25 March 2018. The messages informed customers to manage their account by using the "My EE" app. It also notified those customers about the release of the iPhone X and encouraged them to "countdown the days" to their upgrade via the app.

This message was sent to 8.2m customers, with a second message sent to customers who had not engaged with the initial message. Over 2.5m messages had been successfully delivered to customers who had previously opted out of direct marketing.

The decision

The ICO explained that including a marketing message within a service message contravened the rules. Since EE sent a follow-up message to non-engaging customers of the initial message this suggested to the ICO that it was a marketing exercise and not a service based one, as EE had attempted to argue.

The ICO's Director of Investigations and Intelligence, Andy White said:

"*These were marketing messages which promoted the company's products and services. The direct marketing guidance is clear: if a message that contains customer service information also includes promotional material to buy extra products for services, it is no longer a service message and electronic marketing rules apply*".

Why is this important?

It took just one complaint from an individual who had opted out of EE marketing communications to launch the ICO investigation into EE. So take great care that a service message is just that, and contains nothing at all of a promotional nature.

Any practical tips?

You need to be very clear whether your proposed message is a service message or a marketing message. Text messages and emails providing service information, which also include a marketing or promotional element, must comply with the relevant legislation.

Ensure that appropriate checks and balances are in place to prevent marketing and promotional material from slipping into otherwise acceptable service messages. Get this wrong and send it to customers who have not given marketing consents and you'll face a lumpy fine under PECR. Remember that the e-Privacy Regulation is on its way in a few years (which replaces and updates PECR), which contains GDPR-level fines (potentially running into millions). Best get those checks and balances in place sooner rather than later…

Autumn 2019

Consumer

White Paper on the Fourth Industrial Revolution – Government strategy on regulating new technologies

The question

What are the government's plans to regulate technological innovations?

The key takeaway

Government proposals for the regulation of new technology involve substantial industry input. There's a host of initiatives aimed at making the regulatory framework more efficient and effective for innovation.

The background

In June 2019 the Secretary of State for Business, Energy and Industrial Strategy presented the White Paper on Regulation of the Fourth Industrial Revolution. The White Paper sets out the government's plan to ensure that the regulations are keeping up with innovation.

In recent years the UK government has struggled to legislate at the pace at which technologies like artificial intelligence and driverless cars are now moving. The White Paper is a comprehensive plan, detailing how government will work with industry. It seeks to ensure that regulation is proportionate, targeted, fair and transparent. Through its implementation, the government aims to ensure that businesses are provided with sufficient certainty to innovate and customers are provided with the protection that they need.

The guidance

Regulatory Horizons Council

The government plans to establish a Regulatory Horizons Council, composed of industry participants. This body will prepare periodic reports which set out recommendations on regulatory measures which should be accelerated through the legislative process.

Its role will complement the recently formed Centre for Data Ethics, which provides detailed, specialist support on governance for issues that relate to artificial intelligence. It will also work alongside the Better Regulation Executive which looks at the design and implementation of regulations and the Regulatory Policy Committee which considers the information which goes into regulatory proposals.

Review of the Pioneer Fund

Following the success of the FCA's "regulatory sandpit" which allowed firms to work with the regulator and trial innovative products, the Regulators' Pioneer Fund has invested £10m in other regulator-led initiatives. The trial is being run from 2018-20 and the funding may be extended to cover local authorities dealing with regulation on a range of issues, from trading standards to taxi licences.

Innovation Test

As part of its plan, the government intends to pilot an innovation test. This should ensure that regulatory impact is considered at every stage – from the development of policy to the evaluation of implemented laws. In particular, if an implemented law is not having the intended effect, it should not be "locked in".

Regulation Navigator

The government plans to consult on the introduction of an online Regulation Navigator tool in order to minimise the compliance burden on businesses. This could potentially also involve mechanisms for businesses to provide feedback on how regulations are impacting their business.

Why is this important?

Start-ups are likely to welcome the White Paper, as it provides a road map for their future relationship with regulators and a template to work from. More established players meanwhile could face greater challenges. They will have grown their businesses in a less regulated environment, and are likely to have to dedicate resources to changing their systems and processes to deal with new rules and interactions with regulators.

The White Paper appears to emphasise the importance of the use of voluntary standards and codes where possible. This is a positive sign for the innovators. However, at this point it is essentially a high level plan, rather than something that provides substantive detail.

Any practical tips?

The government's proposals seek to involve industry in regulation, so industry stakeholders should commit time and resources to their proposals. The more input that they provide on the challenges and realities of a new industry, the more pragmatic their legislatures' approach to regulation is likely to be.

Autumn 2019

Consumer

CMA shows how far it is willing to "gogo" to ensure fair consumer practices

The question

What are the circumstances which led the CMA to pursue court action against Viagogo?

The key takeaway

The CMA's decision to apply for a court order against Viagogo after it failed to comply with the CMA's enforcement action shows the seriousness with which the CMA takes its enforcement actions. While the CMA suspended its preparations for future court action in light of remedial measures taken by Viagogo, this scenario shows just how far the CMA will go to protect consumers from regulatory breaches.

The background

The CMA issued enforcement action against Viagogo after it found that the secondary ticket seller had been engaging in unfair consumer practices. Viagogo agreed to take action in relation to the issues raised by the CMA without the need for a trial. However, after Viagogo failed to remedy the problems, the CMA sought a court order. In particular, the court order specified that, before mid-January 2019, Viagogo must:

- not provide misleading information about the availability and popularity of tickets (thereby influencing consumer behaviour)
- make is easier for consumers to get money back under Viagogo's guarantee
- be transparent with consumers by informing them if there is a risk they might be refused entry at the door
- tell consumers which seat they will get
- inform the consumer about who the ticket seller is so that consumers can benefit from enhanced legal rights if the seller is a business and prevent the sale of tickets a seller may not own
- make sure that consumers are aware of the face value of tickets.

The developments

By July 2019 Viagogo had not done enough to comply with the court order. Consequently, after repeated warnings, the CMA put Viagogo on notice that it was going to pursue action for contempt of court.

Having been put on notice, Viagogo started to take the remedial actions outlined in the court order. This prompted the CMA to announce via press release in early September this year that it was suspending preparations for court action relating to contempt of court.

In October this year, a further review will be undertaken to evaluate Viagogo's compliance with the court order. The CMA has announced that, if the results of the review are not satisfactory at this stage, it will not hesitate to take further action, including court action, if necessary.

Why is this important?

The Viagogo scenario is an indication of the lengths to which the CMA will go to in order to ensure that its enforcement actions are taken seriously.

Any practical tips?

Don't underestimate the CMA's interest in protecting consumer rights, especially when it comes to potential pricing infringements. The Viagogo proceedings show that once it clamps its regulatory jaws around your leg, it won't let go!

Autumn 2019

Consumer

CJEU confirms that e-commerce platforms need not make a telephone number available to consumers

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl, Case C 649/17

The question

Are online traders required to provide a contact telephone number for consumers?

The key takeaway

Provided that online traders make consumers aware of alternative means of communication, such as automated call back or online chat-services, in a clear and comprehensible manner, they are not obliged to offer a contact telephone number.

The background

The German Federal Union of Consumer Organisations and Associations sought a declaration from the German courts that Amazon.de (**Amazon**) had fallen foul of its legal obligation under German law to provide a telephone number to its consumers. Instead Amazon gave its consumers, through a serious of webpage links, the option to request a call back, send an email or use an online chat service.

Following the opinion of Advocate General Pitruzzella in February 2019, the Court of Justice of the European Union (CJEU) were tasked with providing guidance on whether the Consumer Rights Directive (the Directive) - which provides that "*traders shall provide the consumer with … in a clear and comprehensible manner ... the trader's telephone number, fax and email address, where available, to enable the consumer to contact the trader quickly and communicate with him effectively*" (Article 6.1(c)) - requires e-commerce traders to establish a telephone number or email address to allow consumers to contact them or whether other means of communication such as those implemented by Amazon would be sufficient to discharge a trader's obligations.

The decision

The CJEU found that the Directive prohibits national legislation from imposing an obligation on traders to provide, in all circumstances, their telephone number. The CJEU also confirmed that the Directive does not require e-commerce traders to establish a telephone number or email address, however, where these means of communication are already available for use by

consumers they should be communicated to consumers unless the trader has in place alternative means of direct and efficient communication such as a call back or online chat service.

Confirming the opinion of Advocate General Pitruzzella consumer protection must be balanced against the freedom to conduct business and therefore it would be disproportionate to place an unconditional obligation on traders to provide a telephone or fax number to consumers in all circumstances. To the contrary, the CJEU was clear that alternative means of communication would be satisfactory as long as they are communicated to the consumer in a clear and comprehensive manner and provide direct, quick and efficient means of communication. The CJEU also suggested that the fact that the consumer is required to click through a series of links is not necessarily indicative that the information is not clear or comprehensible unless navigation of the links is so complex that it makes it difficult to access the information.

Why is this important?

This will undoubtedly be a welcome decision for many online and off-premises traders as it provides more flexibility in terms of the means that can be used to communicate with consumers.

Any practical tips?

Online traders can continue to explore and take advantage of innovative and cost-efficient ways to communicate with customers such as online chat services, automated call-back services and enquiry templates. However, they must ensure that the chosen means of communication are made clear and accessible to consumers.

Autumn 2019

Online platforms

DCMS consults on AVMS Directive

The question

How will the updated provisions in the Audiovisual Media Services Directive (**AVMSD**) impact on video-sharing platforms (**VSPs**)?

The key takeaway

VSPs will now be required to protect minors from harmful content, monitor their sites for hateful content and introduce basic advertising standards.

The background

The AVMS Directive is the regulatory framework governing EU-wide coordination of national legislation on all audio-visual media. The Directive, which was initially created in 1989, aims to keep up to date with the impact of technological developments since 2010 when the Directive was last reformed. As viewers are moving from TV to digital mediums, the regulatory onus has also started to shift from TV to digital mediums and this Directive, alongside the introduction of the Online Harms White Paper (where there is some overlap), aims to ensure that consumers will be protected online.

Whilst video-on-demand services were included in the 2010 reforms, the new 2018 revisions increase the regulatory burden on these service providers, and in addition broadens the scope of these rules to video-sharing platforms. In addition, the new amendments are also focussed on the protection of minors and taking action against hate speech, and reinforcing regulations regarding the promotion and distribution of European content. Further, more detail is built into this Directive in respect of the country of origin principle, which determines which Member State's regulations should apply to a business.

The DCMS has launched two separate consultations to address both the questions asked by the implementation of the Directive as a whole, in light of a number of possible Brexit scenarios (which closed on 22nd August), and the introduction of the expansion of the scope to VSPs (which closed on 17 September). This snapshot primarily addresses the issues raised in the second consultation regarding VSPs.

The development

Scope

In order to capture social media services in its scope, VSPs are defined (in the Directive's recitals) as a service where the sharing of audio-visual content is an essential functionality. Therefore, Twitter, Facebook, Instagram, etc will fall under the rules of this Directive.
The definition will further apply to businesses where video sharing is a "principal purpose" such as YouTube, Vimeo and Twitch, and adult websites showing user-generated content for profit, and live streaming sites.

The consultation suggests that Ofcom should provide guidance in determining the status of services.

Country of Origin

VSPs will only be subject to the regulations of the Member State in which they are located. The E-Commerce Directive states that the Member State that has jurisdiction will be the State where VSPs are already set up as an "information society service". If this cannot be determined, the jurisdiction will be the Member State where a VSP's associated companies (such as subsidiaries, parent undertakings or other undertakings) are based. As a result, Google, Facebook and Twitter and many others will be based in Ireland and will be subject to its regulations.

Requirements placed on VSPs

The key fundamental obligations placed on VSPs (under Article 28a) are:

- to protect minors from programmes, user-generated videos and audiovisual commercial communications that might impair their physical, mental or moral development
- to protect the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred or containing content which is a criminal offence (for example terrorist content or child pornography)
- to introduce basic standards around advertising (Article 9.1). This is to make sure that both their own advertising complies with these rules and that "appropriate measures" are taken for advertising content that is not directly under their control.

Compliance and Redress

The Directive sets out a number of "appropriate measures" that Member States must ensure that VSPs comply with, such as operating an age verification system and a dispute resolution procedure. In addition, the Directive states that a national regulatory authority must have the relevant powers to be able to require VSPs to take these "appropriate measures". Finally,

Member States must provide an out of court redress mechanism for users of VSPs to settle disputes relating to the Directive's requirements.

The consultation suggests that Ofcom should be the national regulatory authority for VSPs and for Ofcom to defer to the ASA as the co-regulator on issues regarding VSP advertising requirements. In addition, the consultation proposes that Ofcom would provide statutory guidance on how to be compliant with "appropriate measures".

Why is this important

This updated Directive will have a major impact on how VSPs are regulated. The obligations which VSPs are expected to comply with are broad and will impose greater burdens on VSPs to regulate their own content more thoroughly as well as start to implement processes to comply with the obligations.

Practical tips

Keep an eye out for any future developments and revisions of the amendments. VSPs should start to think about how they will be impacted by the Directive with regard to which jurisdiction they will be regulated by and what measures they must start to put in place to comply with the Article 28a obligations. With the introduction of the statutory duty of care for most online businesses, it is now even more important that you do not get caught out by harmful content on your site.

Autumn 2019

Influencer marketing

ASA ruling on "celebrity" status – ThisMamaLife

The questions

What number of Instagram followers constitutes a "celebrity" status?

The key takeaway

According to the ASA, if an individual has 30,000 followers, that's enough of an indication that an individual has "celebrity" status. This is especially important for marketing medicines, as under the CAP Code, marketers must not use health professionals or celebrities to endorse medicines.

The ad

A post on ThisMamaLife's Instagram account, seen in February 2019, featured an image of the blogger in bed smiling. In the background of the image was a packet of Phenergan Night Time tablets. The caption stated "*[AD] Sleep. Who needs more of it? I'm really lucky in that I don't actually need a lot of sleep to get by and manage to cram all sorts into my evening, being the night owl I am … I tried out Phenergan Night Time, which really helped. It is a pharmacy only, short term solution to insomnia for adults which works by inducing a sleepy effect thanks to its active ingredient, promethazine hydrochloride, helping you to sleep through the night. #AD #sleep*".

The complaint

The ASA challenged whether the ad used a celebrity to endorse a medicine.

The response

Sanofi (the makers of Phenergen Night Time) said that ThisMamaLife (a working mum blogger) had a niche following which was unlikely to influence a medicinal decision taken by a consumer and that ThisMamaLife was not a celebrity.

The decision

Rule 12.18 of the CAP Code states that marketers must not use health professionals or celebrities to endorse medicines. The ASA therefore had to assess whether the blogger was a celebrity for the purposes of the CAP Code and whether she had endorsed a medicine.

The ASA considered that ThisMamaLife's 30,000 followers indicated that she had the attention of a significant number of people. As she had attention of a large audience, the ASA considered her to be a celebrity for the purposes of the CAP Code.

The ASA considered that consumers would understand the ad to mean that ThisMamaLife had used and recommended the product. On that basis, the ASA considered that ThisMamaLife had endorsed the medicine.

Why is this important?

For the first time brands are now aware of what amount of followers are required for an influencer to be considered as a celebrity, or at least what constitutes a celebrity in the eyes of the ASA.

Any practical tips?

Don't forget about the ban on using health professionals, or celebrities to endorse medicines - see CAP Code Rule 12. If you work with influencers in this space, you must (a) select them carefully (ie no professionals or celebs) and (b) keep an active eye on them and their number of followers. While 30,000 followers was enough in this case, this is not a minimum threshold. It's possible that a much lower number could still achieve ASA "celebrity" status.

Autumn 2019

Influencer marketing

ASA ruling on weight loss post – Jemmy Lucy

The question

Is your choice of influencer appropriate for your product, especially when they might be encouraging an unsafe practice?

The key takeaway

Always ensure your influencers use a prominent identifier (eg #ad) when you have a commercial relationship with them. And be careful who you choose (ie pregnant women and weight loss supplements are not the best match).

The ad

On 5 May 2019, reality TV celebrity Jemma Lucy published an Instagram post that read as follows:

"*I've been staying in shape with my go to @skinnycaffe products. I love the Coffee's [sic], Hot Chocolate's and the Thermosyn capsules are amazing! I love to use them as me and some of the girls have been seeing great results and they work with or without exercise. You can lose up to 7lbs in 7 days with Thermosyn. Right now you can claim your first packet of Thermosyn free by clicking here*". A link to Skinny Caffe's website was included in the post.

The Complaint

The ASA received 25 complaints about the post relating to a number of issues. Some complainants challenged whether the post was "obviously identifiable" as an ad, while others challenged whether it was irresponsible in encouraging pregnant women to consume weight loss supplements. The ASA also challenged the claim about weight loss, as advertising that attributes a rate of weight loss to "consumption of a particular food" is in breach of the CAP Code.

The response

The White Star Key Group (trading as The Skinny Caffe) responded by stating that Jemma was a personal friend to an employee of the company and made the post as a personal favour. They had sought to create brand awareness ahead of Jemma giving birth. The Group also stated that there was no implication Jemma had used the products while pregnant. It defended the weight loss claim by saying customers had told the Group of their own weight losses resulting from usage of its products.

The decision

The ASA upheld all three main strands of complaint received.

On the first point, it found that the post was not obviously identifiable as an advert, which gave rise to a breach of CAP Code (Edition 12) Rules 2.1, 2.3 and 2.4. It found that there was a commercial relationship between Jemma and White Star. Also, White Star provided the wording for Jemma's post which gave them a degree of control such as to make it a marketing communication. The post should have included a prominent identifier at the start of the ad, such as #ad.

On the second point, the ASA acknowledged that the post did not make express reference to Jemma's pregnancy, nor show her as noticeably pregnant in the picture. But her other posts did mention her pregnancy, which had also been widely reported in the press. It considered the ad to be irresponsible by encouraging consumers, potentially including pregnant women, to use weight loss supplements. This encouraged an "unsafe practice" and put the ad in breach of CAP Code Rule 1.3.

Finally, the claim about weight loss was also in breach of the Code, namely Rule 15.6, which prohibits health claims that refer to a rate or amount of health loss.

Why is this important?

The ruling is yet another example of a failure to correctly identify a post as an ad where a brand has supplied free products (here a weight loss supplement) and also exercised editorial control (by providing the wording they wanted her to include). It is also a reminder about not allowing influencers to encourage unsafe practices.

Any practical tips?

Note that Jemma did not expressly reference her pregnancy in the post, nor did she appear pregnant in the accompanying picture. However, her other posts – and the press – clearly referenced her pregnancy. It follows that you need to know your influencers well (ie the context in which they are making their posts) to see whether they are truly right for your brand – and this is particularly relevant to products that may be deemed unsafe in certain circumstances (as here, with Jemma's pregnancy). In short, don't forget to do your homework on those you choose for your campaign.

Autumn 2019

Influencer marketing

The ASA's Love Island "cheat sheet"

At the end of July, the Advertising Standards Authority (**ASA**) published a cheat sheet for Love Island contestants, celebs and influencers with guidance on how to declare ads on social media.

The question

What's the ASA's latest guidance on influencer marketing?

The key takeaway

The ASA's new "cheat sheet" firmly underlines the need for influencers to be open and upfront with their followers about when they are advertising. Honesty and authenticity are vital – and the ASA encourages influencers and brands to do their research and to be vigilant whenever making sponsored posts so that they do not fall foul of advertising rules.

The background

The CAP Code defines advertising broadly for social media influencers. For example, advertising can be:

- affiliate marketing: being paid for click-throughs.
- advertorials: being paid or otherwise rewarded for a post by someone who has editorial "control" over the content.

In August 2018, the Competition and Markets Authority (**CMA**) launched an investigation into concerns that social media influencers were not properly declaring when they are being paid for advertising on their own channels. The CMA argued that this could mislead consumers. Following on from this, in January 2019, 16 high-profile influencers including Ellie Goulding and Rita Ora agreed to change how they post on social media. They assured the CMA that they would clearly state when they have been paid or otherwise rewarded for a post that endorses a particular product or brand. While the relevant laws have been in place for some time, the increasing usage of social media platforms for advertising has led to a need for updated guidance from regulatory bodies.

The development

Love Island is a phenomenon, with 3.6m viewers tuning in live for the most recent series' finale, and millions more watching it on catch-up. Most of the show's stars go on to monetise

their new found fame as influencers across social media. The ASA therefore decided it was timely to partner with ITV to provide succinct guidelines for Love Island contestants and other social media celebrities for declaring ads on social media.

The cheat sheet covers the following points:

- Authenticity: influencers should retain their authenticity by letting their followers know when they're advertising
- Brands: when an influencer is paid by a brand to promote their products or services (either with money or "gifted stuff"), then they are advertising
- Control: where a brand controls an influencer's message, the influencer has to declare the post as an ad
- Discount Codes: if influencers are being rewarded for discount codes or affiliate links, they will need to say it is an ad
- Enforcement: the guidance makes clear that both the ASA and the CMA will actively enforce transparency
- Followers: influencers should be clear with their followers. As the cheat sheet says, "*they're not mind readers*."
- Gifts: freebies and gifts that brands have given to influencers to promote to their followers count as ads
- Hashtag: influencers who choose to use hashtags as a way of showing a post is an ad should make sure it's "clearly visible upfront".

Why is this important?

As the ASA outlines in the cheat sheet, influencers are quite often trading off their authenticity and honesty towards their followers. If their followers feel they are being misled, then this could damage influencers' personal brands, and impact the trust consumers have in advertising more widely.

Any practical tips?

The cheat sheet should be welcome and tying it in with Love Island was a cunning move by the ASA to get extra attention on the topic. But equally the cheat sheet is pretty limited. There is much more extensive advice available online, including CAP's "Influencer's Guide to Making Clear Ads Are Ads" and the CMA's "Social Media Endorsements: Being Transparent With Your Followers". These provide much more in-depth guidance.

Autumn 2019

Influencer marketing

ASA ruling on audience composition – Tanya Burr

The question

What evidence must a business provide to show audience composition?

The key takeaway

Use data from multiple sources when trying to prove audience demographics.

The ad

The ads which were the subject of the complaint were two Instagram posts which appeared on popular influencer, Tanya Burr's, Instagram story. The first, a post on 5 April 2019, had a picture of a Heineken beer; the second, a post on 24 April 2019, consisted of an image of a Heineken being poured and the words "*Swipe up to get 40% off all Subs using the code INSTA40*".

The complaint

There were six complainants who contended that, given Tanya Burr was so well-known and well followed by under 18 year olds, that the beer ads were inappropriately targeted.

The response

In response to the accusation that the ads had been inappropriately directed at under 18's by virtue of Tanya Burr being popular with kids, Heineken used three different accounts to show a demographic of Tanya Burr's followers:

- a data collection site, which used publically available information on Tanya Burr's Instagram account to highlight that only 11% of Tanya Burr's followers were under the age of 18
- a global data company, which looks at Instagram activity such as views, likes and comments to posts, measured that only 7.1% of Tanya Burr's audience was under the age of 18
- demographic evidence from Instagram itself which revealed the same as the data collection site, that only 11% of Tanya Burr's followers were under the age of 18.

Tanya Burr also challenged the complaints using the demographic data provided by Instagram.

The decision

The CAP Code (18.15) states that "*Marketing communications must not be directed at people under 18 through the selection of media or the context in which they appear. No medium should be used to advertise alcoholic drinks if more than 25% of its audience is under 18 years of age.*"

The ASA considered the nature of Tanya Burr's Instagram account and whether it might be appealing to those under 18 years of age. The ASA decided that Tanya Burr's account would be more suited to those over 18 years old and that the data provided from the three different sources that Heineken presented, proved that less than 25% of Tanya Burr's followers were under 18.

Why is this important

These types of complaints for age-restricted products (HFSS, alcohol and gambling etc) are becoming more and more common in the UK. The adjudication is a good example of a brand getting it right and having the appropriate data to be able to successfully defend a complaint (particularly in an influencer marketing context). It is also interesting that the ASA took into account the nature of Tanya Burr's Instagram posts and not just the evidence provided. This shows that the content itself should not be more appealing to those under 18 than over 18, even if the composition of the influencer's audience is compliant with the CAP code.

Practical tips

If you are using an influencer to advertise an age-restricted product: (1) check the demographics of their followers on numerous data sources (and hold records of this data on file); and (2) check whether the nature of the posts might in any case be attractive to children.

Autumn 2019

ASA

Complaint against e-cigarette poster on grounds of targeting is dismissed by ASA - BAT

The question

What factors will be taken into account by the ASA when it considers targeting complaints relating to the advertising of age-restricted products?

The key takeaway

In reaching its decision, the ASA took a broad range of factors into account, which indicates the practical approach the ASA may take when evaluating similar complaints.

The background

British American Tobacco UK (**BAT**) installed an ad for Vype e-cigarettes at a bus stop. A complaint was raised in relation to the location of the ad. Allegedly, because of the ad's location, more than 25% of the advert's audience comprised of people under the age of 18.

BAT responded to the complaint by stating the following:

- the ad's location formed part of a special "ad package" which was for age-restricted products. As such, the location had been deemed appropriate for the placing of ads relating to products such as alcohol and e-cigarettes
- one of the criteria for being deemed an appropriate location under the ad package was that it must be at least 100m away from a school so that under-18s were not inadvertently targeted (and the bus stop was indeed more than 100m from any schools)
- the bus stop served three routes, covering significant distances over a wide variety of sites and none of these specifically served one school/college
- estimated footfall data related to the ad site showed that not more than 25% of the footfall related to under-18s.

The ASA's decision

After considering each of the factors raised by BAT, the ASA did not uphold the complaint. Based on the factual assertions made by BAT, the ASA found it unlikely that underage people made up more than 25% of the ad's audience. Moreover, the ASA stated that it believed that BAT had taken "reasonable steps" to ensure that the ad's audience was not made up of more than 25% under-18s.

Why is this important?

This decision acts as a helpful “reference-marker” for businesses which advertise age-restricted products (especially on billboards or by posters, etc). Businesses may take inspiration from BAT’s safeguards to lower the risk of any adverse ASA rulings.

Any practical tips?

If you are undertaking an offline advertising campaign such as posters and billboards, take great care in choosing the location of your ads. To lower the risk of an adverse ASA ruling, choose a location which is more than 100m away from any school/college. Also, consider any other practical factors which may affect the demographic of your ad’s audience. Such factors may not be obvious. For example, is the ad on a bus route which serves mostly school children? It may also be helpful to show that the location you have chosen has already been deemed suitable for ads for age-restricted products.

Autumn 2019

ASA

ASA ruling on alcohol and social responsibility - Macallan

The question

How easy is it for an alcohol ad to breach advertising rules on "social responsibility" when it includes daring or potentially dangerous behaviour? Does including elements of fantastical situations help you?

The key takeaway

Be cautious! Any combination of dangerous behavior with alcohol in an ad is going to be extremely hard to defend – even if some of the elements are fantastical.

The ad

Edrington Distillers advertised its single malt whisky with a 90-second ad which featured a man jumping from a cliff and falling towards the ground, before sprouting wings and flying. This was accompanied by the tagline: "*Would you risk falling … for the chance to fly?*" More text on the screen then stated, "*The Macallan. Make the call*", which was accompanied by an image of a glass of whisky. The ad was shown on TV, video on demand and Instagram in December 2018.

The response

The ASA began an inquiry after receiving six complaints from people that the ad linked alcohol with daring, toughness or irresponsible behaviour.

Edrington said that the ad featured a "fantastical story", was "mystical, almost mythical", and "clearly removed from the real world". The company also denied that the ad linked the consumption of alcohol with daring or irresponsible behaviour and said that the story portrayed in the ad was "simply a metaphor" for making decisions.

Clearcast said that it had considered the rule which prevents advertisers from linking alcohol with daring behaviour but had found that the ad was "fantastical enough" to be acceptable. ITV, who had shown the ad, said that they believed that the ad was "imaginary, fanciful and dreamlike; inasmuch as it was both detached from reality and grotesque". Instagram said that the ad did not violate their policies and that they had not received any complaints in relation to it.

The decision

The ASA upheld the complaint and banned the ad from being shown again in its current form. It said that the scenes of the man falling from the cliff were reminiscent of the extreme sport of base-jumping and portrayed "*very dangerous, potentially fatal and extreme risk-taking behaviour*". In response to Edrington's argument that the ad was fantastical, the ASA stated that it had "*noted that at that point in the ads there was no suggestion that the male character had any super-human attributes or powers, or that he was part of a mythical world*".

Despite the fact that the man in the ad was not shown consuming alcohol at any point, the ASA thought that the ad "*made a clear association between an alcoholic product and potentially very dangerous, daring behaviour*" and was therefore irresponsible.

Edrington was told to ensure that future ads did not link alcohol with daring, toughness or irresponsible behaviour.

Why is this important?

The ruling underlines the ASA's strict approach to ads which combine alcohol with daring situations. Even if you get your ad through Clearcast, this doesn't mean it won't get picked up – and potentially banned by the ASA - if consumers start complaining.

Any practical tips?

When advertising alcoholic products, be sure to avoid any portrayals of behaviour that could be considered dangerous, daring or irresponsible; even when based in situations which may seem to be fantastical or not based in reality. Remember this applies even where the characters in the ads are not shown actually consuming alcohol.

Autumn 2019

ASA

ASA ruling on gender stereotyping – Philadelphia

The question

When does an advertisement perpetuate harmful gender stereotypes? Will humour save you?

The key takeaway

Advertisers must not include gender stereotypes which could be considered likely to cause harm in their ads.

The background

Earlier this year, following a review of gender stereotyping in advertising, the ASA introduced a new rule banning the depiction of men and women engaged in gender-stereotypical activities. This new rule in the Advertising Codes, which came into force on 14 June 2019, states that advertisements "*must not include gender stereotypes that are likely to cause harm, or serious or widespread offence*".

The ad

The advertisement is a television ad for Philadelphia cheese. This depicts two new fathers, accompanied by their respective babies, eating lunch at a restaurant where there is food being circulated on a conveyor belt. They become distracted whilst talking, and find that their babies have accidentally been carried away by the conveyor belt, to which one of them says "*Let's not tell mum*".

The response

The ad received 128 complaints by complainants who stated that the ad "*perpetuated a harmful stereotype by suggesting that men were incapable of caring for children and would place them at risk as a result of their incompetence*". In response, Mondelez (the company which produces Philadelphia) said that it was "*stuck in a no-win situation*", as it had specifically chosen two fathers to feature in the ad to avoid the stereotype that mothers should handle childcare responsibilities. It argued that it had aimed to show a positive image of men as taking on an active role in childcare in modern society.

Clearcast considered that the focus of the ad was the experience of two new parents who were not used to dealing with children rather than new fathers who were unable to look after their children properly as a result of their gender. Similarly, ITV, who had shown the ad, stated that it did not believe that the ad "*constituted a stereotypical incompetence*".

The decision

The ASA upheld the complaints and banned the ad.

The ASA recognised that the intention of the ad was to be humorous. It noted that Mondelez had purposefully chosen two fathers to avoid the stereotype of new mothers with childcare responsibilities (and because men were a growing market for Philadelphia), and had not purposefully made the men featured look incompetent. However, it found that overall, the ad relied on the stereotype that men were not able to care for children as well as women and implied that the fathers had failed to properly look after their children because of their gender. It was also found the humorous nature of the ad did not detract from the harmful stereotype and in fact derived from it.

Why is this important?

This decision provides evidence of the ASA's strict interpretation of its new rules on gender stereotyping in ads and demonstrates that it is willing to find that harmful stereotypes are perpetuated even in what may seem to be light-hearted and humorous scenarios.

Any practical tips?

Advertisers should take care to ensure that their ads do not perpetuate what could be considered to be harmful gender stereotypes, or suggest that stereotypical roles or characteristics are always associated with one gender. Above all, forget the idea that humour will save you. It's the focus of the ad which is key – see, for example, the recent Buxton ruling on gender stereotyping where the focus on drive and talent overcame the suggestion of portraying men and women in stereotypical ways.

Autumn 2019

ASA

ASA ruling on gender stereotyping – Volkswagen

The question

When does an ad perpetuate harmful stereotypes?

The key takeaway

Advertisers must not include gender stereotypes which could be considered likely to cause harm in their ads. Avoid giving the impression that roles and characteristics are exclusively associated with one gender.

The background

Earlier this year, following a review of gender stereotyping in advertising, the ASA introduced a new rule banning the depiction of men and women engaged in gender-stereotypical activities. This new rule in the CAP and BCAP Codes, which came into force on 14 June 2019, states that ads "*must not include gender stereotypes that are likely to cause harm, or serious or widespread offence*".

The ad

A television ad for the Volkswagen electric eGolf car depicted a variety of scenes including a man and woman camping on the side of a sheer cliff face, male astronauts working in space, a male para-athlete doing a long jump and a woman sitting on a bench accompanied by a pram. The final scene of the ad depicts a Volkswagen eGolf passing quietly by the woman sitting on the bench, accompanied by the words "*when we learn to adapt we can achieve anything*".

The response

The ad received three complaints from people who believed that the ad perpetuated harmful gender stereotypes by showing men taking part in adventurous activities in contrast to a woman involved in a care-giving role, and therefore was in breach of the BCAP Code.

Volkswagen stated that the ad was not sexist and said that including the scene of the woman with the pram was intended to show that caring for a new-born baby was a life-changing experience about adaptation, regardless of the gender of the parent portrayed. Volkswagen also claimed that the characters depicted in the ad were not shown taking part in activities that were stereotypical to one gender. For example, the woman camping on the cliff face was sleeping and one of the astronauts was eating an apple. Volkswagen considered that it was

the environments that the characters found themselves in that were adventurous rather than the activities that they were taking part in.

The decision

The ASA upheld the complaints and banned the ad.

It considered that the juxtaposition of men in extraordinary environments and carrying out adventurous activities with depictions of women in passive and care-giving roles "*directly contrasted stereotypical male and female roles and characteristics in a manner that gave the impression that they were exclusively associated with one gender*". The ASA believed that the way in which gender stereotypes were presented was likely to cause harm and therefore constituted a breach of the BCAP Code.

Why is this important?

This decision reminds advertisers to take particular care when creating ads which depict men and women in different situations, and that it will not hesitate to ban an ad which crosses its line on gender stereotyping.

Any practical tips?

Ask the creative teams to send you (as early as possible!) the storyboards for all ads which might contain any form of gender stereotyping. Catching a potential problem early – by screening the proposed ad through the (more critical) eyes of the ASA – may save it from being banned under the strict new rules.

Autumn 2019

ASA

ASA ruling on gender stereotyping – Buxton

The question

Can you still use gender stereotypical roles in your ads, even with the ASA's new gender stereotyping rules in play?

The key takeaway

Notwithstanding the new gender stereotyping rules, you can portray men and women in gender stereotypical roles, provided your main focus is on other elements (such as drive and talent).

The ad

On 15 June 2019, a TV ad for Buxton bottled water, featured a female ballet dancer, a male drummer and a male rower. Each of the men and the one woman were featured practising their different skills as children and then as adults (for example, the rower was seen training on a stationary bike and rowing machine and then rowing on a river). This was then intermingled with the characters drinking Buxton water and images of water flowing through rock.

A voice-over stated "*Rock bottom. The start of the journey. There will be obstacles but it's all about finding a way through, pushing upwards until finally reaching the top. Buxton. Here's to the up and coming*". On screen text stated "*Forced up through a mile of British rock. #HeresToTheUpAndComing*".

The complaint

Five complainants believed that the ad perpetuated harmful gender stereotypes by contrasting the men and the woman doing activities that they considered gender stereotypical - specifically, the only woman in the ad was a ballet dancer, which they considered was a role that was stereotypically associated with women. They challenged whether it breached the BCAP Code rule 4.12 (Harm and Offence).

The response

Nestlé UK Ltd stated that the characters depicted were real people (not actors) nor was the ad stating that the roles portrayed were always uniquely associated with one gender or that these activities are only ever available to one gender.

Clearcast agreed with Nestlé UK Ltd. Whilst the female character was shown to be a ballet dancer, she was featured as tough and athletic with her discipline requiring the same amount

of physical exertion as the rower or cyclist. Clearcast did not consider that the ad was in breach of the regulations.

The decision

The ASA acknowledged that ballet was stereotypically seen as an activity for women and sports, such as rowing, were stereotypically associated with men. However, the viewers of the ad would be less focused on the specific disciplines of each character but more on their shared characteristics - equal levels of drive and talent in order to be high achievers in their respective fields. The ad reinforced this with multiple shots of the characters training or practising and the ASA considered that this illustrated hard work and perseverance.

The ASA found that the ad did not perpetuate harmful gender stereotypes and concluded that it did not breach the BCAP Code rule 4.14.

Why is this important?

The ASA's interpretation of gender stereotyping in advertisements for Buxton (and two other advertisements relating to Philadelphia cheese and Volkswagen cars) against the new rules and guidance go further than had been anticipated and has implications for a wide range of ads. Specifically, in relation to the Buxton ad, the implication of the ASA's decision is that gender stereotypical roles may be acceptable where, for example, the focus is on the drive for success.

Any practical tips?

If you are creating ads to be shown in the UK market, you need to think very carefully indeed about your narrative and castings. The good news is that it seems that the ASA's application of its new rules means that ads may feature people undertaking gender-stereotypical roles. However, the key is to avoid suggesting that stereotypical roles or characteristics are always uniquely associated with one gender; the only options available to one gender; or never carried out or displayed by another gender - for example, portraying men as being bad at stereotypically "feminine" tasks, such as vacuuming, washing clothes or parenting. And if you do use gender-stereotypical roles, make sure your focus is on the right elements – as in the Buxton ad which brought out shared male and female levels of drive and talent.

Autumn 2019

ASA – pricing

ASA rules on price comparisons – Samuel Windsor

The question

Can a retailer compare its prices to “typical high street prices”? Does it help if you explain the basis of those "typical" prices?

The key takeaway

Beware using broad phrases to make price comparisons. In this case, the ASA took "typical high street prices" to mean a comparison with all items of a similar design on the whole high street – not an easy claim to substantiate!

The ad

Samuel Windsor, a menswear brand, published a brochure in September 2018 relating to its end of season sale. The cover stated “END OF SEASON SALE SAVE UP TO 70%”. The brochure included several different products that were discounted against the “typical high street price”.

Examples of listings include:

- “THE FAMOUS SAMUEL WINDSOR GOODYEAR WELTED CLASSICS” shoes, which stated “OUR PRICE £39.95 A PAIR… TYPICAL HIGH STREET PRICE £134.50*”
- WEEKEND SHIRTS” and stated “OUR PRICE £20 EACH… TYPICAL HIGH STREET PRICE £52.88*

The bottom of the page stated that the prices were compared against a calculated average high street price for each product.

The complaint

The complaint alleged that the comparison made between the prices of the advertiser and the “typical high street” was misleading and could not be substantiated.

The response

Samuel Windsor challenged the complaint and stated that the brochure included a qualification explaining the basis for the comparison on every alternate page. Their evidence showed that the shirt in the complaint was compared to two other shirts from four retailers that they considered to be similar quality, specification and design and therefore were

representative of high street pricing. Their evidence also showed that the shirts were made similarly and using the same manufacturing methods, location and were designed in a similar way. Similar evidence was given for the shoes as well. The company did, however, admit that the brochure's cover claim of "END OF SEASON SALE SAVE UP TO 70%" was an oversight and their future covers would comply with the CAP Code.

The decision

The ASA upheld the complaint.

It noted that the cover page implied that the 70% savings were against Samuel Windsor's usual prices for the products, whereas the rest of the brochure was intended to be a comparison with the prices of other retailers. The ASA considered that, while the comparison was explained elsewhere in the brochure, consumers who would see the claim on the cover page would be misled by it.

In terms of the promotion for the shoes, the ASA said that, although the ad did state that the typical high street price was calculated by comparing products of similar quality in a footnote at the bottom of the page, the overall presentation of the ad was likely to be seen as a comparison against identical products. Due to this, consumers were likely to be misled by the ad. Since the comparison did not constitute a full comparison against the whole high street, including all items of a similar design, the evidence did not sufficiently demonstrate that the price claim for the average high street price was what was presented. The ASA considered that the same also applied to the shirts, which failed to demonstrate, through evidence, that the price presented was an accurate representation of the average high street price.

Why is this important?

The ruling highlights the difficulties of finding alternative methods for showing price savings compared to the competition, particular where the comparison is not with the whole high street.

Practical tips

Ensure that the basis of your price comparisons is clear. Advertisers should be careful when making comparisons to other retailers' prices in very broad terms, such as "typical high street price", without immediately and properly clarifying how the comparison has been made. The ASA suggests that this type of phrase requires a full comparison against the whole high street, including all items of a similar design, together with full substantiation evidence.

Autumn 2019

ASA – pricing

Aldi rapped for misleading shopping basket price comparison

The question

In what circumstances will a multi-production comparison be considered fair?

The key takeaway

Multi-product comparisons must not be unfairly skewed in your favour. An ad cannot imply that consumers can make more general savings by switching allegiance where the claim is based upon a specific selection of comparable goods. In any event, where own-brand and household brands are selected as comparator products, the comparison must be appropriate.

The background

On 8 December 2018, a press ad for Aldi headed "Swap to Aldi and save" was published showing a comparison between two Christmas-themed baskets of goods from Tesco and Aldi. While the Tesco basket, which contained "household" brands and fresh products, was shown to cost £61.56, Aldi's basket, full of "exclusive" own-brand products, cost £32.53. For one of the comparator products, champagne, a bottle of Moët et Chandon Brut Imperial Non-Vintage was included in Tesco's basket, whereas Aldi's included its own brand Veuve Monsigne Champagne. The ad went on to state that consumers could "Save 45%". In addition, the ad was emblazoned with Aldi's slogan "Everyday Amazing", while a disclaimer in small text at the bottom of the page stated that "Tesco may sell 'own brand' products at different prices".

Tesco challenged whether the price comparison was misleading. They alleged that the selection was unfairly skewed in Aldi's favour and that it was not sufficiently clear from the ad that Tesco also sold alternative own brand products at a cheaper price.

The response

In response, Aldi contended that the selection was not unfairly skewed. Champagne was a justifiable comparator product in the lead up to Christmas, and the brands selected did not fall foul of the CAP Advertising Guidance on Retailers' price comparisons. They said that the Moët and Aldi champagnes were the first and second best-selling champagnes on the market, while the price saving percentage on the Aldi champagne (57%) was not extraordinary in the context of a multi-product comparison ad of this nature. Aldi noted that the price differential between Tesco's Lindt reindeer and Aldi's own brand product was in fact higher, at 70%.

Further, Aldi disagreed with any assertion that own-brand products and household brand products were not properly comparable, and noted that, in any event, the aforementioned disclaimer was usual practice to address any potential concerns.

The decision

The complaint was upheld. The ASA found that the ad was likely to mislead Tesco's consumers into believing that they could make significant savings by shopping at Aldi instead. The claim "Save 45%" was written in similar font and colouring to Aldi's slogan, "Everyday Amazing", and it was not sufficiently clear that the advertised savings related only to the specific selections featured, not the average price differential between the two supermarkets. The level of savings promoted was therefore likely to be understood as representative of those which a savvy shopper could achieve.

The ASA also considered the actual price comparison to be misleading. Although it acknowledged that it was permissible for own-branded and branded products to be compared, this was subject to the caveat that such a comparison was not unfair. The emphasis of the ad was on price not quality. However, the chosen champagnes were not comparable. Of the 24 different champagnes Tesco sold, the Moët product sat in the higher end of the range and is associated with both luxury and status. In comparison, the Aldi product was the second cheapest of the range sold at Aldi, and was unlikely to have the same level of recognition and associations for consumers. As a result, the ASA held that the price comparison was unfairly skewed by the inclusion of the Moët Champagne.

Why is this important?

This ruling illustrates that it is all too easy for price comparison ads to breach the CAP Code. It highlights the need for marketers to be careful when formatting the text to be included in an ad, as well as the importance of selecting appropriate comparator products.

Any practical tips?

Retailers must take care when selecting own-brand and branded products for use in a price comparison ad. Products must be truly comparable in terms of both brand reputation and cost. The old adage of comparing "apples with apples" remains as true in advertising as it has ever done – noting of course that this role is also enshrined in UK legislation in the form of the Business Protection from Misleading Marketing Regulations 2008.

Autumn 2019

ASA

ASA ruling on sales and introductory offers - Furniture Village

The question

Can advertisers make reference to both a “Sale” and an “Introductory Offer” in respect of the same promotion?

The key takeaway

Advertisers must take care not to cause confusion in respect of the basis of a savings claim by making reference to both a “Sale” and an “Introductory Offer” for the same promotion. Critically, they should provide consumers with significant information such as closing dates to prevent them rushing to take advantage of an offer. Beware also of using the abbreviation "ASP" for after sales prices – the ASA says this isn’t clear enough for consumers.

The background

Furniture Village offered an in-store “Early Bird” promotion on a divan bed set which included a mattress, base and two free drawers. The promotion prominently featured the word “Sale” at the top followed by “ASP £1099 – Introductory offer £549” with small text confirming that “ASP = After Sale Price”. Notably, the promotion did not specify an offer end date for the divan set but offers on other products in close proximity had an end date of 20 January 2019. Ultimately, the price of the divan bed set actually fell to £499 after 20 January 2019. The complainant, who had rushed to purchase the bed set before the perceived deadline, challenged whether the promotion was fair. In response, Furniture Village explained that the “Early Bird” “Introductory Offer” could be distinguished as it featured two free drawers which were not part of subsequent offers.

The decision

The ASA considered that references in the ad to both a “Sale” and an “Introductory Offer” in respect of the same promotion meant that the basis of the savings claim was not clear to consumers. Consumers would understand “Sale” to represent a saving against a genuine, established, usual selling price and would understand “Introductory Offer” to refer to an introductory price that was lower than the intended standard price. The ASA noted that although the Code does allow for the use of introductory offers it must be clear that the lower price was an introductory price rather than a discount against the usual selling price and the ASA did not consider that the use of the abbreviation ASP to signify “After Sale Price” made this sufficiently clear as consumers would not necessarily be familiar with the abbreviation.

The ASA also considered that, given that the £549 offer price was significantly lower than the £1,099 usual/intended standard price and that ads on other products in the vicinity displayed looming closing dates, the absence of a closing date for the divan bed set would suggest that consumers needed to act quickly to take advantage of that offer. The fact that the offer would in fact continue until 12 February 2019 was significant information that was likely to influence a consumer's decision to take up the offer.

On this basis, the ASA upheld the complaint finding that the ad breached CAP Code rules on misleading advertising (3.1 and 3.3), availability (3.31) and promotional marketing (8.17).

Why is this important?

This decision helps remind advertisers that they must make the basis of savings claims clear, in particular by not confusing references to both a "Sale" and an "Introductory Offer" in the same promotional material.

Any practical tips?

Three tips:

- don't use a reference to both a "Sale" and an "Introductory Offer" in the same promotional material;
- take care with the layout of different offers with different closing dates. You have to be very clear as to what is going on with each one;
- avoid using the abbreviation "ASP" for 'After Sales Price'. Use the full phrase instead.

Autumn 2019

ASA – HFSS

ASA rejects complaint that HFSS ad was directly aimed at school children - Cadbury

The question

When will an ad which markets HFSS products be considered to be directly aimed at pre-school or primary school children?

The key takeaway

Even if an HFSS ad could be seen to appeal to children, the ASA will consider the overall tone of the ad to determine whether it is directly aimed at children

The ad campaign

In November 2018 Mondelez UK Ltd ran a Christmas ad campaign for Cadbury chocolate which comprised a TV ad, a YouTube ad and a cinema ad. Each of these ads depicted people wearing Santa masks secretly leaving chocolate for other people and included a voice-over which referred to Cadbury's "biggest Secret Santa ever", suggesting that Cadbury was running a Secret Santa themed campaign in the weeks leading up to Christmas.

The campaign featured two promotions: pop-up stalls where consumers could get free chocolate to send to other people and a supermarket gift-with-purchase promotion.

The response

The campaign received a complaint from the Children's Food Campaign (Sustain), who stated that the ads were HFSS product ads which were targeted directly at pre-school or primary school children and contained a promotional offer, in contravention of ASA rules which state that HFSS products which target their content directly at pre-school or primary school children must not feature promotional offers.

In response, Cadbury said that the ads were intended to remind audiences that giving chocolate as a gift has been a longstanding Christmas tradition. Furthermore, in relation to Sustain's suggestion that the ads contained a promotional offer, Cadbury acknowledged that the ads directed consumers to the Cadbury website, which referenced the promotions. The site referred to a free sampling activity whereby people over the age of 16 could visit a pop-up stall to pick up a chocolate bar and send it to someone for free and also a supermarket promotion that offered consumers over the age of 18 a free gift with the purchase of Cadbury products, as well as the opportunity to send any products purchased to someone else as a

"Secret Santa". However, they did not consider that the ads themselves included or referred to a promotional offering. Cadbury also argued that the overall look and feel of the ads were aimed at an older audience. For example, they featured a version of the Beatles song "Do you Want to Know a Secret", which Cadbury maintained would only appeal to an older audience.

Clearcast did not consider that the ads were directly targeted at pre-school or primary school children. Specifically, they drew attention to the fact that the ads featured on-screen text which said "age restrictions apply" and also said the call to join the "biggest Secret Santa ever" did not state that children should do so. The Cinema Advertising Association (**CAA**) also felt that the ads were not directly targeted at pre-school or primary school children, and instead were targeted either at the parents or guardians of these children, or older children. The CAA referred to the fact that the only information concerning the promotions was the on-screen text referencing the terms and conditions and the age restrictions which applied. The CAA said that this text was likely to be read only by those older than primary school age.

Decision

The ASA believed that the ad campaign featured a promotional offer because the ads promoted both the promotional and non-promotional aspects of the campaign and because both aspects were branded under the same theme. However, the ASA also decided that the ads were not targeted directly at pre-school or primary school children. Whilst they acknowledged that the depiction of someone wearing a Santa mask secretly leaving chocolate as a gift for someone would appeal to children of this age, they also considered that this would appeal to older children and adults too. Furthermore, the ASA believed that the overall tone of the ads was understated and more likely to appeal to adults than children, particularly in light of the Beatles song that was featured.

Why is this important?

It's clear that even if an ad marketing HFSS products features or would appeal to young children, the ASA will consider the wider context of the ad and its overall tone when deciding whether or not it complies with advertising rules.

Any practical tips?

Companies that wish to market their HFSS products by running ad campaigns that feature or could appeal to pre-school or primary school children and also contain a promotional offer need to strike the right balance between appealing to young children and older children or adults. As long as the ads target and appeal to older children and adults as much as to younger children, they're unlikely to breach the CAP Code.

Autumn 2019

ASA – promotions

ASA ruling on extending closing dates - Ogilvie

The question

Does the illness of a key staff member and/or technical issues constitute unavoidable events beyond the control of a promotor, in order that they can exercise a contractual right to extend the end date of a promotion by 12 months?

The key takeaway

In order for an extension to be appropriate, it must be due to both unavoidable circumstances beyond the control of the promoter and it must not disadvantage original entrants. Consider also making contingency plans for your promotions. Failure to do so will not sit well with the ASA.

The promotion

A promotion offered the opportunity to win a house, by entering into a prize draw, after answering a multiple choice question. Tickets were £10 plus a 50p booking fee. Due to staffing issues and technical issues, competitors were informed on 29 October 2018 that the original closing date of 30 November 2018 was to be extended by 12 months to 30 November 2019. Following the ASA's investigation, the closing date was brought forward to 30 June 2019.

The response

Ogilvie argued that the competition was not run as a raffle or lottery, but that it required entrants to exercise skill in order to be considered for a prize, as they had to answer a multiple choice question correctly. They also stressed that Part IV(h) of the Preface of the Code stated that "*the Code is primarily concerned with the content of advertisements, promotions and direct marketing communications and not with terms of business and products*". As the competition was their product, and the ad was an offer for potential entrants to enter into a contract with them, the extension of time was a contractual matter beyond the purview of the ASA.

The decision

The ASA considered that the competition to win a mansion and other prizes as listed on the website amounted to a promotion in non-broadcast media. Additionally, Part IV(h) of the Preface of the CAP Code states that "*some rules, however, go beyond content; for example those that cover the administration of promotions*". They considered that these circumstances fell within this.

As the extension of the date would increase the number of entrants and thus decrease the chance of winning for any one individual, the ASA held that the original entrants had been disadvantaged by the extension. They also gave short shrift to Ogilvie's contention that the illness of a key member of staff was an unavoidable circumstance beyond their control which required an extension of 12 months.

Why is this important?

The CAP Code requires that any extension to a promotion should only be made where this is due to unavoidable events beyond the promoter's control. In these circumstances, the promoter must not change the date where to do so would be unfair to those who sought to participate within the original terms or it must ensure that those who sought to participate within the original terms would not be disadvantaged by the change.

Practical tips?

There needs to be evidence to show that circumstances were outside of the promoter's control, were unavoidable and required that the closing date be extended. It is also necessary to do this in such a way that original entrants would not be disadvantaged.

The ASA made it very clear that businesses are expected to have contingency plans in place to ensure adequate staffing in the case of illness, and this of its own will likely be insufficient to justify an extension. While technical issues may be compelling, Ogilvie was criticised for failing to provide details of both the issues faced and how they made the 12 month extension necessary.

Autumn 2019

Gambling

ASA rules on inappropriate targeting of gambling ads

The question

Are ads for age restricted promotions appropriate in a free to play app? If not, who is responsible for ensuring that under-18s are not exposed to inappropriate ads for their age?

The key takeaway

Adopting a strategy of not targeting under-18s with gambling ads is not enough on its own. If other tools are available to specifically target over-18s, these should be used as they necessarily make it less likely that under-18s are exposed to such ads.

The background

Four gambling operators have been censured by the ASA for breaches of the CAP Code's Rules on social responsibility and targeting. Ads from William Hill, Dunder, LottoGo Euromillions and Betfair were seen in a PEGI 7 app, where in-game currency could be earned by completing tasks or watching ads. The app was "Looney Tunes World of Mayhem" where players build a town and battle with well-known Looney Tunes characters.

All ads were placed by Tapjoy Inc and followed a similar format. They invited players to register with the gambling operator and deposit a certain amount of money in order to play arcade games. If these steps were completed, the player would earn a significant amount of gems as in-game currency.

The outcome

Betfair's response was that their site has appropriate safeguards including a verification process to prevent people under the age of 18 from being able to sign up for an account, in accordance with their obligations. Additionally, the ads were not pop-up ads, but were found in the Tapjoy store. Users would have to specifically go to this tab, which took you away from the main gameplay. This is essentially an "offerwall", from which users can select from rows of ads, which provide different levels of awards of in-game currency. Tapjoy classifies ads which are only suitable for people over the age of 18 with a mature or mature plus rating. It also works with the developers and publishers of free to play games to provide in-app currency rewards for interacting with ads and engaging with offers within the app. Publishers have the option to choose which ratings of ads can be offered in the game. Here, the game had been marked to allow mature gambling in error. As soon as Tapjoy was made aware of this, it was corrected. Tapjoy also offers the option for advertisers to further target their advertising to a

defined set of users, but Betfair had not taken advantage of this. Given the test in the CAP Code relates to whether the advert had been directed at people under the age of 18, rather than whether people under 18 were exposed to it, they argued that they had not targeted under-18s.

The ASA held that although the app did have broader appeal it was also likely to appeal to under-18s. While users of the app were required to self-certify that they were over 16, this would not prevent under 18s getting access to the app and therefore being presented with the ads. It was not appropriate to solely rely on self-reported age data, as users could misreport their ages, or play on a relative's account. Given that Tapjoy did have options for age targeting, based on interest-based data, and the advertisers had chosen not to do this, the ads had been inappropriately targeted in breach of the CAP Code.

Why is this important?

Concerns about young people being targeted by "pay to play" mechanics in free to play games have received significant media attention of late, after reports of young people spending significant sums without their parent's consent or knowledge. A complicating factor is a diffusion of responsibility between advertisers, developers of ad-placing software and the developers and publishers of the apps themselves. This can make it difficult to pin down who is ultimately responsible for ensuring, as far as possible, that under-18s are not exposed to inappropriate advertising. The recent decisions of the ASA in relation to this stress that in order to comply with the requirements that ads about gambling are not targeted to under-18s, it is insufficient just not to target them. Rather, it is important that, if available, additional steps are taken to actively target the ads towards over-18's in order that under-18s are less likely to be exposed to them.

Practical tips?

It is important to make sure that ad restrictions are in line with the restrictions on who can access a particular app. Additional safeguards are also required. Age-tracking via self-reporting is not enough, as users can misreport or use the account of a relative or friend who has accurately reported their age. The content of an app is also relevant. Here the app contained well-known cartoon characters, which had originally been aimed at children, much as the app itself had a wider audience. Eventual responsibility lands on gambling advertisers to take all reasonable steps available to them to ensure that they are actively limiting exposure to under-18s as much as possible. Interest-based data, if available, should be used in conjunction with self-reported age data to minimise exposure of under-18s to gambling advertising.

Autumn 2019

Gambling

Sky Bet "sports noggin" ad crosses line on guaranteeing betting success

The question

Can gambling operators imply that a good knowledge of sports may result in betting success?

The key takeaway

The reason that Sky Bet avoided censure was because they carefully constructed the ad so that it did not make any suggestion that a better sporting knowledge will lead to greater gambling success. Instead, the ad expressly recognised the unpredictable nature of sport.

The ad

On 30 August 2018, the online betting company Sky Bet advertised its "Request a Bet" feature using Sky presenter Jeff Stelling's narration:

"*Forget 'anything can happen', in sport anything does happen. But could it be better? With Request a Bet it could. Spark your sports brain and roll all the possibilities into one bet. Three red cards, seven corners, five goals: let's price that up. Or browse hundreds of request a bets on our app. The possibilities are humongous. How big is your sports noggin? Sky Bet, Britain's most popular online bookmaker. When the fun stops, stop*.".

Alongside a collection of odds and statistics, a screen depicted brain waves emerging from Jeff Stelling's head.

The complaint

The BCAP Code, under section 17 (Gambling), states that ads must not portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm. The ad received two complaints on grounds that it was socially irresponsible; the complainants believed the comments "spark your sports brain" and "how big is your sports noggin?" suggests better sports knowledge results in greater success when gambling.

The response

Sky Bet argued that the ad did not irresponsibly encourage gambling in a manner that could lead to financial, social or emotional harm.

They contended that whilst the ad referred to knowledge through the phrases “Spark your sports brain” and “how big is your sports noggin?” within the context of the ad, they were referring to consumers’ ability to formulate a bet using the Sky Bet feature rather than the consumers’ probability of winning the bet. They recognised it is widely accepted that consumers’ sports knowledge may increase betting success. However, the betting company explained that its ad does not indicate the result is that knowledge guarantees success, emphasised by the comments “in sports anything can happen” and “anything does happen”. Further, they believed the ad was consistent with other betting ads where the focus is on the excitement of forming a bet rather than the likelihood of success. Jeff Stelling’s narration does indeed conjure this excitement, offering the consumer a range of possibilities and potential outcomes of the game but not indicating that this would lead to guaranteed success.

The decision

Despite initially ruling that the ad was socially irresponsible, the ASA recently reversed its decision on the basis that it did not exaggerate the association between sports knowledge and gambling success, concluding that the ad is not socially irresponsible and as such does not breach the BCAP code. The ASA understood the phrases “spark your sports brain” and “how big is your sports noggin?” as drawing the consumer’s attention to the ability of using sports knowledge when forming a multi-layered bet. Further, they believe Sky Bet recognised the unpredictable nature of sport through the phrase “in sport anything does happen”.

Why is this important?

The ASA’s ruling highlights the necessity for marketers producing gambling ads to avoid sending the message that consumers may possess qualities that will enhance their gambling success.

Practical tips

Whilst SkyBet did indeed recognise that having a “sports noggin” may indeed increase the chance of the consumer as a whole, it is important that advertisers are careful when framing the links between intelligence, knowledge and gambling success. In particular, it would be advisable to explicitly recognise that anything can happen. On a wider basis, this decision is really all about how carefully you frame your copy. Sky Bet did well to weave a path that focussed on the excitement of forming a bet, rather than the likelihood of success. It also worked in neutralising comments such as “in sports anything can happen”. This all reinforces the need to know the rules, and respect them in marketing communications, especially when it comes to (expensive) TV ads in highly regulated markets.

Autumn 2019

Gambling

ASA ruling on using under 25s in betting ads - BetIndex Limited

The question

Can a gambling ad use the image of a person who is under the age of 25? What if they are not singled out in the ad ie they do not seem to be playing a 'significant role' in the ad?

The key takeaway

Take great care using under 25 year olds in betting or gambling ads (yes, that includes famous young footballers!). Even though you may not be particularly singling them out, they are likely to still be held to be playing a 'significant role' (and therefore in breach of the CAP Code).

The ad

An ad appeared on Facebook promoting the company Football INDEX (Bet & Trade), a football player trading company (based on a real stock market). The ad, which showed the names, images and BetIndex stock values of many footballers included Jadon Sancho. The ad stated “Jadon Sancho is now the football stockmarket’s third most valuable player, with many traders seeing handsome profits” as well as “Sancho The Big Mover” which was at the bottom of the ad.

The complaint

The challenge arose as the complainant noticed that the ad consisted of players who were under 25 years old and so contended that the ad was irresponsible.

The response

BetIndex , withdrawing the ad, admitted that Jadon Sancho had played a significant role in the ad that appeared on Facebook and promised to both train their staff and make sure that future ads would not contain players under 25 in a significant role. They did, however, argue that the images of the young players, such as Sancho, Sterling, Hudson-Odoi etc solely illustrated the players that were available on the app and were used to depict the actual features of BetIndex. As such, BetIndex contended that the images did not constitute the players in a “significant role” and that this element should not fall foul of the CAP code. BetIndex suggested that no single football player was focused on and none of the players were gambling in the ad.

The decision

The CAP Code states that "*no one who is or seems to be under 25 years old may be featured gambling or playing a significant role*". However, there is an exception "*that individuals who are, or seem to be under 25 years old (18-24 years old) may be featured playing a significant role only in marketing communications that appear in a place where a bet can be placed directly through a transactional facility, for instance, a gambling operator's own website. The individual may only be used to illustrate specific betting selections where that individual is the subject of the bet offered. The image or other depiction used must show them in the context of the bet and not in a gambling context*".

The ASA considered that the ad had dual purposes, to both depict the nature of the app to the consumer but also of equal importance to offer the consumer the opportunity to gamble. In the context of gambling, and as shown in the recent case where Tottenham Hotspurs included a number of under 25 year old players in a gambling ad (see our Summer 2019 snapshots), all of the players who featured in the ad were held to play a significant role in the marketing communication to the consumer, including the players that were under 25; it did not matter that one player was not drawn out for specific focus. In fact, the ASA did not even consider that Jadon Sancho, who was described by the text at the top and bottom of the ad, was playing more of a significant role than the others. Finally, the ASA held that the ad had not appeared on a site where a bet could be placed, such as the BetIndex app and that the players shown had not been used to illustrate the specific betting selections where they were the subject of the bet. As a result, the ad was held to have breached the CAP code.

Why is this important

This case reinforces how careful gambling operators and alcohol companies (who have similar restrictions) need to be when including persons under the age of 25 in their ads. As stated above, even where there are a number of persons under 25 featured in the ad who are deemed to be in a significant role but may have not been the centre of attention, it is likely that this will result in all persons playing in a significant role rather than none at all.

Practical tips

If you wish to place an individual under the age of 25 in a gambling ad, make sure that the ad is placed in a location where a customer can make a bet and ensure that where the individual is used they are only there to illustrate specific betting selections where they are the subject of the bet offered. The image or other depiction used must show them in the context of the bet and not in the gambling context.

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