RPC

Snapshots for Meta

Key UK and EU developments for Meta's commercial lawyers

The UK's new AI Bill arrives

Uber hit with €290m EU data transfer fine

New Digital Information and Smart Data Bill to "harness the power" of UK data

When is an in-game purchase deemed an advertisement?

Enforcing consumer regulation under the new Digital Markets, Competition and Consumers Act

AUTUMN 2024

Welcome to the Autumn 2024 edition of Snapshots for Meta

We aim to cover everything Meta's lawyers need to know in the UK and EU from the previous quarter (well, almost!). We hope it hits the spot, as we aim to address most of the key changes affecting Meta, including data, digital, consumer and advertising developments as well as the latest UK commercial case law. Please do let us know if you have any feedback or queries.

Best wishes
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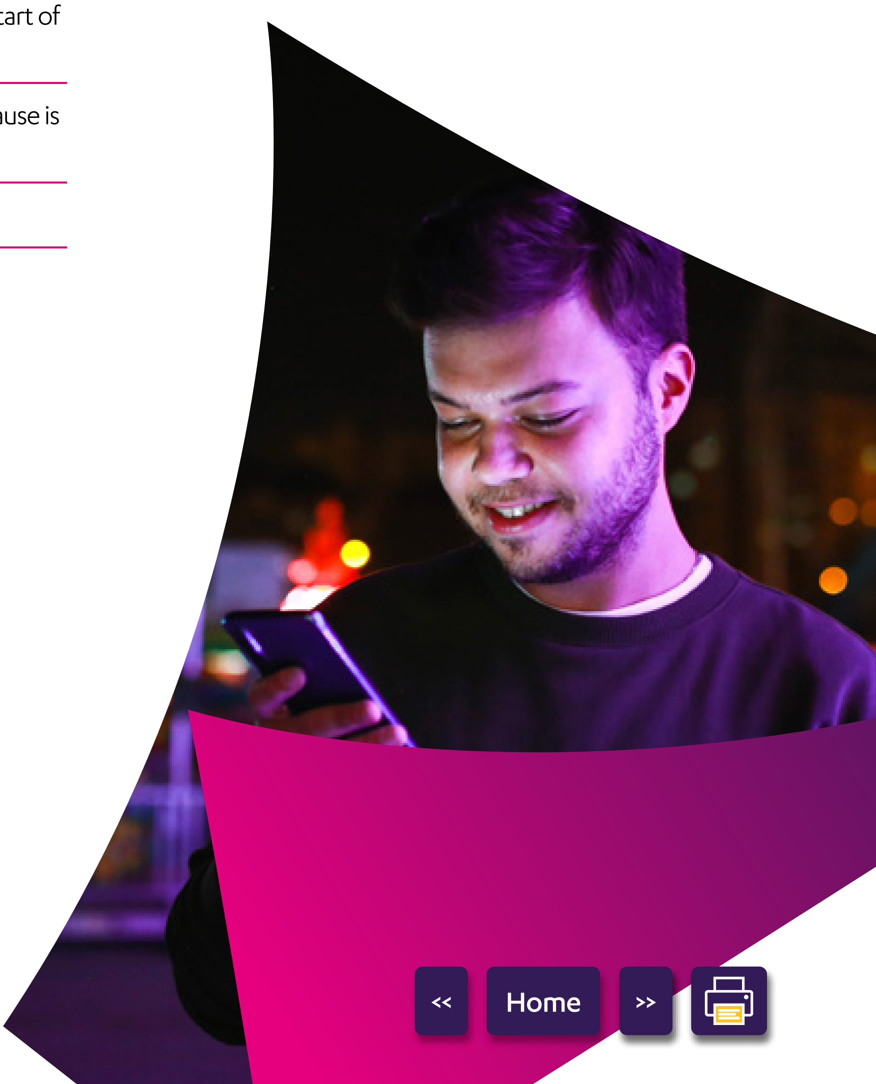


DATA

Uber hit with €290m fine for transferring European driver data to its US HQ

The question

What does the Uber fine signal for international data transfers and the consequences of failing to comply with the EU General Data Protection Regulation (**EU GDPR**)?

The key takeaway

The EU GDPR sets out strict rules governing the transfer of personal data from the EU to countries outside the EU that are not held to offer an adequate level of protection for that data, including the US. Failure to comply with these rules, including around the use of data transfer mechanisms, may result in substantial financial penalties from EU data protection authorities. This includes intra-group data transfer arrangements, which should be subject to regular review to check for compliance.

The background

Other than in very narrow circumstances, the EU GDPR only permits personal data transfers to countries outside of the European Economic Area (**EEA**) if the European Commission determines that the third country provides an adequate level of data protection (an **Adequacy Decision**), or if appropriate safeguards are in place to protect personal data.

The EU-US Privacy Shield, the previous EU-US data transfer mechanism, was successfully challenged in the Schrems II case and as a result the ECJ declared the EU–US Privacy Shield invalid on 16 July 2020. Entities could not then rely on an Adequacy Decision for EU-US data transfers and had have put in place appropriate safeguards, such as the implementation of standard contractual clauses (**SCCs**) and associated transfer impact assessments, to be compliant with the EU GDPR. The European Commission approved an Adequacy Decision in the form of the EU-US Data Privacy Framework on 16 July 2023, but this did not cover transfers between the two dates.

The development

On 26 August 2024, the Dutch Data Protection Authority (the **Dutch DPA**) announced its decision to fine Uber €290m for violations of the cross-border transfer provisions within the EU GDPR. The decision follows the DPA's investigation into Uber's EU-US data transfer practices, having received a number of complaints from French Uber drivers. Uber's European headquarters are in the Netherlands, which is why the Dutch DPA led the investigation.

The Dutch DPA's decision noted that Uber had failed to adequately protect and safeguard the personal data of its EU-based drivers when this personal data was transferred to Uber's US headquarters over a two-year period between 2021 and 2023. During this period, the data sharing agreement between Uber's Dutch and US companies (which were joint controllers of driver data, and both subject to the EU GDPR) did not include standard contractual clauses and the Dutch DPA rejected Uber's argument that an EU GDPR derogation applied to the transfers.

These data transfers took place at a time when there was no Adequacy Decision for EU-US data transfers in place, and after the invalidation of the EU-US Privacy Shield. The personal data which was transferred included drivers' identification documents, licences, location data, and some special category data, in the form of health information. Uber has announced that it will appeal the fine.

Why is this important?

The DPA's decision is important as it signifies that European regulators are willing and able to investigate complaints from data subjects regarding international data transfers and, where necessary, impose substantial financial penalties on entities it finds to be in breach of the EU GDPR. As evidenced in Uber's case, the financial penalties imposed can be significant, with supervisory authorities having the power to impose fines of up to €20m or 4% of an entity's total worldwide annual turnover, whichever is the greater.

Any practical tips?

Organisations with operations that are caught by the EU GDPR should take great care when transferring personal data to countries outside of the EU, including where these data transfers are on an intra-group basis. Regularly reviewing all contracts involving data transfers is never a bad idea, including internal transfer arrangements. This Uber decision shows just how high fine-wise the EU's data regulators are willing to go to punish non-compliant transfers.

"As evidenced in Uber's case, the financial penalties imposed can be significant..."

DATA

Social media and video sharing platforms targeted by ICO over children's privacy practices

The question

What must social technology platforms be aware of to ensure they are following the ICO's codes of practice for children's online safety?

The key takeaway

As social media and video sharing services continue to evolve and become a part of day-to-day life, the ability of children to access these services increases. Online platform providers must ensure they are designing their services with mechanisms in place to protect children's privacy or face regulatory scrutiny.

The background

The ICO's Children's Codes (the **Codes**) outline the standards that social technology platforms should meet to ensure their services safeguard children's personal information. The technologies within the scope of the Codes include social media platforms and those that enable the sharing of videos. The ICO emphasises that children's safety should be a primary consideration for platform operators in the development of online services. The accompanying Children's Codes Strategy (the **Strategy**) further details the ICO's focus on improving how platforms protect children's personal information online.

The development

An August 2024 update published by the ICO reveals varying levels of adherence to the Codes among the providers of social media and video sharing platforms. The ICO confirmed that 11 out of the 34 online platforms it reviewed to inform this update will face further questions from the ICO in relation to their children's online privacy procedures. The regulator has announced it is prepared to take enforcement action against platforms who fall short of their legal obligations.

Back in April 2024, the ICO announced the Strategy, which pushed the following focus areas to the forefront of its children's privacy protections:

a. having default privacy and geolocation settings
b. the profiling of children for targeted advertising
c. controlling the use of children's personal information in certain categories of machine learning and algorithms
d. the use of personal information of children under 13 years old.

The ICO's approach to its Strategy review was to observe 34 social media and video sharing platforms' joining processes for children. This required creating proxy accounts of children of various ages, and using these to sign up to different social media platforms. The ICO then examined key settings and privacy information presented to children before interacting with different users.

The concerns raised by the review have seen 11 unnamed social media and video sharing platforms face scrutiny for their practices and adherence to the Codes. This includes age and geolocation privacy issues, plus further queries based on the ICO's advertising expectations for targeting ads at children.

Interested stakeholders have been invited to provide views and evidence on Strategy focuses (c) and (d), relating to how algorithms use children's personal information and age assurance to identify children below 13. This will inform further Strategy reviews of the Codes and measure the regulator's success in guiding the market to structure these technologies in a way that protects privacy and personal information. The ICO has reaffirmed its aims of supporting opportunities for young people to explore and develop via online platforms, whilst obliging platform operators to improve safeguarding.

Why is this important?

The ICO is further strengthening its commitment to children's online safety, alerting social media and video sharing platforms that they must take responsibility for the use of their services by those under 18. Thanks to the rapidly evolving social media sphere, its approach remains a prevalent regulatory focus and this looks set to continue. The ICO's Deputy Commissioner, Emily Keaney, has commented that online platforms "have a duty of care to children" and warns that poorly regulated services can increase the risk of harm to children from bullying and abuse.

Any practical tips?

The operators of social media and video sharing platforms should be alert to the ICO's increasing regulatory scrutiny. These organisations must regularly review and adapt their children's privacy practices to meet their regulatory requirements. Clearly close adherence to the Codes can help achieve this.

DATA

X suspends personal data training of AI chatbot Grok following Irish DPC pressure

The question

How are the data regulators addressing the use of personal data when training AI language models?

The key takeaway

The training of an AI language model using an individual's personal data needs to comply with data protection laws, including the EU General Data Protection Regulation (**EU GDPR**) where this applies. Following an investigation into X's training of its AI language model, Grok, by the Irish Data Protection Commission (**DPC**), X has suspended the use of EU user personal data to train Grok. In cases like that of X, it is possible that an organisation will ultimately be asked to delete the personal data used to train the AI model from their systems, although there are no obligations to delete the resulting AI model itself.

The background

On 6 August 2024, the DPC launched proceedings in Ireland's High Court against Twitter International Unlimited Company (**TIUC**), the main Irish subsidiary of Elon Musk's social media platform X. The action related to the use of the personal data of X users that is subject to the EU GDPR to train an artificial intelligence model named Grok. Grok was intended to act as an AI search assistant exclusive to X's premium account holders, and was created by another one of Musk's companies, US-based xAI Corp.

X had changed its privacy settings in July 2024 to require its EU users to opt out of training Grok. The DPC's action was brought on the grounds of a breach of the EU GDPR in the training of Grok, specifically that the use of public posts on X to develop the model amounted to processing personal data without a lawful basis for doing so. The DCP requested the suspension of the processing of personal data collected between May and August 2024. Following an interim suspension of the data processing starting on 8 August 2024, X's Global Governance Affairs team tweeted: "The order that the Irish DPC has sought is unwarranted, overboard and singles out X without any justification. This is deeply troubling...While many companies continue to scrape the web to train AI models with no regards for user privacy, X has done everything it can to give users more control over their data."

The Irish DPC's proceedings were terminated on 4 September 2024, after TIUC agreed to permanently discontinue the processing of some of the personal data. The undertaking means that TIUC must delete and stop using EU user's data to train Grok. Interestingly, however, TIUC is not obliged to delete AI models which were trained using this data, despite the absence of explicit consent from data subjects.

The development

Due to a lack of clarity in this area, the DPC has taken the case to the European Data Protection Board (**EDPB**), the EU body in charge of enforcing privacy laws, to provide its view on whether TIUC breached any data privacy laws during the period when personal data subject to the EU GDPR was being used to train Grok. Furthermore, another nine complaints have been filed against xAI Corp by the data privacy advocacy group NOYB, for allegedly breaching 16 articles of the EU GDPR.

With the rise of AI and the rapid development of AI tools by large tech platforms, the Irish data commissioner, Dale Sutherland, is lobbying for the EDPB to introduce a "proactive, effective and consistent Europe-wide regulation" to regulate the training of AI. The EDPB is expected to make a two-thirds majority decision on this issue in October 2024. So far, TIUC and xAI have managed to escape any sanctions, but further EU GDPR complaints relating to the training of Grok are still under investigation.

Why is this important?

A potential loophole has been unearthed by this case, whereby AI platforms do not need to delete AI models trained using personal data even if they are required to delete the data itself. When American newspaper TechCrunch interviewed the DPC on this point, the watchdog replied that it was immediately more concerned about the processing of EU and EEA users' data and did not comment on the information already learned by Grok.

In a parallel GDPR complaint, Marco Scialdone, a lawyer and university professor, has demanded that an "algorithmic disgorgement" should be performed by X whereby the AI model trained with deleted data is either retrained or deleted. With the surge of AI, the outcome of this decision is likely to act as a crucial precedent in future cases.

Any practical tips?

Understanding what data to feed an AI language model and how breaches of privacy laws can be avoided is absolutely key to safe deployment. Any data processing consent sought from users whose personal data is used to train a large language model should require their explicit agreement to that processing.

DATA

New Minister for Data Protection Sir Chris Bryant

On 8 July 2024, the Government appointed Sir Chris Bryant as the Minister of State for Data Protection and Telecoms (as well as Minister of State for Creative Industries, Arts and Tourism). This is a new role and sits within the Department for Science, Innovation and Technology.

The responsibilities of the Minister include:

- digital infrastructure and telecoms
- data protection including the new data bill
- the ICO
- digital inclusion
- building digital UK
- space sector growth and UK Space Agency (**UKSA**).

Not much has been published yet regarding the Minister's approach to data or digital reform. However, at a fringe meeting at this year's Labour Party conference, the Minister highlighted digital inclusion and preventing AI bias as key aspects of his agenda.

DIGITAL

The UK's Digital Information and Smart Data Bill

The question

What can we expect from the new Digital Information and Smart Data Bill (the **DISD Bill**)?

The key takeaway

The Labour Government's DISD Bill seeks to create modern legal frameworks around the use of data to enhance opportunities for businesses and consumers alike. It will introduce several changes to data protection ranging from reforms to existing data laws which the Government considers lack clarity, to expanding the powers of the Information Commissioner's Office (**ICO**).

The background

The 2024 King's Speech announced the new Labour government's DISD Bill. This followed the former Conservative Government failing to pass the Data Protection and Digital Information Bill (the **DPDI Bill**) in the wash-up period before the dissolution of Parliament. The DPDI Bill sought to amend the UK GDPR and Data Protection Act 2018 by encouraging innovation, and reducing the burden on businesses to comply with legislation (see our Autumn 2022 Snapshot for our previous discussion on the DPDI Bill).

The development

The newly announced DISD Bill seeks to "harness the power of data for economic growth, to support a modern digital government, and to improve people's lives", as stated in the King's Speech.

To achieve these aims, the DISD Bill proposes a number of key changes including:

- Digital Verification Services to create secure technology that can be used in digital identity products and services, such as for pre-employment checks and buying age restricted goods
- establishing Smart Data schemes, 'Smart Data' being the "secure sharing of customer data, upon the customer's (business or consumer) request, with authorised third-party providers (ATPs)"
- modernising the ICO by expanding and strengthening its powers
- targeted reforms to data laws which currently lack clarity with the aim of ensuring high levels of data protection.

While the DISD Bill and the above proposals were announced in the King's Speech, exact details have not yet been published. It is likely that primary legislation will be prepared in the coming months.

Why is this important?

While full details of the Bill are yet to be seen, the aims and changes proposed by the DISD Bill demonstrate the Government's focus on using data as a tool for economic growth. The Labour Government appears committed to harnessing the full powers of technology, and the DISD Bill highlights that even though the former Conservative Government's DPDI Bill did not pass the wash-up period, data protection remains a key area of focus to the new Labour Government.

Any practical tips?

Once further information around the DISD Bill is published, organisations should review the details to understand how it may impact the business and its operations. They should then follow and track the progress of the Bill through the Parliamentary process and start preparing for the Bill's implementation.

DIGITAL

The UK's new AI Bill

The question

What will the UK's Artificial Intelligence Bill (the **AI Bill**) focus on and how will it regulate advanced generative-AI models?

The key takeaway

The recently announced AI Bill is expected to focus on the regulation of advanced AI models including generative-AI such as ChatGPT. The AI Bill also seeks to formalise voluntary agreements that companies had previously entered into under the former Conservative Government.

The background

The regulation of AI is a fast-moving area and the approach to regulation in the UK appears to be shifting. It was widely expected that an AI Bill would be announced during the King's Speech in July 2024, but instead the King simply noted that the Labour Government would seek to establish the appropriate legislation around powerful AI tools.

It has since been announced that an AI Bill will be introduced, and the regulatory approach taken by the new AI Bill is in contrast to the former Conservative Government's more laissez-faire approach, which was considered to be pro-innovation to encourage the growth of the AI industry, rather than pro-regulation.

The development

The UK's Secretary of State for Science, Innovation and Technology, Peter Kyle announced that the AI Bill, expected later this year, will focus on advanced AI models, including generative-AI tools such as ChatGPT. It is expected that the AI Bill will set out regulatory principles that apply to any business which develops, deploys, or uses AI.

The Labour government is seeking to formalise voluntary agreements that companies previously entered into under the Conservative Government. Under the former Government, a number of Big Tech companies including Amazon, Microsoft, Meta, and Google DeepMind signed voluntary commitments with the UK, US and Singapore governments. A notable voluntary commitment that tech companies signed up to in 2024 was in relation to risk, in that if severe risk could not be mitigated then companies would not deploy or develop the respective AI model at all (see our Winter 2023 Snapshot for our previous discussion on this topic).

Currently, if it becomes commercially beneficial to do so, companies can depart from voluntary commitments, which is an area of concern for AI regulation in the UK and has contributed to calls from senior UK government officials to formalise voluntary agreements and make these legally binding.

There will likely be an upcoming consultation on the new AI Bill before the end of 2024.

Why is this important?

As the first piece of primary legislation aimed at regulating AI in the UK, the AI Bill represents a departure from the current regulatory approach and changes the way certain advanced AI models are regulated in the UK. One big question will be how the AI Bill sits in comparison to the EU's AI Act which categorises AI technology based on its risk to society, requiring technologies with a greater risk of harm to comply with stricter regulations.

Any practical tips?

Companies that use or develop AI tools, including, generative-AI tools, should closely monitor the AI Bill as it progresses through Parliament and keep an eye out for any future developments that may affect their business. Additionally, companies that entered into voluntary commitments should consider the effects of the proposed formalisation on their use of AI tools.

UK's new AI Cyber Security Code of Practice

The question

What is the UK's proposed AI Cyber Security Code of Practice?

The key takeaway

The UK Government is establishing a voluntary AI Cyber Security Code of Practice (**AI Cyber Code**). The AI Cyber Code aims to protect the end-user of AI and sets out steps to cover the entire AI supply chain, with a particular focus on Developers and System Operators.

The background

On 15 May 2024, the UK Government published a call for views on the cyber security of AI (the **Call for Views**). This forms part of a wider piece around AI by the Government to ensure that we effectively harness the power of AI, but do so in a safe and secure way. The proposed voluntary AI Cyber Code was first published in November 2023, developed by the Department for Science, Innovation and Technology and based on the National Cyber Security Centre's Guidelines for secure AI system development, alongside the US Cybersecurity and Infrastructure Security Agency and other international cyber partners.

The Government intends to use the feedback gathered from the Call for Views to update the AI Cyber Code.

A key aim of the Government in establishing the voluntary AI Cyber Code is to create "baseline security requirements across various areas of technology". Establishing these baseline security requirements will have many benefits, including:

- enabling users of AI to verify that AI products are securely designed
- create good security practices within the AI sector and thereby create a marketplace where security and safety is a distinguishing factor among competitors
- improve cyber security, thereby reducing cyber-attacks and protecting the data that is used within AI tools
- support the UK in becoming a leader in AI by enabling innovation and safety to develop together.

The development

The AI Cyber Code sets out 12 principles which cover the AI supply chain and focuses on four groups of stakeholders, namely:

- **developers**: businesses and individuals that are responsible for creating an AI model and/or system
- **system operators**: businesses responsible for embedding/deploying an AI model and system within their infrastructure
- **data controllers**: "any type of business, organisation or individual that control data permissions and the integrity of data that is used for any AI model or system to function"
- **end-users**: "any employee within an organisation or business and UK consumers who use an AI model and system for any purpose, including to support their work and day-to-day activities".

The AI Cyber Code covers the different stages of use of an AI tool including:

- secure design
- development
- deployment
- maintenance.

Key principles included in the AI Cyber Code include:

- designing systems for security as well as functionality and performance
- modelling the threats to a system
- ensuring decisions on user interactions are informed by AI-specific risks
- securing the supply chain
- communication and processes associated with end-users
- maintaining regular security updates for AI model and systems
- monitoring the system's behaviour.

Each principle notes which stakeholder (as outlined above) is primarily responsible for implementing the respective principle.

Why is this important?

The AI Cyber Code has been developed with a pro-innovation approach in-mind and seeks to encourage the safe development and deployment of AI tools. By adhering to the voluntary AI Cyber Code, AI developers will be able to differentiate themselves from competitors through their commitment to the safe and secure development of AI. In-turn, the focus on security aims to help promote the UK as a leader in the AI marketplace.

Any practical tips?

It goes without saying that few AI platforms will survive for long if they are not secure. The AI Cyber Code provides a useful reference point, including from the UK Government perspective. Indeed, the Government will be monitoring the application of the AI Cyber Code and working with stakeholders to determine what regulation may be needed in the future.

DIGITAL

EU AI Act into force 1 August 2024

The EU AI Act came into force across all 27 EU member states on 1 August 2024. The aim of the legislation is to ensure AI systems used in the EU are safe and transparent.

Most of the AI Act will be fully applicable on 2 August 2026 after a 24-month transition period.

However, certain provisions of the AI Act will apply sooner. This includes the ban on AI systems posing unacceptable risks, applicable on 2 February 2025. Certain high-risk systems have a longer transition period, and requirements related to them will not apply until 2 August 2027.

Recently, the European Commission has invited providers of GPAI systems and models (eg OpenAI and Google) operating in the EU to participate in a consultation on a Code of Practice. Views from providers, along with other stakeholders will be used to inform the Commission's draft Code of Practice.The Code of Practice must be ready by May 2025.

For a more detailed explanation of the EU AI Act and requirements for businesses it applies to, see our Summer 2024 Snapshot.

Urgently Misleading: the CMA secures undertakings from Wowcher and £4m of customer refund

The question

When does a selling practice create a false sense of urgency that is considered misleading by the Competition and Markets Authority (**CMA**)?

The key takeaway

Special care must be taken with marketing claims around stock levels and a product's popularity. The use of countdown timers on websites are particularly risky, as they can easily create a false sense of urgency that consumers have to act quickly to avoid missing an offer. Get this wrong and you will be in breach not just of the CAP Code, but also the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**), which are soon to be revoked and restated, with some amendments, under the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**).

The background

Late last year, the CMA launched an investigation into Wowcher's selling practices. The investigation falls within the CMA's well-publicised agenda for tackling harmful online selling practices and dark patterns, including urgency and price reductions claims - aka its "Online Choice Architecture" awareness campaign.

The focus of this investigation was on the use of timers and marketing practices that create a sense of urgency in customers. Countdown timers and claims that particular products were "Running Out!" and "In High Demand!" were at the centre of the CMA's investigation. The CMA stated it was concerned by the high number of products in a promotion which remained available for sale at the same or similar price even after the countdown timer had reached zero.

Separately, Wowcher had been signing consumers up to a paid-for "VIP membership" via a pre-ticked box that the CMA was concerned did not necessarily result in consumers realising that they were signing up to it. In November 2023, the CMA wrote to Wowcher, setting out its concerns and urging the firm to change its practices to avoid court action. As a result, Wowcher signed formal undertakings in July 2024 and agreed to provide refund credits to more than 870,000 customers who signed up to its paid-for VIP membership without fully being aware of exactly what they were agreeing to at the time.

The development

There are four key takeaways from the outcome of this investigation:

- **countdown timers**: any countdown timer should specify to which deal it applies and how the deal will change once the timer concludes. Timers shall not be used if the deal will continue to be offered on the same or similar terms shortly after the conclusion of the countdown
- **marketing claims**: claims should not give consumers the false impression that they must act quickly in order to benefit from a particular deal or simply in order to be able to purchase the product at all. Claims made regarding stock scarcity and popularity should reflect the correct and up to date sales figures (including taking into account refunds processed) and stock levels
- **comparison claims**: when making a claim that draws comparisons between products or merchants, such as "Best Seller" or "Top Rated", the nature of the comparison must be disclosed. Moreover, only the top 10% of items should be listed as "tops" in their category
- **paid-for membership**: when paid-for memberships are offered after the initial transaction, it must be clear to consumers that the initial transaction has been completed and that the membership is optional. As ever, pre-ticked boxes are likely to be problematic.

Why is this important?

The consumer elements of the DMCCA look like they will come into force in April 2025. This will give the CMA new direct powers to levy fines against businesses who breach consumer regulation. As online choice architecture remains one of the hot topics for the CMA, it's a fair bet that this is likely to be one of its first targets for its new fining powers.

Any practical tips?

While businesses need to be careful about any representation made on their websites, stock availability and other messaging around urgency of buying remains a highly sensitive area and one which is clearly a target for the CMA. The Wowcher investigation is a timely reminder that any urgency claims (eg countdown clocks) need to be handled with extreme care, as do any online practices which impact the transactional mind of the consumer – including paid-for memberships which may not be presented as transparently as they should be.

CONSUMER

CMA targets Simba for misleading online choice architecture

The question

What types of promotional tactics are in the Competition and Markets Authority's (**CMA**) line of sight when it comes to misleading online choice architecture?

The key takeaway

The CMA has yet again taken action to pursue its aim of tackling harmful online selling practices. Following the CMA's investigation into Simba's advertising tactics to sell mattresses online, Simba has committed to several undertakings that will help ensure that consumers are not mislead into believing they are getting a better deal than they really are in practice.

The background

In December 2023, the CMA commenced an investigation against Simba for misleading online advertising (covered in our previous Spring 2024 Snapshot). The CMA was particularly focused on two key selling tactics: (i) the use of countdown clocks promoting hasty online purchases; and (ii) price comparisons using misleading "was" prices. Both were identified as negatively impacting consumer choice in the CMA's "Online Choice Architecture" awareness campaign.

The development

Simba has now agreed undertakings with the CMA to ensure compliance with the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**):

- **countdown clocks**: Simba will ensure that the countdown clocks used on its websites are clear and specify prominently which exact products they apply to. Further, Simba will ensure the clocks do not give consumers a false impression that they must act quickly or that the product price will revert to the pre-sale price once the countdown ends, if this is not the case (ie if the clock simply resets itself when it reaches zero)
- **genuine discount claims**: Simba will ensure that any "was" price referred to is genuine (ie that a sufficient volume of the product has been sold at that price before using it as a "was" price).

Simba had a timeframe of just over a month to ensure compliance with the above. It is also required to submit a report to the CMA, demonstrating its compliance to the commitments, within six months of signing the undertakings.

Why is this important?

The Simba undertakings follow the CMA's threat of court action against competitor mattress company, Emma Sleep, who failed to reach an agreement with the CMA in relation to similar issues. Following numerous investigations of traders in the same sector, the CMA has published guidance for online mattress selling to clarify the rules in relation to the discount and reference pricing principles for online sales. This shows the CMA's willingness to put pressure on a whole sector it believes is practicing harmful or misleading selling tactics. In particular, we expect to see the CMA's interest in online choice architecture continue into 2025 – which will become especially risky for business as it is anticipated that the CMA will be taking up its new direct enforcement and fining powers in April 2025.

Any practical tips?

Given the risk of significant CMA fines going forwards, businesses should take time to carefully review and ensure that their current online selling practices are fully compliant with consumer regulation, in particular the soon-to-land Digital Markets, Competition and Consumers Act (**DMCCA**). They should also have internal processes in place to follow regulatory developments and share these with relevant internal teams, including the marketing and web teams. Above all, they must avoid using tactics which encourage hasty decisions or immediate and/or reckless spending. Learnings from the CMA's action against Simba include the need to:

- clearly communicate the time limits for any promotions and, if a countdown clock is used, reset the price to the product's usual selling price when it reaches zero – and certainly not resetting the clock to start running down again
- keep all records to evidence the 'was' price at which the product or service was being sold prior to the promotion.

CONSUMER

CMA publishes draft guidance on enforcement of DMCCA consumer law

The question

How will the CMA look to enforce the consumer protection law sections of the recently enacted Digital Markets, Competition and Consumers Act 2024 (**DMCCA**)?

The key takeaway

The CMA has published draft enforcement guidance for its new consumer protection powers under the DMCCA. This guidance outlines the enforcement process, from pre-launch to final decisions, offering essential insight into the procedures and penalties. A consultation on the content of the guidance recently closed and we expect the final version of the guidance to be published ahead of the relevant parts of the DMCCA coming into force next year (currently expected to be around April 2025).

The background

The CMA has published draft enforcement guidance, which offers key insights into how the regime under the DMCCA will work in action. The guidance outlines the stages in the investigations process, namely:

- **pre-launch**: the phase before the CMA decides whether to open a case, during which time the CMA may make enquiries and research. This will help it form a view on the merits of pursuing a case under its direct consumer enforcement powers. Once a decision has been made to open an investigation the CMA will usually publish a notice about the case
- **Provisional Infringement Notices**: under the DMCCA, a Provisional Infringement Notice (**PIN**) can be served on any party who may be involved in a relevant infringement. Parties who receive a PIN will be allowed to inspect the CMA's file (excluding certain documents) to allow them to defend themselves and make representations in their defence
- **information-gathering powers**: the CMA may use its powers to gather information both before and after a decision to open an investigation. It will use written information notices to require persons/parties to provide information. The CMA can impose monetary penalties on those who do not comply with informational notices
- **representations**: parties may be invited to make written representations or representations at a single oral hearing, or both
- **final decision**: the CMA may give a Final Infringement Notice (**FIN**) to any party it is satisfied has engaged, is engaging or is likely to engage in a relevant infringement, or is an accessory to that relevant infringement. A FIN will set out the grounds for giving the notice, any further justifications for it and the remedies/penalties that the party will be subject to.

The potential consequences of any findings and failures (besides FINs) are also covered. These include:

- **undertakings**: the CMA has broad discretion to accept an undertaking from a party that it will make a change in practices, prior to making a FIN. If accepted, the undertaking will be published on the CMA's website. After acceptance, there are limited circumstances in which the CMA can then issue a FIN
- **settlements**: a party may enter into a settlement with the CMA. Settlements normally involve an admission of conduct from the party, an agreement to amend their behaviour and to comply with any FIN. Parties can also expect a streamlined investigation process and will agree not to appeal any FIN (settlement discussions will be subject to a set timetable and procedure). The decision to settle is at the CMA's discretion. Parties may withdraw from settlement discussions before confirmation in writing. However, if they choose to withdraw after written confirmation, the CMA may still take into account any admissions of conduct in its investigations
- **Enhanced Consumer Measures** (**ECMs**): ECMs were first introduced to the consumer protection law enforcement framework in 2015 and will be a feature of the new regime too. The guidance outlines proposals for the use of three measures: redress, compliance and choice. Redress measures require the party to offer an impacted consumer some form of compensation or other redress in relation to the breach. The CMA can also direct a party to implement compliance measures to increase adherence with the law. "Choice measures" are intended to give the public more information about the party's infringement, allowing them to make more informed purchasing decisions
- **Online Interface Notices** (**OIN**): OINs can be issued to an infringing party or a third party in connection with websites, applications or other digital content that they operate. They can require a person to remove content, disable or restrict access, display a warning or delete a domain name entirely
- **penalties**: the CMA has stated its objectives in imposing penalties are to defer infringements of consumer law, to reflect the seriousness of any infringements, and to encourage cooperation during investigations. The guidance sets out a framework for determining the overall level of harm and culpability, which offers starting

points for calculating the monetary penalty as a fixed sum or percentage of UK turnover (whichever is highest). The guidance outlines how adjustments can be made for deterrence and aggravating/mitigating factors and how the final figure the CMA is proposing to fine a business will be checked to ensure it is within the statutory maximum.

The draft guidance also provides further details on the governance behind the CMA's decisions and the procedural complaints process.

Why is this important?

Legislation is only as effective as its enforcement. The DMCCA has ushered in a new era of direct enforcement for the CMA, with questions naturally arising around how it will work in practice. Given that, at the top level, the CMA will be able to impose fines of up to 10% of a business's global annual turnover, the new guidance offers much-needed clarity on what to expect if a party falls under investigation, following the process from cradle to grave and offering a new understanding of what's at stake and how it will work.

Any practical tips?

As well as taking measures to ensure compliance with the DMCCA, consumer-facing companies may also want to acquaint themselves with the enforcement guidance. The CMA's investigative and enforcement powers are extensive, and companies caught up in potential investigations should prepare for a range of eventualities, from providing information and making representations, to giving undertakings, agreeing settlements, and paying (potentially sizeable) penalties.

CONSUMER

Exemption from HFSS product restrictions for Ofcom-regulated internet protocol television (IPTV) services

The question

What is the UK Government's proposal for the incoming HFSS restrictions in relation to IPTV advertising?

The key takeaway

Although the final position will be confirmed in response to the consultation, the Government proposes an exemption of Ofcom-regulated IPTV services from the incoming HFSS advertising restrictions under the Health and Care Act 2022 (**HCA 2022**).

The background

The delayed advertising restrictions for advertising food and drinks high in fat, salt or sugar (**HFSS**) will come into force on 1 October 2025. See our previous Snapshots (Spring 2022 and Summer 2022) for more detail of the HCA 2022 and its implementation. With the aim of halving childhood obesity by 2030, the HCA 2022 introduced:

- a 0530 to 2100 watershed for the TV advertising of HFSS products (**Broadcasting Restriction**). All services regulated by Ofcom, including all On-Demand Programme Services under the jurisdiction of the UK, are included
- a total ban on paid-for online advertising of HFSS products (**Online Restriction**).

The development

On 12 September 2024, the Government launched a short consultation on implementing the advertising restrictions for IPTV services. IPTV services deliver TV programmes and advertising live over the internet, as opposed to on-demand. They are regulated by Ofcom if they appear on regulated EPGs (electronic programme guides, which are licensed by Ofcom) and therefore subject to the BCAP Code. The HCA 2022 did not specifically address IPTV services and so they may be currently subject to both the Broadcasting Restriction and Online Restriction. As a result, the Government is proposing to introduce an express exemption so that Ofcom-regulated IPTV services, that are subject to the Broadcasting Restriction, will not also be simultaneously subject to the Online Restriction. IPTV services that are not regulated by Ofcom will continue to be subject to the Online Restriction.

The consultation closes on 10 October 2024 and it's expected that any resulting legislation, along with full guidance for advertisers, will be published in good time ahead of the October 2025 coming-into-force date.

Why is this important?

The IPTV services sector has been growing rapidly, and will continue to do so, particularly given the advertising restrictions to be introduced by the HCA 2022. The current proposal will increase the amount of advertising that is only subject to the broadcasting watershed; some cautiously hopeful news for HFSS product advertisers who need to rely on the limited TV advertising space only.

Further, additional IPTV services which are currently unregulated could also become Ofcom-regulated, following a recent consultation by the Department for Culture, Media and Sport (**DCMS**). This may increase the IPTV services exempt from the Online Restriction, although Ofcom will have the power to take action against any breach of the restrictions by a regulated IPTV service.

Any practical tips?

Businesses looking to place HFSS product advertising on IPTV services, and providers of IPTV services, should be alert to any updates from both consultations. It will be important to keep track of whether a service provider is Ofcom regulated, as this will eventually determine whether or not it is exempt from the Online Restriction. If not already, HFSS selling businesses should review and develop a future marketing strategy, and consider focusing on utilising business owned media, to be ready for the arrival of next year's advertising restrictions.

"The current proposal will increase the amount of advertising that is only subject to the broadcasting watershed."

ASA rules that #ad is not sufficient where influencers also have business interests

The question

Why could Zoe and Huel not rely on a #ad disclosure in ads promoted by the famous entrepreneur, Steven Bartlett? And what does this mean for brands where the individual featured in their ads has a business interest in them?

The key takeaway

The Advertising Standards Agency (**ASA**) continues its strict enforcement against influencer marketing with a new ruling against ads for Zoe and Huel which featured Steven Bartlett. The ads included #ad but failed to disclose Bartlett's commercial relationship with the companies. This ruling is a new development to the influencer debate and adds another layer of disclosure where the influencer has a commercial interest in the relevant brand.

The background

Steven Bartlett, a well-known entrepreneur, investor, and television personality from the show "Dragon's Den", has 3.8 million Instagram followers, and hosts the popular podcast "The Diary of a CEO" which has over 7 million subscribers. In February and March 2024, Bartlett appeared in paid-for Facebook ads for two healthcare companies: Zoe Ltd and Huel Ltd. The ASA ruled that the ads were misleading due to the omission of material information regarding his business interests in these companies, even though #ad disclosures had been used in both ads.

Zoe Ltd

The ad featured an image of Bartlett wearing a Zoe patch, a continuous blood glucose monitor, with text reading "If you haven't tried ZOE yet, give it a shot. It might just change your life" followed by his name. #ad was used but there was no disclosure of his commercial interest in Zoe.

Huel Ltd

The ad for Huel's Daily Green Drinks included Bartlett's statement "This is Huel's best product", along with the caption "Ever wondered what Bartlett actually thinks of Huel's Daily Greens? Well there you have it…". Another ad featured two side-by-side videos of Bartlett and another individual discussing Huel products, with text such as "Is Huel actually nice?" to which Bartlett replies "This is the best product that Huel have released". The ad ends with a caption "Steven Bartlett said it first…". Again, #ad was used but no disclosure of his commercial relationship with Huel was made.

The development

Steven Bartlett is an investor in Zoe Ltd and a director of Huel Ltd. Aware of these commercial relationships, complaints were made to the ASA on the basis that the ads were misleading. In response, the companies contended that the posts were clearly marked as ads (using "#Ad"). They further argued that the average consumer would reasonably understand that Bartlett was being paid for his appearance in the ads, making further disclosure unnecessary.

Despite these arguments, the ASA upheld the complaints against both companies. While the ASA acknowledged that the ad were identifiable as marketing communications, it found that consumers were unlikely to be aware of Bartlett's financial interest in the performance of the companies. His role as an investor and director constituted material information necessary for consumers to make informed decisions. As the ASA said: "Because the ads omitted material information about Steven Bartlett [being an investor in Zoe] [as a director at Huel], we concluded they were likely to mislead". The omission of this information rendered the ads misleading in violation of rules 3.1 and 3.3 of the CAP Code.

Why is this important?

The ruling reinforces the ASA's stringent approach to influencer marketing. The scope of "material information" is broad, and businesses cannot rely on assumptions that consumers understand influencers are financially compensated for endorsements. Any specific business interests or financial ties must be disclosed in the ad itself, as the ASA sees this information as directly impacting consumers' perception and decision-making regarding the product. Moreover, the ASA noted that featuring an individual's name below a quote can appear as a testimonial to consumers, resembling a customer review or independent endorsement. They see this as adding further weight to the need for transparency, noting that this level of transparency is in addition to the normal influencer marketing disclosure (eg #ad).

Any practical tips?

#ad was clearly not enough in these cases. The ASA has made it clear that it expects any commercial relationships or interests the influencer holds in a company or product must be explicitly disclosed to avoid misleading consumers. For more guidance on influencer marketing, see our previous Summer 2023 Snapshot where we covered the joint guidance issued by the CMA and CAP. Note that the latter does not address this new point about the disclosure of commercial relationships, as Zoe, Huel and Bartlett himself no doubt found out to their surprise!

IAB Europe's 12 guiding principles for the 2024-2029 EU legal agenda

The question

What principles will guide IAB Europe in the upcoming EU legal agenda?

The key takeaway

IAB Europe has published new guiding principles for the 2024-2029 EU legal agenda, aiming to influence EU policy with a focus on inclusivity, safety and innovation. The framework emphasises continued collaboration with industry representatives and the use of market-tested strategies. The principles also highlight commitments from IAB Europe members to develop practices that promote transparency and build consumer trust.

The background

IAB Europe is the EU's leading advertising and digital marketing industry association, representing the interests of over 5,500 companies across Europe. It aims to advance the industry's priorities, foster collaboration at the policy level, and provide frameworks for its members to follow. In cooperation with national IABs (Interactive Advertising Bureaus), IAB Europe drives the evolution of working practice, industry standards and technology.

The release of these principles coincides with the formation of a new European Parliament and College of Commissioners, both of which are seeking targeted and evidence-based approaches to key issues in the industry, such as consumer trust, profitability and cross-sector collaboration.

The development

IAB Europe has published 12 guiding principles with a focus on inclusivity, safety, and innovation. These principles highlight the importance of the advertising industry, which saw approximately $144.6bn spending across Europe in 2023.

- **inclusivity**: the IAB emphasises the importance of promoting choice and diversity in digital advertising services, engaging all relevant stakeholders and fostering dialogue through industry-wide initiatives.
- **safety**: another key priority is strengthening regulation, enhancing privacy protections and increasing public trust. The IAB advocates for targeted strategies and the introduction of 'competitiveness checks' to ensure that policy impacts are positive and balanced.
- **innovation and growth**: looking to the future, the IAB stresses the critical role of advertising in economic growth, market coordination, and delivering consumer benefits. The IAB aims to maintain its input in developing future initiatives that will benefit the region.

Why is this important?

As the largest advertising association in Europe, IAB Europe plays a pivotal role in setting industry standards and influencing policy at the EU level. These new guiding principles will be especially relevant given the incoming EU Commission and their upcoming legal agenda. For IAB Europe's 5,500+ members, they represent a clear path to having their interests reflected in future legislation. Regulations on Transparency and Targeting of Advertising, expected over the 2024 – 2029 period, may incorporate some of these principles.

Any practical tips?

Membership in organisations like IAB Europe, or national Interactive Advertising Bureaus, provides companies with a platform to shape both EU law and industry practices. Contributing to these guiding principles may help ensure that a company's interests are considered in future regulatory developments.

ASA rules on impact of historic environmental performance on green claims

The question

What does the Advertising Standards Authority (**ASA**) say about poor historic environmental behaviour in respect of green claims?

The key takeaway

On 10 July 2024, the ASA ruled that ads must not mislead consumers by failing to include material information about an organisation's historic environmental performance. The decision responded to an ad published by Wessex Water, which was in breach of BCAP Code rules 3.1 and 3.2 (misleading advertising) and 9.2 (environmental claims).

The background

In February, Wessex Water released a TV ad about storm overflows; structures designed to relieve pressure on water and sewage systems during periods of heavy rainfall. The ad focused on the company's efforts to upgrade the existing infrastructure, on which it said it was "taking a different path" through such initiatives as "separating rainwater from sewage", "treating wastewater naturally using wetlands", and "monitoring changes to water quality".

The ad was challenged on the basis that the water provider had failed to include substantial information in relation to its historic environmental behaviour, namely its intermittent practice of discharging sewage into the environment. Wessex Water had previously received a two (out of a potential four) star EPA rating by the Environment Agency in 2021 and 2022, designating it as a company in need of improvement. Notably, the organisation was identified as "significantly below target" in respect of the number of serious sewerage and water supply pollution incidents it had been involved in.

The development

Wessex Water disputed that the ads made any environmental claims at all. The ASA disagreed, holding that phrasing such as "a better way for our waterways is already underway", and colourful images of green water sources and wetlands, contributed to an overall impression that Wessex Water was not only taking steps to reduce environmental damage, but that active improvements had already been made.

Given the conflict between this impression and the company's historic pattern of poor behaviour, the ASA upheld the challenge, asking for the ads to be removed on the basis that Wessex Water's history was material information which, as omitted, made the ads "likely to mislead". The regulator prohibited the ads from reappearing in the form complained of.

Why is this important?

This decision is yet another in an ever-growing list of regulatory clampdowns on greenwashing in the UK and EU. It builds on responses in industries such as aviation, fashion and food, reinforcing the need for brands to be clear and precise whenever they make green claims. Critically, it also reminds them to be mindful of their past environmental performance when creating new 'green' campaigns. The ruling also highlights the need for businesses to carefully consider the impression that their ads can create, not only in terms of specific wording but also in terms of their visuals and imagery.

Any practical tips?

- **Qualifications and supporting info**: When making specific environmental claims, it is important to include any relevant qualifications and material supporting information – this may include a need to identify and disclose any relevant history of poor environmental performance.
- **Stay ahead of the regulator**: Businesses need to keep a close watch on green adjudications, commentary and guidance from both the ASA and the Competition and Markets Authority (**CMA**), including guidance on green claims by the Committee of Advertising Practice (**CAP**).
- **Work in step with the marketing team**: Remind all relevant internal stakeholders, especially the marketing team, that green claims are dangerous territory and require legal input from the start. No doubt the last thing Wessex Water thought its new campaign would do would be to shine a light on its poor past (sewage) performance!

ASA continues to scrutinise aviation green claims

The question

What can we learn from the Advertising Standards Authority's (**ASA**) recent rulings against green claims in the aviation industry?

The key takeaway

Organisations must continue to take great care with green claims made in their promotional materials. Material information must not be omitted if the effect is that consumers are likely to be misled in relation to the actual environmental impact of the product or service in question, or of the business as a whole. It goes without saying that it is particularly tricky to keep green claims in environmentally unfriendly industries (such as aviation) on the right side of the regulatory line.ne.

The background

Since 2021, the ASA and CAP have published and updated guidance, including some that seeks to reflect the principles of the CMA, to help businesses with green claims. This followed research that ads containing environmental claims such as "carbon neutral" and "net zero" often mislead consumers in relation to the environmental impact of the business itself or the product or service in question. As seen with the publication of the ASA and CAP's Annual Report 2023 (see our Summer 2024 Snapshot), climate change and environmental claims remain one of the ASA's key areas of focus. This has resulted in a continued regulatory crackdown on green claims and a spate of upheld ASA rulings. The aviation sector in particular has received considerable scrutiny from regulators and courts around the world, including by the European Commission.

London Luton Airport (LLA)

Against this backdrop, the ASA has issued two relevant rulings on green claims made in the aviation sector. In July, the ASA ruled that LLA had misled consumers with ads in support of the proposed expansion of LLA featuring the headline claim "If we miss our environmental limits, our expansion will be stopped in its tracks". The ads omitted "significant information" about LLA's total greenhouse gas emissions (notably, the emissions caused by additional air traffic movements).

Virgin Atlantic

Similarly, in August, the ASA ruled that a radio ad in which Virgin Atlantic claimed to have become "the world's first commercial airline to fly transatlantic on 100% sustainable aviation fuel" was misleading to consumers. The ASA determined that consumers would understand the phrase "100% sustainable aviation fuel" to mean that the fuel was 100% sustainable and had no negative environmental impact – whereas Virgin Atlantic had apparently sought to say that 100% of the fuel used was "sustainable aviation fuel" (a commonly used term in the industry).

In both cases, the ASA held that the ads must not appear in the same form again.

These rulings come as the Civil Aviation Authority's (**CAA**) consultation on draft principles for consumer environmental information is set to close on 15 October 2024. The CAA says it hopes to ensure that consumers "can make informed choices about their flight booking selections through relevant, accurate, understandable, comparable and accessible information". Part of the CAA's strategy is to produce a set of principles for airlines and travel agents to follow when displaying environmental information to consumers in relation to advertised flights (such as flight emissions calculators).

Why is this important?

It is no surprise at all that the ASA continues to closely monitor the aviation industry, given its huge environmental impact. Once published, the CAA's principles will provide useful guidance to aviation organisations looking to publicise their environmental efforts in a way that complies with their regulatory obligations. Beyond the aviation industry, businesses in all sectors should take heed of the regulators' continued focus on green claims and the hard line that they are taking in relation to broad statements such as "sustainable".

Any practical tips?

As the LLA ruling shows, all material information should be included in the ad itself, or else the ad may be found to be misleading to consumers. This includes incorporating information about a company's wider environmental impact, as LLA found out to its detriment. Further, advertisers must be able to substantiate any claims made. In line with regulatory guidance, this becomes very difficult (if not impossible?) for broad claims, such as "good for the environment". Equally even narrower claims, such as Virgin Atlantic's "100% sustainable aviation fuel" need very carefully handling to avoid the suggestion that a wider sustainability claim is being made.

ADVERTISING

Heating and insulation green claims under CMA review

The question

What is the Competition and Markets Authority's (**CMA**) new guidance on the marketing of heating and insulation products and how does this fit into the wider consumer protection picture?

The key takeaway

Following a review that found evidence of potentially misleading business practices, the CMA has published new guidance on the advertising and marketing of heating and insulation products and services. The guidance aims to bolster and protect consumer laws by assisting businesses in avoiding making misleading green claims to consumers. One of the UK's leading boiler brands, Worcester Bosch, has subsequently committed to changing its marketing strategy to ensure that consumers are able to make informed purchasing decisions.

The background

In September 2022, the CMA began a two-year project in which it sought to investigate consumer protection in the UK's green heating and insulation sector, that ultimately led to the regulator launching an investigation into Worcester Bosch's compliance in October 2023. The CMA simultaneously wrote to 12 other businesses to advise that they may also be in breach of consumer protection law.

The development

Fast-forward a year, and the CMA has since published compliance advice (in July 2024) to assist businesses in adhering to their obligations under consumer protection law when marketing green heating and insulation products for home use. Products in this category include heat pumps, biomass boilers, solar thermal panels, and home insulation products. The scope of the advice also extends to related services such as the marketing, selling, design, installation, servicing, and maintenance of these products.

The new advice focuses on the upfront marketing and advertising of in-scope products by encouraging any claims, information and quotes presented by businesses to be truthful, accurate, and complete, in order to allow consumers to make informed choices before purchasing. The guidance emphasises that depicting false or deceptive information concerning a product or service is likely to constitute a misleading action under the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**) if it results or is likely to result in a consumer making a purchasing decision they would not have made otherwise. Some of the main principles of the guidance include:

- presenting headline price information accurately, comprehensively, honestly and clearly when referring to government funding access and special deals on product bundles
- product claims must be well-explained, realistic, unexaggerated and supported by evidence.

The CMA began investigating well-known boiler brand, Worcester Bosch, in October 2023 following concerns that the company was misleading consumers into believing that buying a Worcester Bosch boiler, as opposed to another brand's, would "future-proof" their heating system and reduce their carbon footprint. The outcome of the CMA's investigation into the brand was for Worcester Bosch to give undertakings to the CMA that it will change its marketing strategy, to allow consumers to make informed purchasing decisions. The nature of the undertakings (made voluntarily in August 2024) means that the company has not admitted to any wrongdoing or liability. Further to revising its marketing material, the company has also committed to contacting its network of accredited installers and third-party retailers to also update any non-compliant marketing material. The implementation of Worcester Bosch's commitments will be monitored by the CMA to ensure compliance.

Why is this important?

The CMA is all over green clams and the investigation into Worcester Bosch highlights just how actively it will pursue misleading green claims, in particular when the activity reflects wider industry concerns. Another helpful example is the CMA's recent investigation into misleading green claims in the fashion industry (the impact of which remains ongoing). Vigilance around compliance with consumer protection laws remains a high business priority, particularly in light of the impending implementation of the Digital Markets, Competition, and Consumers Act 2024 (**DMCCA**). The DMCCA establishes new consumer protection laws and provides the CMA with the power to directly enforce breaches with fines of up to 10% of the offending party's global turnover.

Any practical tips?

All businesses, not just those providing heating and insultation products, are advised to review carefully any current or planned marketing campaigns around sustainability and green claims. Helping the marketing team understand the full implications of pushing green credentials too far is an important step in the wider compliance journey, including avoiding (potentially hefty) CMA fines next year.

ADVERTISING

Updated CAP guidance on when in-game purchases are considered 'advertising'

The question

When and how does the CAP Code apply to the advertising of in-game purchases such as "loot boxes" in apps and video games?

The key takeaway

New CAP guidance confirms that in-game storefronts and inducements to purchase items are considered advertising if the virtual in-game currency can only be purchased via a real-world transaction.

The background

The Committee of Advertising Practice (**CAP**) first published guidance on the advertising of in-game purchases in September 2021. This guidance set out how in-game purchases such as "storefronts" and "loot boxes" should be advertised with the aim of ensuring that that advertisers act responsibly, and consumers are not misled. The context for the publication of this guidance was the widespread public concern and regulatory scrutiny towards "loot boxes" and their potential links with gambling, particularly in relation to young gamers. For advertisers, the guidance details how the CAP and BCAP Codes (the **Codes**), which regulate broadcast and non-broadcast ads, apply to the advertising of in-game purchases.

The development

The gaming industry has grown substantially since the publication of CAP's 2021 guidance. Indeed, UK Interactive Entertainment, a trade association for the UK games and interactive entertainment sector valued the UK gaming industry at £7.82bn in 2023, up from £7.16bn in 2021.

Due to the growth of the sector, CAP undertook a comprehensive review of the guidance to ensure it continues to satisfy its objective to protect consumers. On 24 May 2024, CAP announced they had completed their review of the guidance and confirmed it had been updated in certain areas to remain current and provide further clarity. The most significant development is that CAP confirmed that the guidance remains an accurate and appropriate resource for applying the Codes to the advertising of in-game purchases.

The key aspects of the updated guidance are as follows:

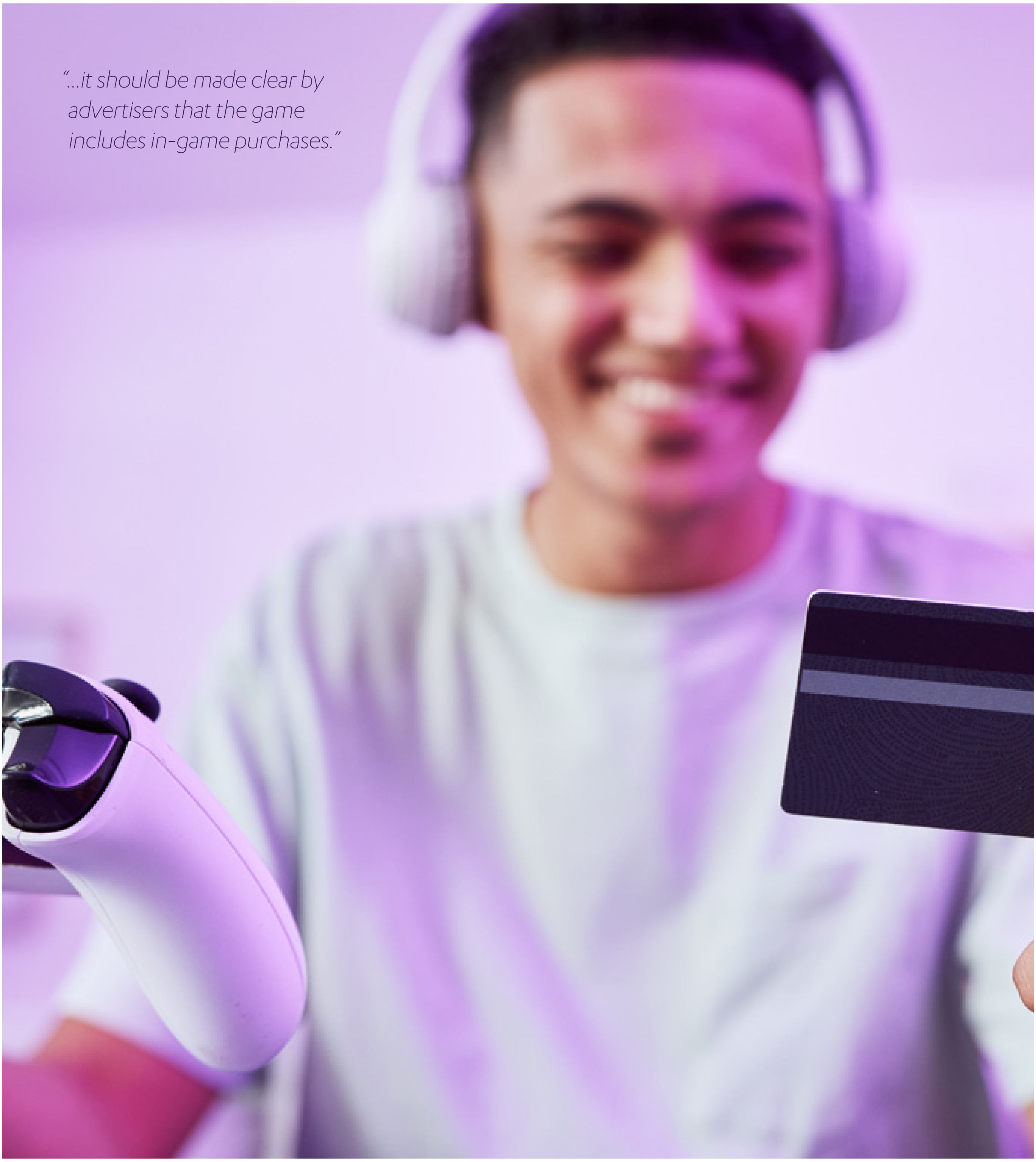
- a storefront and any inducement to purchase items with in-game currency will be considered advertising under the Codes if the in-game currency is purchased by a player in a real-word currency transaction
- the cost of buying virtual currency for in-game purchases must be clear and not likely to mislead the consumer. The guidance makes particular reference to currency "bundles" in this respect
- consumers should be able to determine the equivalent real-world value of an item bought in-game
- consumers should be given sufficient information about "odd pricing". Odd pricing is when increments of virtual currency bundles in-game do not match the increments of the virtual currency price for items, meaning that players are required to purchase more currency than they need to buy a specific item
- the context of when in-game purchases are advertised is considered by the guidance, particularly in relation to time pressure and chance, which may make players more vulnerable to being misled in a gameplay context
- when marketing a game itself, it should be made clear by advertisers that the game includes in-game purchases. Similarly, ads should not imply that content which is only available when purchased is available for free in the game.

Why is this important?

Since the publication of the CAP guidance in 2021, the Advertising Standards Authority (**ASA**) has received and upheld a number of complaints regarding the advertising of in-game purchases. This may suggest that certain advertisers remain unaware of the applicability of the Codes to the marketing of in-game purchases. In light of the updated guidance, now is a good opportunity for advertisers to review their ads for in-game purchases alongside the Codes to ensure compliance.

Any practical tips?

Gaming companies should ensure they understand when and how advertising in-game purchases is subject to the CAP Code. This is both in terms of the in-game purchases themselves and also ensuring that the existence of in-game purchases – including loot boxes in particular (because of the gambling-risks associated with loot boxes) is made clear when advertising for the game itself. And of course, using the PEGI content description labels should not be forgotten too.


"...it should be made clear by advertisers that the game includes in-game purchases."

Court infers novation despite 'no dealings' clause

Magee and others v Crocker and others [2024] EWHC 1723 (Ch)

The question

How will a court interpret a 'no dealings' clause restricting assignment and other dealings when addressing an alleged novation by conduct?

The key takeaway

The inclusion of a 'no dealings' clause and other clauses intended to restrict the parties' ability to vary any terms, or to transfer or dispose their rights may not be sufficient to prevent a finding of novation by conduct.

The background

The parties entered into a shareholders' agreement in respect of shares in a golf course, one in his own name (**Mr Crocker**) and the other (**Mr Fitzgerald**) via a company (**Camelot**).

The shareholders' agreement contained a 'no dealings' clause: "No person may assign, or grant any Encumbrance over or sub-contract or deal in any way with, any of its rights under this agreement or any document referred to in it without the prior written consent of all the parties (such consent not to be unreasonably conditioned, withheld or delayed)."

Later, Mr Fitzgerald sought to transfer the shares owned by Camelot into a settlement, managed by his daughters (who were also the trustees). Written consent from Mr Crocker, required to make such a transfer effective, was never obtained but Mr Crocker behaved as though he were in agreement with it (including signing the share certificates) and the shares in the golf course transferred to the settlement.

To evidence the transfer, the trustees relied on a deed of assignment between the settlement and Camelot which stated that the settlement had offered to purchase the shares held by Camelot along with "an assignment of all rights and obligations attaching to such Shares pursuant to the [2010 SHA] for the sum of £25,000."

Relations between Mr Fitzgerald and his family on the one hand and Mr Crocker on the other broke down, and the trustees brought a claim for declaratory relief concerning the validity of the transfer of shares and as to their entitlement to rely on the terms of the shareholders' agreement.

The decision

The court determined that, even in light of the 'no dealings' clause, the transfer of shares was valid and that there had been an effective novation of the shareholders' agreement so that the trustees could rely on and enforce its terms.

The assignment was in fact a novation – a tripartite agreement involving, effectively, the extinction of rights under the share-holders' agreement and the entry into of a new agreement (with new rights). The agreement involved the settlement "stepping into Camelot's shoes". A novation was the effect of what was agreed, and it was necessary to infer a novation in the context to provide business efficacy to what had happened, irrespective of the label on the relevant document.

The court also reasoned, applying the ejusdem generis principle (ie that the following general words used are limited to the same kind or nature as the prior specific examples), that a novation was not prohibited by the 'no dealings' clause. The general words "or deal in any way with, any of its rights" came after a reference to assigning, granting any encumbrance, or sub-contracting, which, the court decided, pointed to some bilateral disposition of the rights under the shareholders' agreement, involving a party to the agreement and a third-party. These words did not point to an agreement that involved a consensual arrangement, such as a novation, including both parties to the shareholders' agreement and involving a termination of the rights under it.

The court also commented that, where a contract contained clauses intended to restrict the parties' ability to waive or vary any terms, or to transfer or dispose their rights (as was the case here), then even if those clauses did not apply specifically to novation, the inclusion of those provisions required the court to "read all the clauses together" and be more cautious before concluding that there has been a novation by conduct.

Why is this important?

This case shows that the courts will treat novation as different in nature to assignment, subcontracting and other dealings with a third party. Although the existence of a 'no dealings' clause and other clauses intended to restrict the parties' ability to vary any terms, or to transfer or dispose their rights, may well be relevant, they will not necessarily prevent novation, without an express provision to that effect.

Any practical tips?

Ensure that novation is considered when drafting, in terms of potential consequences for the contracting parties. Understand what obligations and liabilities may transfer and keep in mind the requirements for a valid novation (if that is what is intended). If there is no intention to novate a contract, avoid performance that would indicate that a novation has taken place. In any event, seek to document the intended transaction to avoid future disputes.

'No dealings' clauses, or any other clauses which seek to limit a party's ability to vary the contract, should refer explicitly to novation, if it is intended that novation should also be restricted (absent prior written consent or other conditions).

COMMERCIAL

Contract construction – adjective at the start of a list found to qualify the entire list

Cantor Fitzgerald & Co v Yes Bank Ltd [2024] EWCA Civ 695

The question

How will the courts approach the question of whether an adjective or determiner at the start of a list qualifies the entire list?

The key takeaway

An adjective or determiner at the start of a list may be found to qualify the entire list in circumstances where the ordinary meaning of the words, used in the context of the contract as a whole and the relevant factual and commercial background, supports such an interpretation.

The background

The claimant, Cantor Fitzgerald & Co (**Cantor**), is a US broker-dealer, investment bank and financial adviser, and the defendant YES Bank Limited (**Yes Bank**), is an Indian commercial bank.

Cantor was engaged by Yes Bank to help with a "Financing" in light of the Indian bank's need of additional capital to deal with its financial difficulties. In return, Cantor could receive a $500,000 retainer and 2% of funds raised from the investors listed in a schedule to the engagement letter.

The key clause in the engagement letter stated:

"1. We have been advised by the Company [**Yes Bank**] that it contemplates one or more financing(s) through **the private placement, offering or other sale of equity instruments** in any form, including, without limitation, preferred or common equity, or instruments convertible into preferred or common equity or other related forms of interests or capital of the Company in one or a series of transactions (a "Financing") The Company hereby engages CF&CO [**Cantor**] to act as the Company's financial advisor, placement agent and arranger in connection with any Financing with any Investor (as defined in Annex A and Schedule I) other than a Qualified Institutional Placement ("QIP"). In the event a Financing is structured as a Qualified Institutional Placement, the Company acknowledges that CF&CO shall not be engaged to act as a placement agent or arranger in connection with such transaction, but rather an offshore financial advisor to the Company, and that in such capacity, CF&CO may provide Investor referrals to the Company. In the event any such Investors participate in the QIP, CF&CO shall be entitled to a referral fee with respect to amounts contributed by such Investors in the QIP equal to the fees set forth in 3(b) below, payable in accordance there with." [emphasis added]

Yes Bank received a sizable capital injection and later, additional funds by a further public offer (**FPO**). Certain investors that Cantor had been in discussion with participated in the FPO.

Cantor was paid the retainer fee, but not the 2% fee. Cantor's claim was that it was entitled to 2% of the amounts subscribed in the FPO by three investors listed in the schedule. It was Yes Bank's position that the FPO did not come under the concept of a Financing because the use of the word "private" qualified all the forms of financing covered by the engagement to private forms of equity financing, limiting Cantor's entitlement to its retainer.

In the High Court, the judge found in favour of Yes Bank – Cantor appealed. The basis of Cantor's appeal was that the judge should have held that the ordinary meaning of the words used in the definition of Financing covered all forms of equity financing and in concluding that the wider contractual context did not substantially affect the construction.

The decision

The Court of Appeal dismissed the appeal, deciding the word "private" qualified all forms of financing and therefore Cantor was not entitled to the 2% fee, as the FPO was not a "private placement, offering or other sale of equity instruments" since it was public by nature.

In coming to its decision, the court:

- considered the ordinary meaning of the words used in the context of the contract as a whole and the relevant factual and commercial background
- excluded prior negotiations
- identified the intention of the parties (judged objectively) to ascertain what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean.

On the ordinary meaning of the words, the court acknowledged that while there is no firm grammatical rule that an adjective or determiner at the start of a list of nouns qualifies all within it, the nature of the list may well indicate that it does. Here the parties had chosen to start the description of the kinds of equity fundraising covered by the engagement with the word "private" and not "public" and a reader would naturally tend to assume that an adjective or determiner at the start of a list qualifies the entirety of it. There was no authority of law needed to support this, the court relied on the ordinary meaning of the words. In contrast to the words in issue, the parties did go to the trouble of making clear in the same sentence both that all kinds of equity instrument were covered and that the arrangement would cover both a single and a series of financings. They did this with the reference to "equity instruments in any form, including without limitation…", and with the references to "one or more financing(s)" and (later on in the sentence) "in one or a series of transactions".

On the wider contractual context, Cantor was only appointed as a "financial advisor, placement agent and arranger" for Financing that was not a "Qualified Institutional Placement" (**QIP**). This is because a QIP needed a Securities and Exchange Board of India-registered merchant bank's involvement, which Cantor was not as they were only an advisory bank and were there to provide referrals. Therefore, the contractual context also supported Yes Bank's case.

On the factual matrix, it was clear that Cantor was approached for its potential access to new sources of capital through its client list and also that an FPO was not a realistic possibility when the contract was agreed and therefore not in reasonable contemplation of the parties. These facts strengthened Yes Bank's argument.

Why is this important?

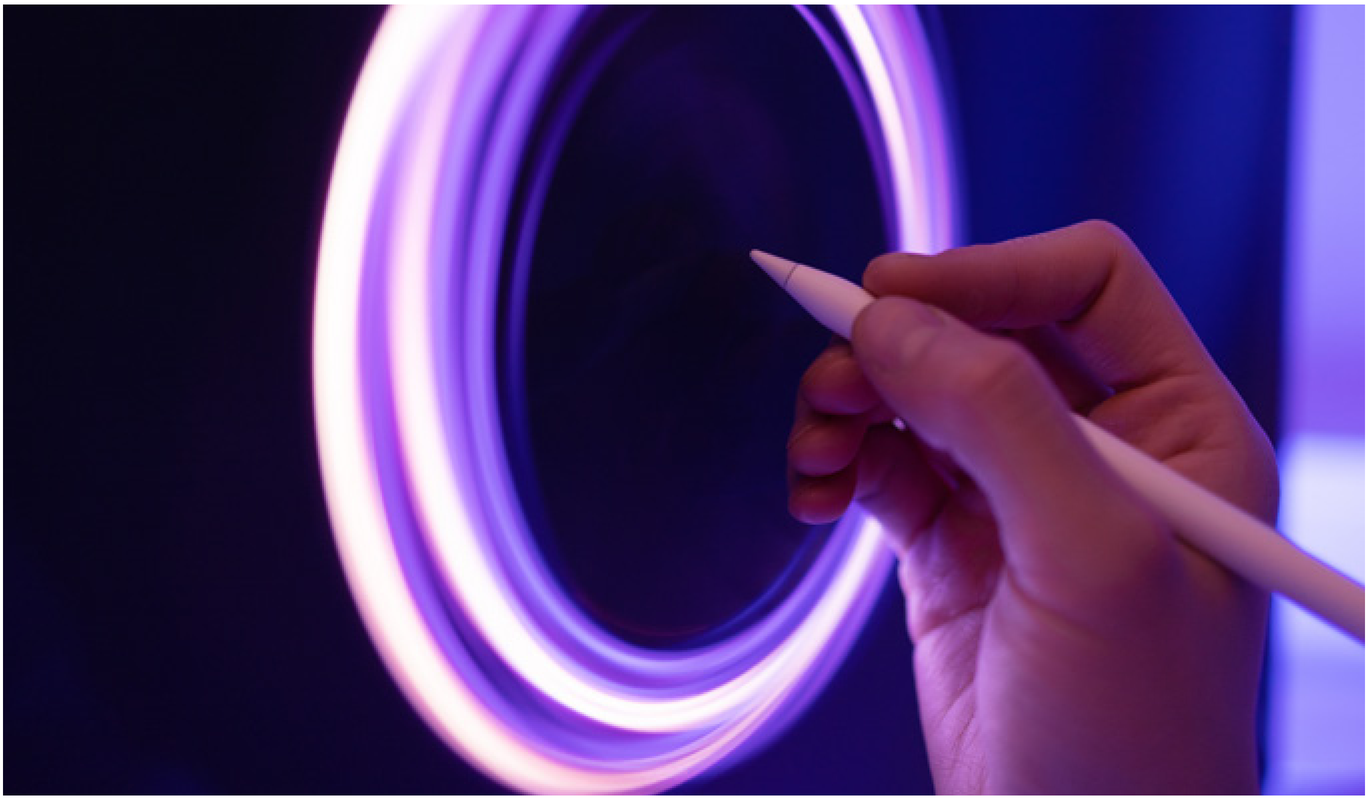
Lists with an adjective or determiner at the start are commonplace in commercial contracts – this judgment provides a reminder of the approach the courts will take in interpreting the contractual language, in this case whether an adjective or determiner at the start of a list qualifies the entire list.

Any practical tips?

Clauses should be clearly and specifically drafted using the ordinary meaning of the words. If there is particular contractual context and/or the factual matrix, consider including in recitals or acknowledgments within the agreement.

Ensure that contract clauses are consistent. In this case, other clauses in the engagement letter used concepts and terms with the aim of qualifying the entire list. If the same approach is not adopted consistently, the court may assume a different approach was intended.

Consider breaking up lengthy clauses into sub clauses and, when drafting a list, considering using additional determiners before key terms or reordering the list, to keep clauses clear and unambiguous.



COMMERCIAL

Determining whether a default interest clause is an unenforceable penalty

Houssein & Others v London Credit Limited & Another [2024] EWCA Civ 721

The question

How will a court determine whether a default interest rate constitutes an unenforceable penalty?

The key takeaway

A default interest rate should protect a legitimate interest of the innocent party and the sum to be paid must not be "exorbitant or unconscionable in amount or in its effect" in light of the legitimate interest being protected.

The background

London Credit Limited (**LCL**) agreed to loan £1,881,000 to CEK Investments Limited (**CEK**) for a period of 12 months by a facility agreement. The loan was secured via mortgages over Mr and Mrs Houssein's (the **Appellants**) family home (the **Property**) and five buy-to-let properties, along with other assets.

The case concerns the proper construction of the interest provisions in a facility agreement. In the agreement, contractual interest was 1% per month from the drawdown date; default interest was an additional 3% per month on the outstanding sum. Default interest was payable on an event of default (which included a material breach) or late payment.

Clause 6, headed "INTEREST", provided:

"6.1 The Borrower shall pay interest on the amount outstanding under the Facility, as from the Drawdown Date and at a rate of 1.00% (One per cent) per month (the "Interest Rate"). The Interest Rate is a discounted rate and assumed strict compliance with the terms of the Finance Documents. Such interest shall be calculated on the basis of a year of 365 days and shall accrue on a daily basis.

6.6 Default interest:
(i) Upon the occurrence of an Event of Default and/or if the Borrower fails to repay any amount payable by it under any Finance Document on its due date, interest shall accrue on the overdue amount from the due date up to the date of actual payment (both before and after judgment) at the standard rate, being 3.00% (Three per cent) per month above the Interest Rate (the "Default Rate"); …"

It was a term of the agreement that CEK would not occupy the Property. Prior to the funds being released, the Property was inspected to check it was unoccupied. LCL discovered that the Property was occupied. LCL initially claimed default interest on the outstanding sum owed until the breach was remedied. The Houssein family did not vacate the Property or pay the sums demanded. Consequently, LCL demanded immediate repayment of the loan in full plus interest at the default rate and threatened to sell the Property. The Appellants applied for an injunction to prevent the sale and then brought proceedings against LCL alleging that i) LCL had waived the non-occupation requirement meaning there was no breach of the agreement and no default interest owed; and ii) the default interest rate was an unenforceable penalty and therefore did not apply.

At first instance, the judge found that the 4% default interest rate was an unenforceable penalty and did not protect any legitimate interest of LCL. He also found that the 1% contractual interest continued to apply on outstanding sums even after the repayment date had passed.

CEK appealed on grounds that the judge had incorrectly interpreted the facility agreement. CEK argued that LCL was not entitled to interest at the contractual rate since this rate only applied up until the repayment date. Beyond this, the default rate of interest would have applied but for the fact that it was found to be an unenforceable penalty. Consequently, LCL argued that CEK was not entitled to any interest under the agreement. LCL cross-appealed on the judge's finding that the default rate of interest was an unenforceable penalty.

The decision

Was the default interest rate clause an unenforceable penalty?

The trial judge had applied the wrong test when determining whether the term in the facility agreement regarding default interest was a penalty clause.

The Court of Appeal held that when determining if a contractual clause is a penalty, the court must consider:

1. whether and to what extent the clause protects a legitimate interest of the innocent party
2. if the clause does protect a legitimate interest, whether the sum to be paid is "exorbitant or unconscionable" in amount or in its effect in light of the legitimate interest being protected.

The trial judge had failed to recognise that lenders obviously had a legitimate interest in charging a higher rate of interest after a borrower had previously defaulted in order to reflect the borrower's increased credit risk. The trial judge had also failed to consider whether the default interest rate of 4% was exorbitant, extravagant or unconscionable in light of the increased credit risk CEK posed. The Court of Appeal decided to remit the question of whether the default interest rate was extortionate, extravagant or unconscionable in amount or effect back to the High Court for reconsideration.

Was interest due after the repayment date and, if so, at what rate?

Applying the ordinary rules of construction, the contractual interest rate of 1% (clause 6.1) and default interest rate (clause 6.6) clearly applied in different circumstances. The relevant clause (clause 12.5) stated:

"Any monies falling due for payment by the Borrower pursuant to this Facility Letter and for the time being unpaid shall bear interest at the rate specified in clause 6.1 or 6.6, if applicable, calculated on a day to day basis from the date of so becoming due until the date on which payment is received by the Lender as well after as before judgment."

The judge was wrong to decide that the contractual rate of interest under clause 6.1 applied after the repayment date. The clause made it clear that monies which have fallen due for payment bear interest at the rate specified in clause 6.1 or 6.6, if applicable. "If applicable" was intended to refer to the circumstances in which the different rates apply and therefore, to the rate applicable in those circumstances. There was no room for an interpretation which allowed either the contractual rate under clause 6.1 or the default rate under clause 6.6 to spring back if the other rate was not "applicable".

It was not correct to revert back to applying the contractual rate pursuant to clause 6.1 if the circumstances were such that clause 6.6 would apply but the provision was found to be unenforceable. If the default rate of interest is found to be a penalty (after reconsideration), the contractual rate of interest will not apply on the sums outstanding after the repayment date.

Why is this important?

The case confirms the considerations that should be taken into account to determine whether a contractual clause, in this case a default interest clause, amounts to an unenforceable penalty.

Any practical tips?

Identify the legitimate interest that is being protected by the relevant provision and make that clear in the contract (including through recitals or acknowledgments).

Ensure that the remedy/interest rate is not exorbitant or oppressive given the commercial circumstances and consider what is normal in the market.

Be prepared to justify the proportionality of the remedy/interest rate, its significance within the overall commercial bargain, and the circumstances in which the parties entered into the arrangement.

Be clear on when the remedy/interest rate applies, and consider the effect of the remedy/interest rate being found to be unenforceable.

COMMERCIAL

Agent authority in contract variation

Advanced Multi-Technology for Medical Industry and others v Uniserve Ltd and others [2024] EWHC 1725 (Ch)

The question

When a principal appoints an agent to manage a supply contract on its behalf, how will the court determine the agent's authority to vary the contract, including contract terms dealing with variation.

The key takeaway

Regardless of existing formalities in the contract, an agent's actions may bind its principal to a variation of contractual terms, through its specific or apparent authority to do so.

The background

Advanced Multi-Technology for Medical Industry (trading as **Hitex**) was a medical supplies manufacturer located in Jordan. During the peak of the Covid-19 pandemic, Hitex entered into a contract (the **Supply Contract**) with Uniserve Ltd (**Uniserve**), a logistics supply company, to supply 80 million face masks.

Uniserve appointed Maxitrac Limited (**Maxitrac**), to manage the Supply Contract. According to Uniserve, Maxitrac was managing the production of masks and the relationship with the factory. Dr Stead was the sole director and shareholder of Maxitrac.

Hitex failed to meet the original delivery schedule. Maxitrac (through Dr Stead) agreed a variation to the original delivery schedule in a revised schedule, which Hitex subsequently met. Hitex claimed that Dr Stead had authority to agree a revised schedule with Hitex, and that an exchange of emails between Dr Stead and Mr Khader (of Hitex) on various dates had this effect. In contrast, Uniserve argued that:

- the exchange did not create a variation to the delivery dates agreed in the Supply Contract
- Maxitrac/Dr Stead had no authority to agree a variation
- the revised schedule was not valid because it did not comply with the formalities for a contract variation.

Uniserve's claimed that it terminated the Supply Contract, either in accordance with the Supply Contract or by common law, having accepted Hitex's alleged repudiatory breach in failing to deliver on time, in a contract where time of delivery was of the essence and it was clearly expressed to be a breach that was incapable of remedy.

The decision

Was the exchange "intended" to create a variation to the contract?

The court determined that, based on communications (emails and phone calls) between Hitex, Uniserve and Maxitrac, there were various indications that led towards the conclusion that the revised schedule was intended to replace the schedule for delivery set out in the Supply Contract. There were references in the exchange to an "agreed schedule", both parties acted as if this would have contractual effect, and Dr Stead and Mr Liddell (managing director of Uniserve) showed in communications between them (in which they discussed finding a way of abandoning the Supply Contract in place for a cheaper manufacturer), that they thought that this revised schedule bound them.

Did Dr Stead/Maxitrac have authority to agree a variation?

In separate communications between Dr Stead and Mr Liddell, it was clear that Maxitrac was Uniserve's agent or representative in some sense, but with no understanding between them that Maxitrac was Uniserve's agent, in the sense of a person with a general authority to create or alter legal relationships on behalf of Uniserve.

However, the court found that Dr Stead was given specific authority to vary the contract during a call with Uniserve's Mr Liddell. In this call, he was told to "get on with it" when discussing coming to an agreement with Hitex on the revised schedule, which Dr Stead construed as giving him the authority to agree an amended delivery schedule with Hitex. After the revised schedule was agreed, as described above, Dr Stead and Mr Liddell acted as if the revised schedule bound them, reinforcing the specific authority had been given.

The court also considered that Hitex had no reason to doubt that Maxitrac could not agree the variation as it was central to the discussions with Hitex for the whole duration and performance of the contract, and Hitex was entitled to assume Maxitrac had the power (by way of apparent authority) to agree the variation.

Was there a failure to comply with the formalities for a contract variation?

The Supply Contract contained provisions relating to formalities for amending the contract. Clause 17.2 in the General Terms and Conditions within the Supply Contract states that any:

"… variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised representative of both Parties."

Uniserve argued that this reference to an authorised representative referred to the parties identified in the order form which identified specific individuals and alternates as the "Uniserve Authorised Representative(s)" and the "Supplier's Authorised Representative(s)".

As this term was not capitalised, the court found that the meaning of "authorised representatives" in the contract should not be limited to the named "Uniserve Authorised Representative(s)" or "Supplier's Authorised Representative(s) in the order form." This meant that Maxitrac's emails could bind Uniserve to the revised schedule despite Dr Stead not being specifically mentioned in the order form.

Ultimately, the court found that the parties did agree to substitute the revised schedule for the original delivery schedule in the Supply Contract. In agreeing to this and not specifically reserving rights to claim for prior breach, Uniserve was found to have waived the breaches arising from Hitex' failures to meet the original contract.

Why is this important?

When using an agent, it is important to address the scope of an agent's authority and power to make decisions on behalf of the principal, both in the relevant agreements and in the agent's dealings with third parties.

Any practical tips?

Ensure that the scope of an agent's authority is set out clearly in the agency agreement, between the principal and agent. The scope of agent's authority should also be clearly provided to the other contracting party, whether in the contract or in writing.

Principals should also ensure agents are properly supervised and their commercial activities dealings are regularly reviewed.

If it is intended to use defined terms in a contract, use capitalised terms and definitions for clarity. Also ensure consistency between agreements and order forms, statements of work, etc, including as to formalities and authority.

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