Expert insight on advertising, marketing and sponsorship

WIGGIN

Contents

Introduction

The advertising industry continues to experience immense change. TV advertising is in decline, influencers continue to rise to prominence and AI optimises campaigns to reach audiences with far greater precision and cost efficiency than ever before.

As marketers push the creative boundaries and new technology offers new opportunities (and threats), the balance of regulatory requirements continues to require a delicate steer.

Thankfully, we love a challenge. We regularly advise on advertising and marketing services arrangements that are an integral element in driving brand value and revenue. By combining our market leading broadcast and digital media experience, we have also helped many organisations to maximise revenues from digital production and interactive sponsorship opportunities.

More traditionally, we advise broadcasters, rights holders and brands on the interpretation of the Ofcom Broadcasting Code, Ofcom's Code on the Scheduling of Television Advertising and the CAP and BCAP Codes and we represent clients who encounter difficulties with the regulators.

Wiggin also helps more conventional advertisers navigate the world of online media and the associated technology and data considerations that are less familiar to them.

We hope you find the insights in this publication interesting and thought-provoking. Please do get in touch if you'd like to discuss any of the issues in more detail with our team.

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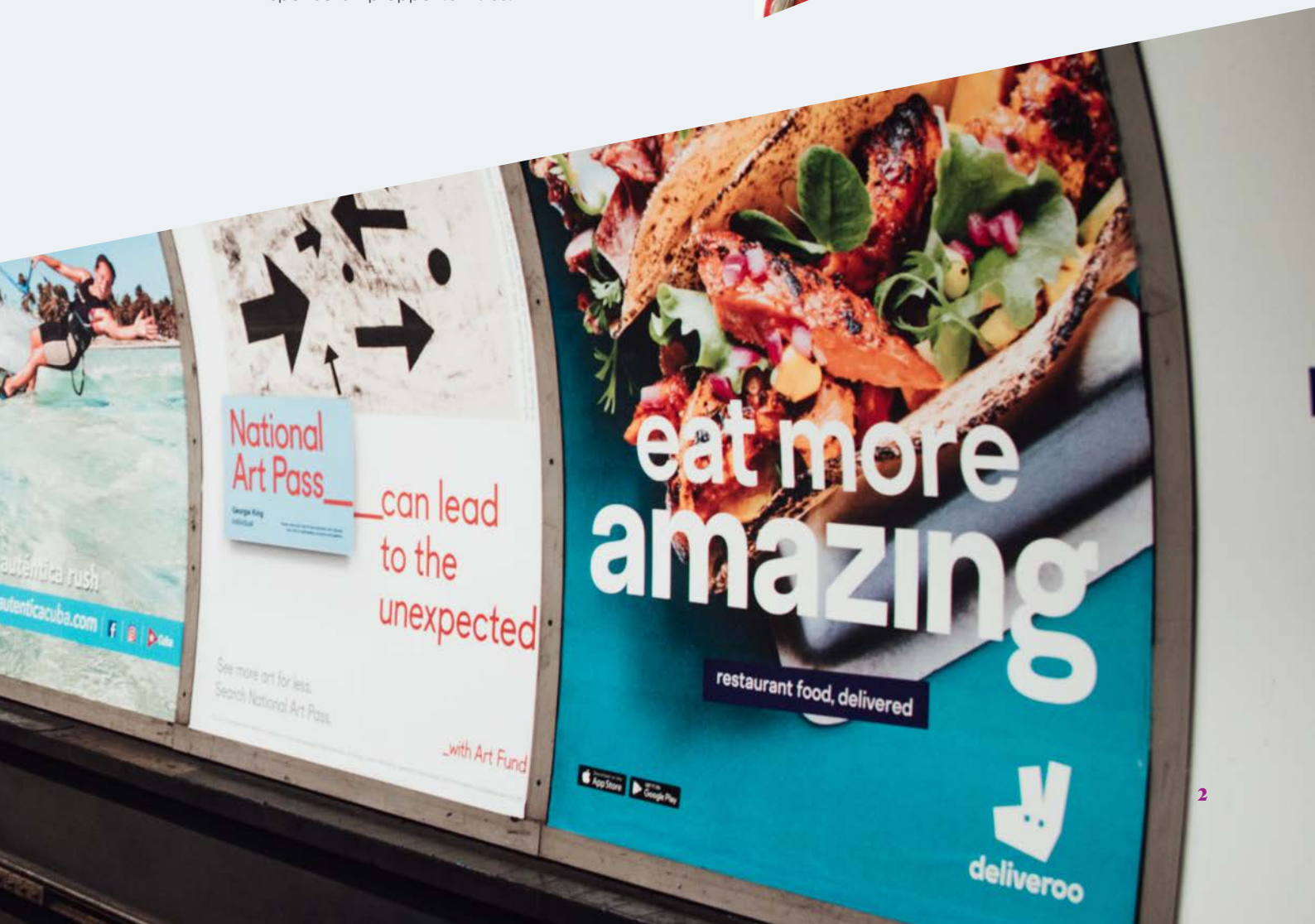

The good, the bad and the scandalous: managing celebrity endorsements

A celebrity endorsement can bring huge value to a brand. Whilst the going is good the high sums paid for such rights and the host of other businesses fighting for similar associations means partner brands must actively defend their space. But fame is a fickle friend and with association comes risk. Skeletons lurking in cupboards or scandals yet to occur can turn a glittering partnership toxic overnight. Careful management is key to ensuring that brands can ride the waves of a partner's success whilst being able to jump ship if their stock plummets.

Avoiding disputes

As top talent exploit endorsement rights to the hilt, potential disputes over the scope of such rights emerge: where does 'fashion' end and 'beauty' begin? What is the difference between 'sport' and 'leisure' and 'lifestyle'? If a business perceives talent to be working with another brand in a sector they claim as their own they're unlikely to turn their fire on their celebrity or sporting partner but on the brand that has overstepped the line and strayed into their territory. This calls for care at the contracting stage: ensuring the scope of rights is clear, that talent give assurances that no competing or overlapping rights have been granted and – as endorsements and associations are marketed – that clearance is obtained for specific projects and campaigns.

Risk vs reward

Of course even the most positive associations can turn bad, particularly in the post #metoo era as society and business develop an ever growing moral conscience. Brands need to be pre-armed with sufficient rights to effectively handle unforeseen fall out. What is needed (and what can be negotiated: not always the same thing) should always be the product of a bespoke assessment. Some celebrities bring value from their clean image, others quite the opposite. Brands need to think about where the value of an endorsement lies and ensure they're able to act if that value is hit. What if someone with a family image is caught in an extra marital affair? What if a sporting 'hero' comes under suspicion of doping? What if a serious criminal allegation is made but not pursued?

Assessing your response

Minds will first go to termination rights and there's no doubt the drafting of these provisions is crucial to the ability to cut ties if that's what's needed - a host of recent scandals will have had lawyers rushing to pour over such provisions with a fine tooth comb. But termination is a blunt and not always the best tool. As fickle as fame is, so too is the public mood. There are many examples of celebrity reputations having ridden out storms such that instant termination may – despite immediate public clamour - not always be the best plan. There's a lot to be said for a wider armoury of responses allowing brands to gauge public temperament over a longer period, putting associations on hold or adjusting the financial terms of an arrangement whilst they do so. In this sphere more than any other, brands should hope for the best but properly prepare for the worst.

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Where might the perimeter fence of virtual advertising regulation be drawn?

Virtual replacement technology is transforming the way in which clubs, venues, leagues and federations target consumers watching sports broadcasts, unlocking significant new commercial revenue potential by enabling the sale of TV advertising inventory with localised messaging in multiple countries.

Southampton FC has joined a host of other Premier League and English Football League clubs by installing a new virtual hybrid perimeter LED display system. The new digi-boards being used integrate augmented reality technology which makes it possible to digitally replace perimeter advertising content seen by fans watching a match broadcast in different countries. Whilst fans in the stadium will see traditional LED content, fans watching the same match broadcast in different countries could see brand content tailored to them/their region.

Flexibility for different markets

This virtual replacement technology makes it possible to commercialise the same perimeter advertising space multiple times over. For example, 90 minutes of advertising inventory could become 900 minutes if sold in 10 different countries. This also helps with the showing of ads that are otherwise prohibited – for example, using virtual advertising to display ads for alcohol outside of countries such as France (where such ads are prohibited on TV).

The market is clearly shifting towards the adoption of virtual advertising and sponsor appetite is growing. Virtual advertising has already been gaining traction in Germany where digi-boards have been installed at grounds of clubs in the Bundesliga and the Football Association became the first international football association to deploy virtual replacement technology on LED perimeter signage for England's FIFA World Cup warm-up match against Costa Rica in June 2018.

But whilst the commercial opportunities seem to lead governing bodies and tournament organisers to conclude that virtual advertising is a no-brainer, producers and broadcasters of sports content in the UK must be mindful of the relevant legal and regulatory issues that affect the use of replacement technology to superimpose branding.

Regulatory response

Ofcom has already made its feeling clear about Formula One Management's use of a large, superimposed countdown watch on the live feed of the Singapore grand prix – it was a breach of the 'undue prominence' rules in section 9 of Ofcom's Broadcasting Code, designed to maintain editorial independence and to protect against surreptitious advertising. Ofcom's investigation of Channel 4 and Sky also suggested that where a broadcaster (to whom the Broadcasting Code applies) has the opportunity to edit coverage to avoid unduly prominent commercial references, they should do so. This presents a potential conflict between the requirements of the broadcaster and the person selling the programme (whether the rightsholder itself or its agent).

Whilst Ofcom's response to Formula One Management's undue prominence of the large Rolex watch found them to have blurred the line between editorial and advertising without editorial justification, arguably the digital replacement of physical advertising boards (e.g. with more relevant local advertisements) should be treated differently given that these are no more prominent that the advertising boards that appear in the original live feed.

Editorial justification will be a key part of the process when applying the section 9 rules to the appearance of a brand name or logo and ultimately may decide whether or not the commercial reference will be permitted, whether it will be classed as surreptitious advertising or whether it will fall foul of the product placement rules and restrictions.

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Social media influencers – love story or tragedy?

With the rise of social media has come the increasing prevalence of the influencer – an individual who has the ability to reach a wide audience through their social channels and is often relied on by companies to promote a brand, product or service.

Influencers are trusted as an authentic and reliable way of discovering new products or services, particularly by young consumers. To an increasing extent, brands want to tap into their fan bases as part of their marketing and advertising strategies. Last year, social media influencer marketing was estimated to be worth over £1.5 billion, and the market is continuing to grow exponentially.

Risk vs reward

However, with reward comes potential risk. Given the commonly arms-length and casual arrangements between brands and influencers, there is significant scope for influencers to go on a 'frolic of their own' when it comes to what they actually post online. Consider, for example, the influencer who posts a video with copyright protected music as the soundtrack. Or the influencer who goes too far when comparing products, such that a competing product is discredited or denigrated. Such activities could lead to liability on behalf of the influencer and/or the brand engaging them.

Reputational issues should also be considered. Brands have faced backlash when inappropriate #ad posts have mistakenly ended up on the social media screens of minors. Without close curating, brands can also find themselves associated with material that harms their image, such as smoking or alcohol.

So how do brands limit this risk? There is a delicate balance to be struck between, on the one hand, putting formal contractual agreements in place and, on the other, introducing a level of control which may lead to liability for the influencer's activities.

The other side of the coin deserves equal attention. Whether it be as a result of using an influencer's image in a way not previously authorised by them, or going beyond any previous authorisation, brands should be wary of false endorsement claims. Of course, individuals with such an ability to sway consumers in a brand's favour also have the potential to tip the scales in the other direction.

The bottom line is that marketing strategies utilising influencers should be considered carefully. The correct legal advice before engaging an influencer could mean the difference between a madly successful campaign and a painful battle to remedy what's already been posted to the world.

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Cookies: a piece of cake? How AI is affected by GDPR

Programmatic advertising - the buying and selling of online inventory by automated processes, in real time - is an integral part of adtech infrastructure. The benefits for both advertisers (enabling better targeting) and publishers (providing an efficient way to monetise available inventory) has led to mass adoption in the digital space, which is underpinned by cookies and similar technologies.

There has been much confusion about cookies in part due to a lack of understanding of the dual regulation of this technology. Use is governed by the Privacy and Electronic Communications Regulations 2003 (PECR) but, to the extent personal data is processed as a result of cookie use, the GDPR also bites.

Out of date guidance from the UK data protection regulator, the ICO, has not helped matters.

The result: wide spread industry non-compliance.

Adtech players should not be lulled into a false sense of security by the lack of enforcement action from the ICO to date: this is an area the ICO has been looking into behind the scenes for some time. Indeed, the ICO has recently published a report into adtech and real time bidding (RTB) and updated its guidance on the use of cookies and similar technologies – the adtech industry is high on its agenda.

What does the law say?

In a nutshell, that if you use cookies (or any other technology that stores or accesses information on a user's device, such as device fingerprinting, HTML local storage etc.), you must tell the user what cookies will be set; explain what the cookies do; and get prior consent. The only exception is for those that are "strictly necessary" for a service requested by the user.

The standard of consent is defined in the GDPR - it must amount to a freely given, specific, informed and unambiguous indication of a user's wishes by a clear affirmative. The GDPR imposes an obligation to be transparent about the use of personal data including specific information which must be provided to individuals.

What does the regulator say?

The ICO has expressed concerns that the online advertising industry is not operating in compliance with the law.

Transparency: Information currently provided to individuals lacks clarity and is overly complex. The public does not understand how online advertising works nor what data is collected/ shared in order for an ad to be served to them.

Consent: Not only needed to set cookies, but also, in most circumstances, for subsequent processing of personal data related to profiling and targeted advertising. Where any "special category" data is concerned (such as health data), explicit consent, an even higher bar, is required.

The updated guidance invalidates many of the common cookie consent practices implemented by publishers today. For example:

- cookie banners with language such as "by continuing to use this site you consent to our use of cookies", even with an 'accept' or 'ok' button is not valid consent; and
- pre-ticked boxes, sliders set to 'on' as a default and 'nudge' behaviour are not permitted.

The IAB's OpenRTB protocol, IAB Europe's Consent and Transparency Framework and Google's Authorised Byer's framework are insufficient to ensure transparency, fair processing and free and informed consent.

Accountability: The ICO has expressed severe concerns about the scale of profiling and the widespread sharing of data, security and cross border transfers involved in online advertising. Risk assessments, know as DPIAs, must be carried out in respect of the use of real time bidding. Businesses cannot rely on contracts for sharing data across the supply chain. Proper due diligence must be carried out.

What is so hard about that?

These issues pose real practical challenges.

How, in practice, do you go about explaining to users the extremely complex and often opaque RTB ecosystem involving multiple parties and technologies, including advertisers, publishers, exchanges, DMPs, DSPs, SSPs and CMPs (the understanding of which can even challenge those working in the industry)?

How, without ruining user experience, can publishers secure granular, meaningful consent to the dropping of third party cookies involved in the RTB process as well as for each subsequent processing activity? This could potentially mean seeking hundreds of consents. With the popular consent and transparency frameworks deemed not fit for purpose, where should the industry turn?

If users are presented with all cookies switched to 'off' as a default, will anyone be bothered to switch them to 'on'?

Controllers (at all levels of the chain) need to satisfy themselves that they are operating and sharing data securely and lawfully, and are no longer able to simply point to contractual assurances from the parties they are working with. DPIAs will require collaboration from all stakeholders, which can be time consuming.

A call to action

Does this spell the end of programmatic advertising? No. The ICO acknowledges automated delivery of ad impressions is here to stay and is continuing its research and industry engagement to address the challenges it has identified. But, crucially, changes are going to have to be made. "It's complicated" will not be an acceptable excuse.

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Cookies: a second slice with the ePrivacy Regulation

GDPR focused unprecedented attention on data protection. However, GDPR is only part of the story. The EU also intends to update the specific rules covering cookies (and similar technologies) with the introduction of the ePrivacy Regulation (the **Regulation**).

Negotiations between EU Member States have delayed implementation of the Regulation, however, following some recent progress, the EU Council has released a latest updated draft. The Regulation indicates the broad rules on cookies remain the same, but with important clarifications and developments.

Key points for adtech

- The Regulation makes clear techniques such as use of meta data and 'device fingerprinting' are covered by rules on cookies and similar technologies. The Regulation clarifies that the organisation making use of cookies is responsible for collecting informed consent.
- To address the seemingly endless requests for cookie consent we all experience, the Regulation allows websites to obtain consent for cookies via software settings. For example, a user could give consent for certain cookies by whitelisting websites and purposes - the consent must still meet GDPR standard.

- The current exemption from obtaining consent for cookies which are necessary to provide an online service (including IoT services) is retained. Interestingly, the Regulation seems to indicate, though the wording is at best ambiguous, that where advertising finances an online service, adtech cookies may be viewed as 'necessary' and therefore covered by the exemption.
- It is not all good news for adtech, however. Making access to online content provided without direct payment conditional on consent to cookies will generally only be acceptable if users have an equivalent option that does not involve consenting to cookies. Consequently, the question of whether an adtech cookie is necessary for the provision of an online service is crucial. Where they are not necessary, online services must seek consent and may not be able to use 'cookie walls' to restrict access where consent is not given – though potentially the 'equivalent' may be more basic and less appealing in order to incentivise consent.
- The exemption from obtaining consent for cookies necessary for the sole purpose of transmitting a communication over an electronic network is retained and exemptions for anonymous website analytics and security updates are added.

All these changes serve to reemphasise the need for transparency and appropriate consent in the use of cookies but also attempt to resolve the practical issues, such as ubiquitous pop ups, caused by these requirements. However, it is not clear whether it is possible to reconcile these legal requirements and practical issues and whether many of these well-intention developments will be able to be usefully implemented in practice.

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Managing competitive advertising online

Competitive advertising is a prevalent trading tool – helping consumers find options and alternatives in a keyword dominated online culture, and helping brands explain their product offerings by reference to market leaders.

But there are legal lines which, if crossed, can open up advertisers to potential exposure and give rise to a range of legal issues, including legal claims for infringement of intellectual property rights.

Keyword sponsorship

With online consumer spending increasing by over 100% between 2011 and 2018, reaching upwards of £166 Billion in 2018, [1]the potential power of optimised keyword sponsorship in search engines is obvious. Brand owners often find competitors sponsoring their trade marks and, in some circumstances, they can take legal action to stop it.

For example, case law of the Court of Justice of the European (CJEU) has established that there is trade mark infringement when a trade marked term is the subject of keyword sponsorship, if the ad that is actually seen by consumers in response to their search for the protected trade mark does not enable an average internet user to tell, without difficulty, that the relevant products or services being advertised are not those of the trade mark owner. But the law is not the same throughout the world and, given the 'global' nature of online trade, this can be a tricky area to navigate without expert guidance.

Some search engines, such as Google and Bing, have their own policies to determine when they will take down sponsored ads in response to a complaint by a trade mark owner. For example, Google has geo-specific ad policies and will take action to remove ads where they determine applicable policy requirements are not met. But even if a search engine operator does not decide to remove an ad in accordance with its own policy, that does not mean there isn't a trade mark claim to answer (indeed, one of the longest running trade mark litigation cases of recent times in the UK, Interflora v Marks and Spencer concerned Marks and Spencer's sponsorship of the Interflora name on Google's AdWord platform.)

Comparative ads

Standing out from the crowd can be difficult in the online world where there is an increased need to cut through the ever-increasing 'noise'. Comparing and contrasting goods and services against those of competitors is one way that a business can help to make sure its message is heard and to encourage potential customers to choose it's offering over that of its rivals. However, brand owners typically (and understandably) don't like to see competitors making liberal use of their trade marks in order to sell competing products and so crossing the line in this area can often lead to legal conflict.

In the EU, the Comparative Advertising Directive provides guidance as to legitimate use of a third party trade mark in a comparative advertisement. Broadly speaking, the Directive provides that comparative advertising is lawful where it is not "misleading" (which, in all cases, will depend on the facts and surrounding context) and when it compares one or more material, relevant, verifiable and representative feature of goods or services that address the same needs. In light of this, whilst it may be tempting for marketing teams to make bold claims that attract attention, it is essential that facts are checked carefully and represented fairly, especially when making a comparison with a competitor. It is important to note that the protection afforded by the Directive does not extend to imitation or replica products and that the EU Trade Marks Regulation states that a trade mark owner should be able to prevent a third party using its brand in advertising that does not comply with the Directive, emphasising the need to get things right in this area.

Where brand owners identify third party ads of concern, a range of legal strategies can help tackle the issue - from self-help (dealing with the advertiser directly), to bringing ASA complaints or even seeking a declaration from the Courts that representations made by competitors are false or misleading and amount to trade mark infringement.

Being aware of both legal framework and factual detail can be all important in maximising the advertising benefit possible from this form of advertising, as well as knowing when and how to take action when the competition oversteps the mark.

[1] https://www.statista.com/statistics/285374/online-retail-spending-in-the-united-kingdom-uk/

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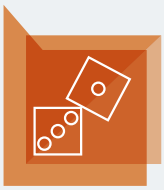
Gambling advertising: are all bets off?



The excitement for the start of the 2019/2020 English football season is building, but what's changed? Putting aside the fact that Premier League audiences will no longer have the pleasure of watching Eden Hazard, viewers may notice that betting adverts will not be aired during televised matches before 9.00pm.

The voluntary watershed ban on gambling advertising in televised sport which came into force this year applies to the televised broadcast of live sports events (except horseracing and greyhound racing). In the case of televised live events, betting adverts may be shown before 9.00pm but are not permitted to be aired from five minutes before an event begins until five minutes after it concludes, including in breaks of play. This also applies to a betting operator's sponsorship of the programme during this period, and any internet stream of the sports coverage.

The Industry Group for Responsible Gambling (IGRG), the collective body for the five main gambling trade associations, reflected the changes through its Industry Code for Socially Responsible Advertising which aims to drastically reduce the amount of gambling advertising on television.

The move follows significant pressure from the British press and, notably, public statements made by key decision makers in the gambling industry in agreement with imposing restrictions, suggesting that the introduction of a TV daytime advertising ban for gambling would be appropriate.

The stimulus for calls to strengthen restrictions on gambling advertising undoubtedly stems from genuine concerns about both problem gambling, and the effect of gambling advertisements on children, young people and the vulnerable. However, views on gambling advertising tend to be polarised and the increased public perception that it is reaching saturation levels in the UK is one that cannot be ignored as an additional driver behind the clampdown.

A comparison to other markets

The UK is not alone in grappling with the ongoing debate around gambling advertising – a number of other jurisdictions have moved to restrict gambling advertising over the past 18 months.

The most extreme is Italy's ban on gambling advertising across all mediums (including a prohibition[1] on sports club sponsorships by gambling operators). The prohibition applies as of 1 January 2019 except in the case of multi-year sponsorship deals already in place, which were instead to be terminated by 14 July 2019. Other proposals for tighter controls on gambling advertising are sweeping their way across Europe including in the likes of Bulgaria, Lithuania and Spain.

The TV advertising restrictions introduced in Australia and Belgium are perhaps the most comparable model to that in the UK, albeit mandatory. Earlier this year, the Australian Communications and Media Authority introduced a ban on gambling advertisements during the broadcast of live sports between 5.00am and 8.30pm on commercial free to air TV, commercial radio and the majority of pay TV channels, while the Belgian government has similarly announced a ban on betting advertising during live sports.

The impact of a TV watershed ban

It is extremely difficult to assess how a voluntary ban will impact the prevalence of problem gambling and the exposure of gambling advertising on children and young people. The provisions extend to the linear streaming of a televised live sports broadcast on to mobile devices, however, it could be argued that targeting live events alone does not reflect the reality of the current reach of gambling adverting.

By its very nature, the new voluntary measures serve to reduce the visibility of gambling advertising but whether such a measure ultimately reduces gambling-related harm is likely a question that can only be answered through repeated, empirical studies.

The impact of a daytime gambling advertising ban on other commercial entities is perhaps, however, more easily measured: the introduction of such a restriction undoubtedly has a significant impact on the advertising revenues it generates for broadcasters in live sport. Or does it just drive up the value of those advertising spots outside the 'five-minute before until five-minute after' period?

What's next?

There is certainly a feeling of momentum building as restrictions on gambling advertising come thick and fast across Europe and beyond.

It is a somewhat accepted position among industry stakeholders that the voluntary measures will not go far enough, and mounting political pressures, public sentiment and media perception are the inevitable drivers to provide that catalyst for change.

Perhaps the most important question that remains then is how can lawmakers and regulators effect that change and still manage to strike the balance between consumer protection and commercial interests? However it unfolds, the optimum result will surely require the combined efforts of all parties concerned.

[1]Note that the guidelines which accompany the legislation prohibiting advertising soften the effects of the ban in practice by allowing for some very limited forms of "marketing" but the position remains heavily restricted.

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Advertising to children – when is something of particular appeal?

In the UK, it is commonly accepted that children (those aged 15 years and below) and young persons (those aged 16 and 17) should be protected from advertising that might cause them harm, as well as marketing communications which, either because of the child's age, experience and the context in which the marketing message is delivered, might have a different impact on a child than it would an adult.

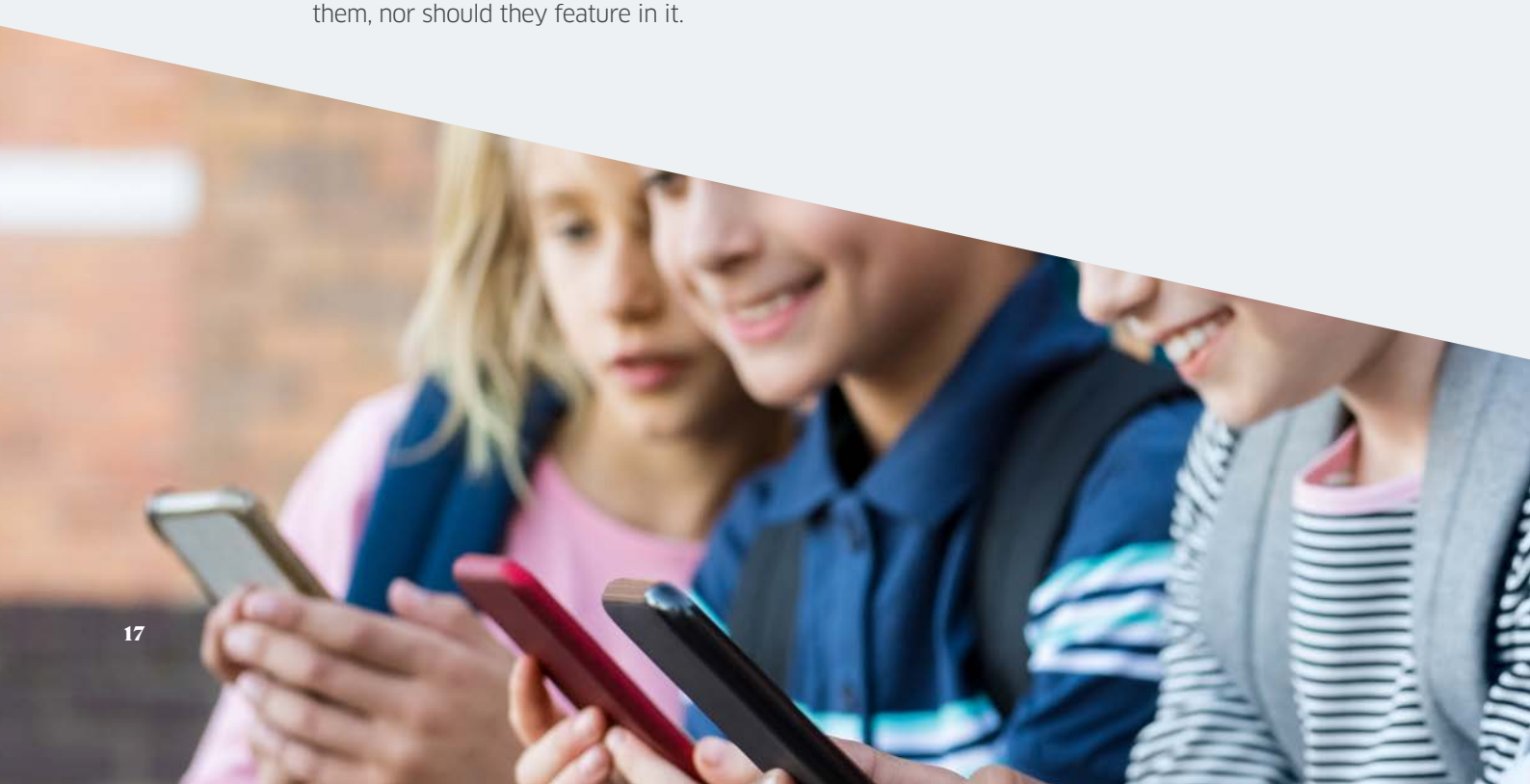
What the regulators say

The CAP Code has a whole section devoted to ensuring that advertising does not cause harm, exploit vulnerability or susceptibility (amongst other things), when adverts are addressed to, or targeted at, children. Many of the other sections of the CAP Code also feature specific rules relating to the protection of children.

The advertising of age-restricted products requires marketers to take further protective measures. If children (or young persons in the case of gambling products, e-cigarettes or alcohol) are not old enough to purchase the goods or services being advertised, then they should not have that advertising targeted to them, nor should they feature in it.

The CAP Code goes even further in respect of age-restricted products and prescribes more editorial style rules on their marketing communications. The content of these ads must not be of 'particular appeal' to people under the age of 18 if they are able to freely access the ads.

CAP has recently provided detailed guidance about what this means in the context of gambling advertising, although the principle translates. They confirm that they are seeking to prevent advertising content being likely to appeal more strongly to the under-18s than to those aged 18 and over. CAP acknowledged that there may be content where the audience appeal is mixed – i.e. it is likely to appeal to both under-18s and adults equally, or more so to adults. In these instances, CAP's 2017 advice was that this content 'is unlikely to be considered problematic'. However, given that the test of what is, and what is not, likely to be of 'particular appeal' is subjective, it is not a simple call to make.



A delicate balance

ASA decisions on this point have turned on the size of a particular cartoon fish, specifically on the size of the eyes of the fish and the innocence of its smile. Similarly, the interpretation of the rule prohibiting marketing communications for gambling being 'targeted' at children (which also features in the sections applicable to advertising for other age-restricted products) often divides opinion. The more rulings we receive from the ASA on these points, the more we see the interplay between the rule prohibiting the 'targeting' of such ads to children and from them having 'particular appeal' is delicate.

No one would argue against the protection of children from harmful marketing but how these rules will develop to protect children from seeing or being appealed to by marketing of other 'harms' will be very interesting. Should video games or social media advertising be the subject of rules to ensure that children are adequately protected and how do we ensure that the rules on advertising are no more onerous than the rules that apply to the creation of the goods or services to which the advertising relates?

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Taking the next step: independent agencies receiving investment

Investment in the advertising and marketing sector is showing no sign of slowing down. Independent agencies remain an attractive target given the specialisms, talent and clients they boast and, increasingly, these agencies now have a choice as to the type of investor or acquirer that they raise money from or sell to. Below, we highlight several key points to be considered by both agencies and investors/acquirers when agencies look to 'take the next step' and secure investment or to exit.

Approaching a new opportunity

Structuring deals

Acquisitions of 100% of a company in the advertising and marketing sector are often structured with an element of deferred consideration, based on a matrix of revenue growth and profit growth, known as an "earn-out". This incentivises the selling management team to help the acquirer continue to grow the business post-acquisition, with payments made to them upon the business reaching certain goals. Whilst the whole of an agency may be sold to an acquirer, founders may alternatively retain an interest (at least initially) by only selling a proportion of the company. Where such an investment takes place, put and call options may be agreed for defined time periods to allow the shareholders to sell and the investor to acquire the remaining shares. The option price will normally be agreed in advance, either at a specific price or to be calculated in accordance with a pre-agreed formula taking into account revenue and profit growth.

Control

When a transaction provides for further equity investment or deferred consideration, thought should be given as to how the agency will operate post-completion. If future options or deferred consideration are price dependant on an agency's performance, management will want to retain some control of the agency in order to maximise that performance. Conversely, investors will want to feel that they have input to key decisions, especially if they hold a majority stake and expect board control. It can be tricky balancing interests and it is important that these discussions are held early in the transaction process. Additionally, it is likely that an agency will have restrictions on its day-to-day operations post-completion. For instance, there may be conflicts between pre-existing clients of both an agency and an investor/acquirer, restricting the ability of either party to continue working with particular clients (especially if there are competition conflicts), and agencies may find that a previously flexible approach is now subject to the policies and strategic considerations of a larger group, restricting the type of work or the sectors that can be worked in.

Management restrictions

Management sellers are also likely to be restricted in their ability to set up new ventures or work in similar businesses for a period after completion of a transaction under non-compete and non-solicitation covenants. Whilst they hold shares, they may also be subject to "good and bad leaver" provisions, potentially leading to (i) the compulsory transfer of any retained shares at a low value; or (ii) some or all of outstanding earn-out or deferred payments being forfeited or reduced in certain circumstances. Both of these mechanics can require careful negotiation, and it is important that these provisions are discussed early in a transaction.

Intellectual property

It will be important to investors and acquirers that all IP has been validly assigned to the company by employees, freelancers and consultants. As a matter of good practice, agencies should ensure that service agreements include clauses governing this, as the IP, along with the talent, are some of the most important assets that an agency has.

The next chapter

Undergoing a transaction process can be daunting, especially if the corporate transaction process is a new experience for an agency, and a founder is coming to terms with losing control over a business they have worked hard to create. However, if key issues are identified and discussed early in the process, there is no reason why a transaction cannot be a positive experience and set the foundation for a good relationship between management and investors/acquirers going forward.

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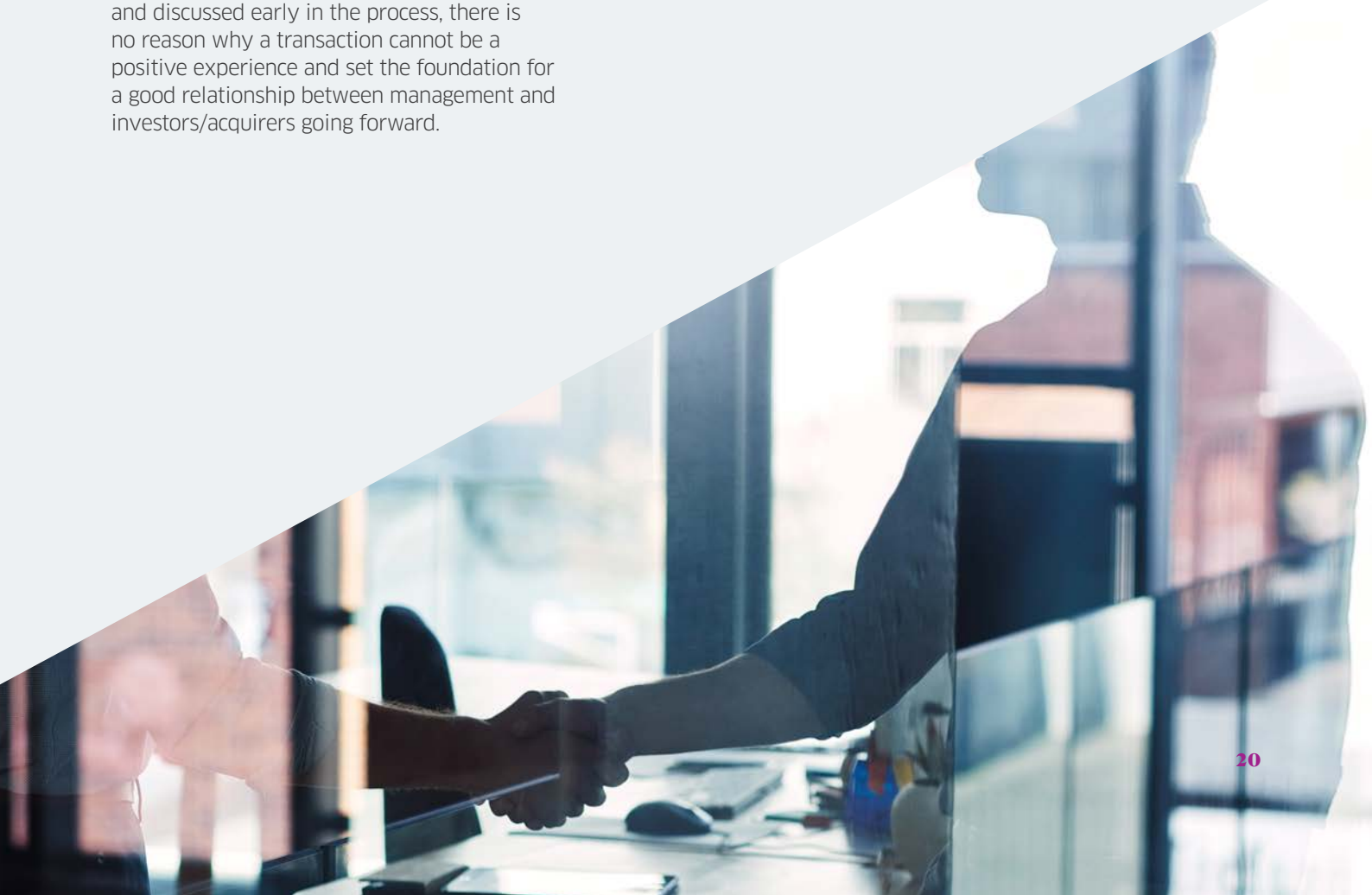

Is programmatic advertising, direct marketing for the digital age?

As programmatic advertising becomes more sophisticated, website users will be presented with increasingly relevant advertisements online. This enhanced targeting brings into question whether or not online ads may become a form of direct marketing – a particularly significant shift because unsolicited electronic marketing requires consent.[1]

The correlation between programmatic advertising and direct marketing is not simply conjecture; further evidence of programmatic advertising becoming direct marketing can be seen in the ePrivacy Regulation. The Regulation was due to come into force last year but estimates are that it will now come into force next year or 2021 and it (or similar post-Brexit legislation) will replace our current laws on direct marketing and cookies.

[1]Save for where the 'soft opt-in' applies, although it is difficult to see this easily applying to online ads.

The significance of the new Regulation for advertisers

An early draft of the ePrivacy Regulation expanded the scope of unsolicited direct marketing from marketing and advertising that is "sent" to individuals; to marketing and advertising that is "sent", "presented" or "made available" to individuals. It is not yet known precisely what the purpose of these amendments were, but it does not require mental gymnastics to conclude that would apply to programmatic advertising.

It should be noted, however, that the most recent draft of the ePrivacy Regulation has reverted the language back to just "sent". If there was an intention to regulate programmatic advertising more strictly, it seems that the legislature is at least undecided on this topic.

All of this is to say, that publishers, website operators and all those involved in programmatic advertising should keep a close watch on the ePrivacy Regulation as well as ICO guidance on the topic.

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