



Covid-19: Advertising guidance for brands (UK)

30 April 2020

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The outbreak of COVID-19 is an unprecedented and rapidly-evolving challenge to businesses in all sectors. In the context of advertising, marketing and social media communications, the overwhelming regulatory focus has been on preventing the exploitation of consumers and on limiting the spread of misinformation. Regulators (in the UK and elsewhere) and social media platforms have taken steps to try to ensure that advertising is truthful and not misleading and to enforce other relevant standards. For many brands, the question is straightforward to ask, but complex to answer— how do I respond to the situation without sacrificing authenticity or breaching the rules?

This note seeks to help brands answer that very question, by setting out some of the key regulatory developments in this area, as well as providing tips for brands currently considering their marketing strategy / ad campaigns. While we focus on the UK advertising regime, the same or similar considerations will be relevant in other markets too.

Regulator response

Advertising regulators are closely monitoring the commercial response to COVID-19, and many have issued guidance. At an international level, the International Council for Advertising Standards, the European Advertising Standards Alliance, and the equivalent Latin American organisation (CONARED) issued a joint statement on 1 April 2020 reminding advertisers of existing standards and indicating regulators' intentions to prioritise and “deal harshly” with misleading and unsubstantiated claims made in the context of the pandemic. However, ICAS, EASA and CONARED indicated that they are also supportive of the brands that have made efforts to support governments and people in these difficult times, and that responsible advertising will continue to be encouraged.

The UK's Advertising Standards Authority (ASA) and the Competition and Markets Authority (CMA) have both taken measures to protect consumers, and to ensure that brands do not behave irresponsibly, or cynically seek to take advantage of the situation.

However, the UK regulators have also made clear that they will take into account the current circumstances when monitoring and enforcing standards and rules. It is clear that the regulators recognise that many businesses are currently under high pressure, and that they will seek to strike a balance between maintaining regulatory standards and taking a more flexible approach where appropriate.

The regulatory developments that we have noted below only mark the start of the response to COVID-19, and we would expect more changes to come as the situation evolves in the UK, and eventually when regulators begin to roll back the temporary measures that have been put in place at this time. Brands should be alive to these potential changes, and continue to monitor the regulatory approach.

ASA's regulatory approach

The ASA (the regulator that runs the UK's self-regulatory system) has taken a proactive approach to compliance, and has introduced guidance on responsible advertising relating to COVID-19, as well as taking swift action in the most egregious cases of companies or individuals seeking to use advertising to exploit the circumstances for their own gain (such as upholding complaints against misleading and irresponsible online face mask ads on 4 March that were seen a short time before in February). The ASA has introduced a new reporting form to fast-track consumer complaints about ads related to coronavirus, and enable the ASA to work quickly to contact brands and remove potentially harmful ads.

However, the ASA has also indicated that it will take more of a light touch approach in some areas of its work, recognising that it must act sensitively and with due regard to the circumstances faced by businesses and members of the public. For relatively minor complaints, the ASA has suggested that it will seek to advise brands rather than conduct investigations. We have also (in recent active cases) seen the ASA indicate it will be more ready to agree time extensions where businesses which are the subject of investigations are suffering from the effects of the lockdown. This clarification and approach will be welcome to many brands facing challenges at this time.

CMA's regulatory approach

The CMA (the government regulator that deals with market-wide regulatory issues and investigations) has also been quick to respond, launching a COVID-19 taskforce to address concerns, and issuing statements, including to warn businesses against any exploitation of the outbreak and to make clear that it will take action in response to unfair commercial practices including misleading claims. The CMA has also launched an online service to enable consumers and businesses to report unfair commercial activity related to COVID-19.

Platform response

Several social media platforms have restricted content related to COVID-19, primarily with the intention of tackling fraud and misinformation, but with a consequential impact on associated advertising:

- **Facebook** will remove any COVID-19 related misinformation that could contribute to imminent physical harm. Facebook has also made clear that it will continue work with its fact-checking partners to limit the impact of posts (including ads) by way of reducing distribution of certain posts and through the display of warning labels and notifications to users. In external statements, Facebook has claimed to have removed millions of ads and commerce listings for violating its policies related to COVID-19.
- **Instagram** has similarly committed to block or restrict hashtags on Instagram that spread coronavirus misinformation, and will remove COVID-19 content and accounts from recommendations unless posted by a credible health organisation.
- **Twitter** initially imposed a blanket ban on all advertising and paid posts which referred to COVID-19, but has subsequently changed its approach to allow managed clients and partners to advertise content containing implicit or explicit references to the pandemic in certain contexts (promotion of adjustments to business/practices or models in response to COVID-19 and support for customers and employees related to COVID-19). Restrictions apply to these use cases, including a prohibition on sensationalised content or distasteful references as well as the advertising of facemasks and hand sanitisers. Up-to-date guidance is provided on their blog.
- **YouTube** began shutting down ads on videos about COVID-19, but has since relaxed the rules to allow ads on videos by a limited number of creators and certain news partner channels following backlash from creators who complained about demonetisation for simple references to the pandemic.

The full extent of how these new policies will impact upon brand advertising is yet to be seen. Facebook recently restored a number of posts relating to coronavirus that had been incorrectly removed, though Facebook subsequently claimed that the removals were due to an error with spam filters and not any actions that it had taken in response to COVID-19. However, this incident does bring to light the fact that from a practical perspective, as platforms cut their moderation capacity and rely increasingly on technology to regulate content, there may be more instances of ads being removed without cause, such that brands will have to consider how to respond to such takedowns. Brands should in any event be careful about any references to coronavirus/ COVID-19 in their advertising, ensure such references are not likely to misinform, and monitor whether their advertising is triggering any unwanted blocking.

Key points to remember

Keep calm, re-consider campaigns, and (sometimes) carry on

We are sensitive to the fact that for many brands marketing is not currently a top priority, and that some brands have been hesitant to advertise for fear of associating their brands with the sensitive topic. There is value in taking a cautious approach in some circumstances, and re-examining whether previously unobjectionable campaigns could be viewed as socially irresponsible or even offensive in light of the drastically changed realities of life under coronavirus. To that end, KFC, recently decided to pause a new ad campaign around its longstanding, "finger lickin' good" slogan, which it found to take on a different meaning (and to be suddenly subject to complaints) in the context of medical advice to avoid touching their eyes, nose or mouths to prevent the spread of the coronavirus. In the short term, brands may wish to consider or pause upcoming ad campaigns which conflict with official guidance (an approach that Cadbury took in choosing not to air a television commercial for its Easter eggs which featured a grandfather hugging his grandchildren, which would have contravened current rules on social distancing).

However, in the long-term, brands risk losing engagement with consumers by choosing not to acknowledge or respond to COVID-19. Recent survey evidence suggests only 8% of consumers globally believe that brands should stop advertising, and brands have an opportunity to demonstrate through advertising their commitment to their purpose and values, and to potentially generate long-term brand loyalty.

Some brands may simply wish to acknowledge the situation in their communications with consumers, and should be reminded that there is no ban on referring to the pandemic in ads provided that the reference is made in a responsible way.

For other brands that are considering whether to go ahead with pre-planned ads, or looking to launch new ad campaigns directly responding to the pandemic, the key message is to think carefully about the tone and coherence with brand values. Brands that maintain authenticity and act responsibly may forego short-term profits, but stand to gain long-term consumer trust (and may benefit in the eyes of the regulator).

Be particularly careful with coronavirus-related products and online gambling

The ASA has made it very clear that it is monitoring closely advertising for products that are relevant to combatting or protecting against the spread or effects of coronavirus. This includes ads for medicines, medical devices, alternative therapies, food supplements, cleaning products, and personal protective equipment. Advertisers in these areas should be particularly careful to ensure they have robust evidence to corroborate any claims they may make as to effectiveness, and that they do not exploit peoples' fears about the virus.

Brands should also be sensitive to the public's current increased susceptibility to certain claims, and in particular health claims. For any claims which are capable of being proven, it is vital that such claims are fully substantiated, as it will be the advertiser's responsibility to show that such claims were true and not misleading at the time the claims are actually made. No ad should exploit an audience's fear in order to mislead them into buying a product, especially if an ad may be seen to target vulnerable consumers.

Advertisers in these markets should also be mindful of the specific regulation that applies to the marketing of such products (eg to medicines and medical devices), and of the detailed guidance produced by the ASA (including its recent guidance on hand sanitisers and face masks), and also by other regulators such as the MHRA (which has recently produced its own guidance on the regulatory status of personal protective equipment). One early conclusion from the ASA rulings on face mask ads is that the ASA is likely to take particular notice of guidance given by Public Health England; if a product is considered by Public Health England not to be effective, it is likely to be difficult to persuade the ASA of an efficacy claim which takes the opposite position.

Finally, it should be noted that the ASA has been quick to realise that there is an increased need to protect the public from problematic advertising for online gambling during lockdown. This is because the "lockdown", and the financial uncertainties that accompany it, have created an environment likely to encourage greater uptake of remote gambling, including among the young and problem gamblers. Gambling website operators should therefore review the ASA's latest sector specific guidance, and be careful to adhere to the extensive existing sector-specific rules and guidance.

Don't forget to consider charitable marketing requirements

We have seen a number of brands engaging in cause marketing as a means of connecting with local communities and to publicise their good deeds – for example, donating money or free meals to the NHS, increasing wages for staff and producing equipment to protect essential workers.

For ads in paid-for spaces (including press and online banner ads) or in non-paid-for spaces where the ad includes a direct solicitation of donations, marketers must ensure that any ads linked with similar causes are compliant with the ASA's rules on charitable marketing and take care not to overstep the mark by misleading consumers. These rules should be considered, for example, where a brand seeks to raise awareness of COVID-19 issues on its website alongside an encouragement to purchase a product where the proceeds of that product will be donated to a related cause. Whilst the ASA may allow a certain amount of leeway in respect of campaigns for good causes, brands should nonetheless avoid overstating the facts and seek to minimise any potential misleading or distressing impact on consumers through attention-grabbing, exaggerated or ambiguous claims.

Particular care should be taken for charity-linked promotions, as they are likely to be categorised as “commercial participator” arrangements under UK charities legislation, which then requires a particular form of contract to be entered into with the charity, and the inclusion of a particular compliance statement in related advertising.

Manage your relationships with influencers

An increased use of social media and decreased access to traditional sales channels, as well as the need to facilitate global connection in a world that is in lockdown, means that influencer marketing is currently a particularly valuable tool to sustain brand loyalty and purchasing intent. The issues raised by influencer marketing are well-known to brands, and should continue to be borne in mind in the current circumstances. In particular, brands should take care to monitor any social media posts to ensure compliance with advertising rules and consistency with the brand message given the greater risk of consumer backlash due to increased visibility and social responsibility concerns (and potential association with #fakenews).

Conversely, a number of influencer engagements will have been paused in light of current restrictions on travel and other activities. Brands should review their contracts with influencers, to ensure that any action taken to assess their options, in the event that performance has become impossible or different from what was originally contemplated. As influencers see an impact on their work, there is also a risk that brands will be exposed to negative publicity for any missteps in this area.

Consider impact on any ongoing promotions

Many businesses use promotional marketing, such as prize draws and skill-based competitions. Ongoing promotions may have been significantly affected by coronavirus and measures taken to combat it in various ways. Prizes (such as travel, or tickets to sporting or cultural events) may no longer be available, or may have to be deferred. Entry mechanisms (eg “send us a photo of you and a friend enjoying a meal at one of our restaurants”) may no longer be appropriate. You will need to consider the position both from a contractual perspective, and under the CAP Code. On the contractual side, you should consider the terms as drafted, and how relevant clauses such as any force majeure clause and clauses regarding ability to substitute alternative prizes should be interpreted. You should also look at the contract with any third party prize providers (can provision of the prize be deferred? Is a refund available?)

On the CAP Code side, there are strict limits on the ability to change rules during a promotion (it must only be done exceptionally and in such a way that the change would not have influenced consumers against participating). And above all, promoters should bear in mind that they have obligations to conduct promotions equitably, and to avoid causing unnecessary disappointment. Any changes mid-promotion to the way the promotion is run must be very carefully considered before they are implemented, and should be kept to the bare minimum.

The outbreak of coronavirus raises multiple advertising and marketing law issues, and the situation is changing daily. Specific legal advice should be sought where there are concerns about compliance. Our global advertising and marketing team can help you to navigate this difficult regulatory landscape and continue to produce creative and impactful advertising content throughout COVID-19.

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