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The AdLaw Insights Podcast, with Brinsley & Geraint (Ep 7): Advertising less healthy foods

Geraint: Hello and welcome to episode seven of the AdLaw Insights podcast with Brinsey and Garrett, but also this time with Rebecca or Becky from our Manchester office. Hello, Becky. Thank you for joining us. We're going to be talking about LHF, less healthy foods, not to be confused with HFSS, foods that are high fat, sugar and salt, although they are relevant and they are sort of interlinked.

Becky: Hello, thank you for having me.

Geraint: I'm looking at Brinsley, I'm hoping that you can just set the scene for us. What is going on in this space of less healthy foods?

Brinsley: Yeah, so this is the latest course in the menu of advertising restrictions. Okay. That was spontaneous. Just a quick refresher that the concerns about child obesity in particular gave rise to the first round of restrictions on advertising for HFSS foods to children in 2007. And at the time there was some controversy about that, particularly around the ~ nutrient profile modelling that's used for deciding what foods are HFSS and what are not, which produces some slightly surprising results when you think, the policy objective is to cut rates of childhood obesity. Why is Marmite, for example, an HFSS food? Doesn't seem like a likely culprit. Now, since 2007, childhood obesity rates have continued to increase somewhat. There might be an argument to say, well, this means that what we need is tighter restrictions. Or it might be an argument to say, actually advertising represents quite a small part of the problem or one of the small causal factors. And there was a big spike around the pandemic, a very noticeable spike. So that was clearly an issue. And then there was also a big correlation between social deprivation.

And childhood obesity. there are clearly other things going on which advertising regulation won't fix. And I mentioned this because I heard Henry Dimbleby being interviewed on the Today program last week. And he said the new rules on less healthy food advertising don't go far enough and it should be treated like tobacco advertising and it should all be banned. I take some issue with people who hold that view. I don't think food advertising is like tobacco advertising and I don't think a complete ban is remotely called for. So that's the background. You'll recall that ~ during the dim and distant days of the Johnson government, he started making noise about having more restrictions.

Geraint: This was because he needed to lose weight because he'd been told by some nurses while in hospital that he could do with losing weight and then we all had to go on a diet.

Brinsley: Well, that's right. I mean, there were those terrible times, which I know you and I were both very upset about, when poor old Boris was in hospital with Covid. I wouldn't wish Covid had yet. No, no, of course

not. But apparently this made Boris realise when he was in hospital with Covid that apparently he was told your obesity is why you were at greater risk.

And from that, he had a Damascene conversion, although you might have missed it and decided that what we needed now was more restrictions on food advertising. So then we had the changes to the underlying law in this, which has taken some time to come through. We had the first round of consultation by the ASA in December, 2023, coming up for two years ago. And that then kicked off this whole long period of uncertainty about whether or not brand advertising was going to be excluded or not from the new regime. The government saying, because we want to encourage food manufacturers to reformulate their products so they can continue to brand advertise. Basically, the ASA kind of saying, okay, well, it's up to you to set the policy, but we don't think that's what these regulations say.

So, there was then a long protracted ding-dong about all of that. And that brings us pretty much to where we are today, where we don't have any final guidance. People are still referring to that draft guidance published in December 23, but it is being re-examined and new guidance is due out before the end of this year from the ASA, with the government also now saying, okay, we appreciate we need to amend the regulations to make it much more clear, that brand advertising is excluded from the new regime.

Geraint: Perfect. So we have a distinction there between brand advertising and product advertising. I don't know if Becky you want to sort of outline what is the difference.

Becky: Yes, so brand advertising would be by definition very much more about the brand. It might be about different schemes that are being running by the brand, whether that's social mobility schemes or different things that they might be doing in the community. Whereas product advertising is very specific to selling a product in effect, but would also capture anything where a product is featured in the ad. So if you name a product in the ad,

You might have it as part of the scene where it's very clear that that product's there. So the distinction sounds quite simple by nature, a brand versus a product, but then when you start to look into it, there are nuances that sit behind it where it's where the grey area is introduced, which is how we've ended up where we are now.

Geraint: And is that mainly where a brand is synonymous with a particular product, for example, or is that something that's more in this sort of old world?

Becky: I think that's the old world rules and that's where the ASA took this for a while and that's why we've had to the new legislation. Do you think there's still those grey areas where some brands will have characters, equity characters that are specifically associated with a food, question whether they still then are indirectly now caught? So that is still something that is of a concern probably for those type of companies.

Geraint: Okay, so the main restrictions are in relation to product ads, not necessarily so much in relation to brand ads. Does it also make a difference which media we're talking about?

Brinsley: Very much so. Yes. So probably worth explaining that we still have all the advertising restrictions for HFSS foods. They are continuing to run. Within that, there is a subset now of less healthy foods, which are basically HFSS foods, which are within 13 categories that have been defined in the regulations. the new restrictions...

Geraint: I'm not going to ask you to list those, but tell us a little bit about that.

Brinsley: I think they're intended to be the foods which are most likely to cause a problem of obesity. an example might be pizzas,

Becky: Ice cream.

Brinsley: Ice cream, confectionary, very sugary breakfast cereals, all those kinds of things. And within the regulations themselves, they set out the categories and there's guidance that says, and examples which might be included are these, but these are examples of things that wouldn't be caught. And some of it is quite surprising. We've been debating sausage rolls, which appear not to be caught. I think they're one of the ones listed as an excluded one. I mean, don't hang your hat on that if you're listening to this podcast, please, because it does seem very peculiar. Yes, yes, yes. So, well, we know that David Cameron was a big fan of Greg, so maybe there was some.

Geraint: A relief for Greg's fans.

Brinsley: I'm sure he wouldn't have lobbied on behalf of Gregg's heaven for fend. We know how David is obscenious about this kind of thing. I'm confident that is not happening. So you've got this kind of subset of HFSS foods, which are the less healthy foods. Now, if a product is not caught in that subset of LHF, it will still be subject to

Geraint: Don't think he's getting a free sausage roll.

Brinsley: Pre-existing HFSS rules, which continues to run. Important to remember that. But if you're in the subset, you basically are not allowed to advertise on basically every form of television between 5.30 in the morning and nine o'clock at night. ~ You can, by the way, still advertise on radio, but not on television. And also, you cannot advertise in paid for space.

online. So you can continue to have your own websites and your own social media channels and advertise on those. It does appear that you wouldn't be able to use an influencer to ~ advertise an LHF identifiable product. would not. You would not. So this is going to be a significant change. So you could get your influencer to do your brand ad and maybe say,

I went to this restaurant, this well-known hamburger chain restaurant, this well-known pizza restaurant and had a fantastic meal. But you wouldn't, for example, be able to have a picture of them tucking into an

identifiable product. That's a very important new aspect of all of this, I think. so, yes, so it's paid for space online and television are where these new rules are going to bite.

Geraint: Very good.

Brinsley: Thank you. I thought you'd like that one.

Geraint: You've got one fan.

On the topic of influencers, Brintsey, there are lots of influencers that go out and review restaurants and the food that they're eating in great detail. Do you have any advice or tips or thoughts on that topic?

Brinsley: Yes. one of the slight challenges with these regulations, which by the way are complicated and confusing, is that nowhere does it say thou shalt not use influencers. It just says thou shalt not advertise online.

And the indication of that is that if you pay anybody for your online advertising, then you will be in breach. So the question becomes, well, has this influencer been paid? And we have to use the kind of very wide definition of payment. So if they've been given, for example, a complimentary meal in a fast food restaurant, and then they talk about on their channel, that would be paid for advertising.

I think even if they're not told what to say or when to say it or how to say it, the simple fact they haven't paid for it out of their own pocket would make it paid for advertising online and therefore that is prohibited under the new regime. So influencers need to be familiar with the rules as well as anybody engaging with influencers? Well they do provided, you know, if they're not being paid, if it is genuinely truly organic content and no incentives and

No retrospective kind of reward for saying something obliging and no freebies. mean, I always think generally with influencers, I always take the view of have you paid for this out of your own pocket? If you've been given it and you haven't paid for it, then you're not really acting as a consumer and therefore you are acting as an influencer.

Geraint: Perfect. And in terms of the timings, that's the other thing that's been under debate and discussion. Are these new rules coming into force in October? Are they coming into force in January? Where are we?

Becky: Good question. Technically, they come into force on the 5th of January. So the government put back the legislation to allow it to introduce this brand exemption and have time for it to be consulted on. But there is a voluntary commitment to abide by the rules as they were set out from the 1st of October. So it's circa three weeks now.

Obviously it's a voluntary commitment, but to that extent, Clearcast won't allow anything on the television that is in breach of those regulations. So to that extent, it's enforced. The ASA on the other hand, still has, ~ we still don't have its final guidance and it won't be able to enforce the online part of the regulation until January. However, from a social responsibility perspective, I think most advertisers will.

try and run with the voluntary commitment and be ready for the fifth edition.

Geraint: And the dates are important because January gives people comfort that actually Christmas ads won't be impacted, but they probably will be impacted, particularly the sort of expensive TV ads because Clearcast are not in a position to approve them, is that right?

Becky: Yeah, that's correct. It's really difficult because people, you know, surprisingly plan their TV ads in the spring, summer time. So yes, there is, it helped with the certainty for Christmas advertising that it's technically not caught, but they still would have to run through playcast.

Brinsley: Yeah, I think there's been a trade off really between, if you like, certainty versus freedom. So advertisers haven't had the freedom that they would have had ~ possibly if this had all been delayed until January. But on the other hand, there is certainty. Everybody does know what they can play with. And once they get through Clearcast, they will know that their campaign should be safe. mean, if you had a Christmas campaign breaking, let's say on the 15th of November, as I understand it, because the ASASN, well, we can't enforce the rules until January. Once you're on air, you're safe. Because even if the ASA received a complaint, say on the 16th of November, and started investigating it and with kind of maybe unusual haste, completed their investigation before Christmas, it's just not going to come off there because as I understand it, the ASA will say, we can't launch an investigation until after Christmas. Now, I suppose there is a possibility. I think it's unlikely. I'm not sure they've said what they would do, whether they would pick up a complaint in January and say, right, actually, we've now received a complaint about a pre-Christmas ad, which we broke the rules. don't think they've said no, Becky, you're agreeing, yes?

Becky: Yeah.

Geraint: But we'd have a field day with that, defending somebody on the basis that you can't sort of say that.

Brinsley: That sort of retrospective. Yeah. Yeah. Yeah. And that wouldn't, I think that wouldn't be in the spirit. So as I understand it, why has this come about was a sort of political fudge because there was something of a disagreement, I think, between the government about whether or not brand advertising was excluded and the regulators saying, well, you keep saying this, but we, you know, we've had legal advice which endorses our view that the regulations don't exclude brand advertising and so the compromise was, right, well, we'll have a moratorium so we can change the regulations to make this more clear. But in exchange, the kind of industry said, all right, well, if you'll do that, then we'll agree just to have a kind of voluntary ban so that there's kind of no prejudice to anybody.

Geraint: Makes sense. So for everybody who is trying to get in line with the new rules, given that you mentioned at the outset, they're not completely sort of crystallized. Where are people looking for the most

definitive guidance? So as guidance published back in December 2023, is that still the most reliable guidance to be following?

Brinsley: Definitive guidance is on the ASA, the Lewis Silkin AdLaw blog. Of course.

Geraint: And we'll share as we always do along with this podcast links to use for guidance. that's the one we'll be sharing with people.

Brinsley: Bet you were going to answer that question properly.

Becky: It is December 23, that's the one referenced in the voluntary commitment and until we know further, that's the most up to date.

Brinsley: And there is also, I mean, I mentioned about this government guidance to the regulations, which sets out the 13 categories and then gives the guidance to kind of what the government considers to be in and what is out. So it will be interesting to see how the Christmas ads look because of this identifiable issue, because often in Christmas ads, what we see is a magnificent Christmas lunch spread of food, some of which, well, usually it's the food, you don't see the food in its packaging. You see the Christmas lunch table with say, some sausages. Now, if they're not in a pack and they're not in any way identified, but you know at the end, okay, that's an ad for this particular supermarket. So presumably these are all foods of a kind you can buy at that supermarket. My expectation is that that would be a brand ad for the supermarket. But there is some uncertainty because when you can still, you can see the sausages on the plate, but are they identifiable? My understanding is no, but…

Geraint: There a sausage roll, then you might be in business again. So there are lots of these sort of grey areas. So it is very important to check the guidance and check through it as to whether you're in or you're out, whether there's an exception that applies or not. But it's not just these brands that are sort of food brands. It is, as you're saying, retailers, supermarkets and others.

Becky: Delivery companies, ~ everybody, even if it was a car company with food, identifiable food in the ad, that would be caught too.

Geraint: That's an interesting point. I think it's sort of, we often sort of mentioned that we're going towards a more French approach in these sorts of things. In France, they have rules around eating in a healthy way, not showing people, not eating at a table. have to, you can't show kids eating in front of a TV, for example. We're not heading down that road yet. The point of these rules is to try and tackle obesity levels across the UK, focusing probably on children. Do you think it's going to work? Do you think these new rules once they've been ironed out? Is that going to achieve that goal either of you?

Brinsley: I don't think so. I think this is actually very, this whole policy going back to 2007, ~ I think it's very dangerous because I think it's deflection. It allows government to say, yes, we take this terribly seriously and

we're doing everything we can to tackle it. Whereas in fact, they're not. School playing fields were sold off 40 odd years ago.

Teachers are overworked and underpaid and frazzled and not inclined to stay on at school and do after school sports clubs. Domestic science and cookery are not taught in schools. You can't really afford to live in, certainly not in London. Tube Drivers are saying they can't afford to buy a house when they're paid £75,000 a year. Most families, mum and dad both work, which means

isn't the bandwidth to cook a healthy meal from scratch at night for the family. There are all these really complicated problems that will take a long... I mean, they may be insoluble. Others will say, well, advertising is still one of the causes, so let's tackle advertising. I take that point, but the problem is it just allows politicians to then just completely ignore all the other factors.

And so they will continue to run and as far as I'm concerned, the problem will continue and not get any better.

Becky: It will be interesting to see if they run statistics in three, four, five years time to see what has changed and if anything has changed. Cause part of the reason for the brand exemption is to allow companies space to reformulate less healthy foods. Question is, would you do that if you're still selling X volume of ~ less healthy food? So there's a supply and demand element to that. So it will be interesting to see over the years if it does have any.

Brinsley: Yeah, I mean, I suppose if you look at Coca-Cola, you know, when I was a kid, there was only one type of Coca-Cola, ~ the kind of full fat type. Obviously now there's a gazillion types, but my certainly, you know, my sense is that these days, probably the biggest variant that gets sold is the Coke Zero. So I guess that's an example of reformulation at work and that works successfully. It probably takes quite a long time for the for consumers to adopt the healthier version, but it does happen.

Geraint: So for the time being, it's better to check the latest guidance, make sure that you're all lined up for October or at least January, depending on the media that we're using.

Brinsley: Yes. And I think people need to have conversations as early as they can with Clearcast. And I think be as transparent in your dealings with Clearcast as possible and as detailed as possible and really make sure you're explaining to Clearcast very clearly exactly how your shot will look. Because what you don't want to do is sort of get that initial okay for a script and then submit a final film and have Clearcast say:

“Okay, the script was all right, but now we've seen the film, you can't have this shot and this shot and this shot”. So much better to be very precise in what you're saying to Clearcast in order to get robust approval or understand why approval is being withheld so you can fix it.

Becky: Yeah, I also think some companies, I mean, there are a lot of large companies who might already have this in order through nutrition teams, smaller companies might not. Is to have those certificates in place.

So Clearcast will ask for certificates as evidence. If you're trying to say it's not a less healthy food, they will want a certificate evidence in that. So it's worth going through that nutrient profiling model for all products really that are up for sale so that you're ready with the information.

Brinsley: Yes, and actually, Becky mentions smaller advertisers. mean, there is an exemption for small to medium sized enterprises with less than 250 employees. Hard to imagine that many of those will be advertising on television anyway, but the online ban will impact on them. And so they will continue to be able to, for example, use influencers online if they're a sort of artisan food company or some description.

Geraint: Excellent. There's lots of useful guidance and advice just there that we've covered. We will make this available as well online. We've also got adlaw.luissilkin where we publish a lot of updates from time to time ~ and lots of other information available on our website. And obviously you can contact any one of us if you want to discuss any of these topics further, including LHF. Thank you very much then to Brinsley and to Becky. It's been a pleasure.

Becky: Thank you for having me.

Brinsley: Thank you.

Geraint: And we'll see you next time for the next episode of our podcast.

Brinsley: Cheerio.