Brexit: deal or no deal—how will it impact the advertising and marketing sector?

06/09/2018

TMT analysis: Geraint Lloyd-Taylor, legal director and deputy head of advertising and marketing at Lewis Silkin LLP, looks at the legal implications of Brexit for the advertising and marketing sector under the withdrawal agreement scenario and no deal scenario.

What are the potential legal implications of Brexit for the advertising and marketing sector under the withdrawal agreement scenario and no deal scenario?

At the time of writing, Brexit negotiations continue apace. But the current state of play is:

- a withdrawal agreement scenario envisages a situation where the EU and the UK are able to negotiate an exit agreement and a framework for their future relationship. This would provide an organised exit for the UK, probably with various further transitional periods (beyond March 2019) to gradually disentangle our respective political, legal, economic, social and other interests, with provisions made regarding the continuing effect of various existing EU laws
- a no deal scenario, on the other hand, would see the UK and EU part ways without any transition period. A no deal scenario is likely to create a 'cliff-edge' situation whereby EU laws, customs and protections would cease to apply to the UK after 29 March 2019

The advertising industry's self-regulatory model is unlikely to be drastically affected under either the withdrawal agreement scenario or the no deal scenario. However, a no deal scenario could have an impact on other, related legal issues of concern to advertisers, such as consumer protection, data protection and privacy, as well as broadcasting rules.

Advertising regulation

The UK's self-regulatory model should escape from either scenario relatively unscathed. In the UK, we have advertising codes. There are two versions of the codes:

- a broadcast version for TV and Radio, and
- a non-broadcast version for everything else, including online, cinema, print, etc

These are drawn up by the Committee of Advertising Practice (CAP), and are known as the CAP Codes. The CAP Codes are enforced (for want of a better word) by the Advertising Standards Authority (ASA). The ASA administers the CAP Codes under a system of self-regulation, which is funded by the advertising industry. This self-regulatory model operates on a national level, with little influence from the EU, save that the CAP Codes do reflect various UK laws—in particular consumer protection laws, data protection and privacy laws, comparative advertising rules, and various other laws and rules—many of which are ultimately derived from various EU Directives.

Despite the fact that EU Directives lie behind a significant number of important UK laws, we do have a number of derogations, which mean that, even before Brexit, UK laws relating to, say, intellectual property (IP) or consumer protections do differ in various ways from the laws in other major EU Member States, such as France, Germany and Spain.

As such, the practical impact of Brexit on the regulation of advertising in the UK will arguably be less significant than in more Europe-centric areas, such as trade or immigration. In a statement published in 2016, the ASA noted that Brexit would 'be unlikely to cause immediate substantive harm to the advertising self- and co-regulatory systems, or require marketers to change their approach to compliance with the Codes in the short-term' (see The potential impact of Brexit on advertising regulation).

The ‘European dream’ for the past few decades has been to move towards greater alignment or homogenisation of various rules and laws. The main implication of Brexit, which I don’t expect will affect the advertising and marketing industry particularly strongly, will be that (in theory) the UK may choose whether or not to follow that same path.

I expect that in practice the UK’s laws will continue along the same trajectory—especially in relation to IP and consumer protection rules, which lie at the heart of most of the rules which govern advertising and marketing in the UK. We are not expecting any sudden shocks or changes in tack in those areas, as they are likely to do more harm than good to our short, medium and long-term relationships and bilateral arrangements with the EU and the rest of the world.

Advertising codes

While the self-regulatory system as a whole should emerge from either scenario intact, consideration should be given to those elements of the CAP Codes which have their roots in EU law. For example, the rules dealing with misleading advertising in the advertising codes are underpinned by the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (CPRs). The UK introduced the CPRs in order to implement the European Unfair Commercial Practices Directive 2005/29/EC.

In practice, the immediate effect of a no deal scenario in this context is limited, as the CPRs are already part of the UK’s body of legislation which would continue in force after Brexit. However, there is potential in the long term for Brexit to cause a divergence between UK and EU law on this issue. This could create a scenario where a marketing claim could be considered misleading or unlawful in the EU, but not in the UK, or vice versa.

Perhaps more interesting will be where the UK wishes to impose higher standards or tougher measures in areas which are currently restricted by maximum harmonisation measures. For example, the ASA and other regulatory bodies are restricted in their interpretation of misleading claims. Claims have to be ‘materially misleading’ and are subject to the tests which come from the EU Directive and which have been shaped by European case law. In the future, the ASA and other regulatory bodies (such as Trading Standards) could technically apply a different test, and they could exercise broader discretion. So, an ad which is arguably slightly misleading but doesn’t satisfy the test of being ‘materially misleading’ (ie likely to deceive consumers and likely to cause consumers to take a transactional decision that they would not otherwise have taken) should not technically result in an upheld ASA ruling. However, in the future, the standards could be changed, and the ASA could allow itself greater discretion in deciding these matters.

Other industry-specific advertising rules in the CAP Codes also stem from EU legislation. This includes the food industry, which will be impacted in various ways, from health claims, to weights and measures, to age restrictions, to the protection of ‘designations of origin’ for products like Champagne and Camembert (as well as our own Melton Mowbray Pork Pies and Cornish Pasties). For example, the Regulation on Nutrition and Health Claims Made on Foods (EC) 1924/2006 sets out the claims that can be made in relation to food products and this is reflected in the advertising codes administered by the ASA. However, unlike the CPRs, these rules originate from an EU Regulation rather than a Directive, meaning they have direct effect in the UK without the need for implementing legislation. To a limited extent, a cliff-edge exit from the EU could create some uncertainty as to the effect of such rules, as there is no domestic legislation implementing the Regulation in UK law. However, in practice these rules would continue in force for as long as they remained part of the CAP Codes administered by the ASA.

Given Brexit and uncertainties surrounding the withdrawal agreement scenario and future trade arrangements, how are practitioners adapting their advice to clients?

Contrasted with the frenzied media coverage in other industries, the message for those in the advertising and marketing sectors post-Brexit is that it is ‘business as usual’. As mentioned above, the UK already operates a relatively self-sufficient system of advertising regulation, with little interference from the EU. In addition, the UK government already plays an active part in setting the agenda for the regulation of advertising. By way of example, the marketing of high-fat, salt and sugar products has become increasingly regulated in the UK in response to political pressure to address the issue of childhood obesity. This highlights that the UK government already plays a

fundamental part in shaping the 'self-regulation' of advertising in the UK, and therefore Brexit is unlikely to have a drastic impact in this area.

As Brexit is unlikely to have an immediate, substantial impact on the advertising and marketing sectors, there is no pressing need for practitioners to radically change their existing advice to clients. The key focus for practitioners will be monitoring any changes to the CAP Codes (which tend to happen at a glacial pace) and related UK legislation post-Brexit.

One recent example (again, pre-Brexit) involves the rule in the CAP Code which requires that promoters make available a list of winners after they operate a competition or prize draw. The introduction of the General Data Protection Regulation, Regulation (EU) 2016/679 (GDPR) has thrown a spanner in the works, and the ASA has (at the time of writing) made it clear that it will not enforce this rule until it decides how to reconcile this rule with the requirements of the GDPR (legislation which it had several years to plan for). It's likely that we will see more of these sticky situations cropping up over the next year or two, and hopefully the ASA will find a way of providing quick, clear guidance to advertisers when these issues arise.

Practitioners may also want to advise clients that, in the long term, there is potential for the UK and EU to adopt differing stances towards issues such as direct marketing and consumer protection. This is unlikely to pose an immediate issue, but may require brands to seek separate advice on such issues when executing Europe-wide campaigns in the future.

Are there any related issues which practitioners advising on the advertising and marketing sector should consider?

There are a whole host of issues related to advertising and marketing which practitioners will need to consider in light of Brexit, including consumer protection rules, consumer data, comparative advertising and so on.

Direct marketing is one area that is more closely intertwined with EU law. This area has undergone a significant shift with the introduction of the GDPR and is braced for introduction of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 (PECR), which will sit alongside the Data Protection Act 2018 and the GDPR.

The current consumer protection regime is also based largely on EU law. Similarly, the rules on comparative advertising, as set out in the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276, and affecting other UK legislation such as the Trade Marks Act 1994, are derived from the EU Comparative Advertising Directive 2006/114/EC.

In fact, trade marks and designs, involving formal registrations, will also inevitably be affected. As one pulls one thread, inevitably it leads to more and more issues unravelling, but until we see what the UK's withdrawal will look like there are simply too many variables, so a cool head, crossed fingers and nimble feet are the order of the day, until more information about the withdrawal arrangements (and any further transitional arrangements) come to light.

Conclusion

Overall, the regulation of advertising and marketing in the UK should remain intact after Brexit, whether or not a withdrawal agreement is reached. Where the uncertainty comes into play is how the UK will regulate issues such as consumer law and data protection in the event of a no deal scenario.

Interviewed by Evelyn Reid.

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