

First published on **The International Forum for Responsible Media Blog** at:
<https://inform.org/2021/03/10/marketers-in-hot-water-asa-rulings-during-the-covid-19-crisis-alexandros-antoniou/> (10 Mar. 2020)

Marketers in hot water: ASA rulings during the COVID-19 crisis

Being conscious of its regulatory role during the ongoing global health crisis, the Advertising Standards Authority (ASA), the UK's regulator of advertising across all media, aims to act with due regard to the circumstances faced by businesses in the current emergency. Since the beginning of the pandemic, the regulator seems to have adopted a layered approach to the implementation of its rules.

'Forbearance'

Following the Chancellor's reference to "[possible regulatory forbearance](#)" in his March 2020 speech on the government's measures to address the economic emergency, the regulator announced it would adjust accordingly its regulatory approach towards relatively minor advertising indiscretions by businesses facing an "existential threat" e.g., the hospitality industry, event organisers etc.

Where a marketer, for example, was unable to carry out or had to rethink elements of a promotion because the impact of COVID-19 had derailed their original plans (e.g., by creating unanticipated high demand of a product or service) and failed to put in place suitable management measures to justify amending a promotion and communicate this to consumers in a timely fashion, a more light-touch approach may be warranted where a breach of the rules on [promotional marketing](#) could not have sensibly been foreseen. Or, an advisory rather than investigatory approach may be adopted where it was the first time a complaint was raised against an advertiser.

A tougher approach

During a period which saw an intense sale of high-demand products (e.g., hand sanitisers), the regulator seems to have escalated its regulatory interventions in cases where marketers have unfairly taken advantage of the ongoing global disruption for financial gain or acted in a way that disadvantages consumers. Key areas of concern that have emerged so far include medical claims about COVID-19, alternative and complementary therapies, food supplements as well as irresponsible advertising practices.

The regulator is likely to take a dim view of an advertiser who makes unsubstantiated 'medical or medicinal claims' as such claims may only be made with respect to licenced medicines or appropriately marked medical devices in compliance with Sections 11 and 12 of the BCAP and CAP Codes respectively. For example, the ASA banned a paid-for Facebook ad and a website post for a COVID-19 test provider which gave the impression that a positive antibody test would show that people were immune to the virus (ASA Ruling on XMedical Ltd t/a Corona Test Centre, 14 Oct. 2020). The regulator also banned an ad in *The Sun* making unsubstantiated claims that a reusable copper-infused face mask would instantaneously kill particles of COVID-19 that came into contact with it (ASA Ruling on Easylife Group Ltd, 11 Nov. 2020).

Unsubstantiated reduction of disease risk claims or claims that food supplements can prevent or treat coronavirus infection can be particularly problematic. The ASA targeted, for example, Instagram posts from the accounts of Cosmetic Medical Advice employees which implied that an intravenous fluid drips treatment could help prevent people from catching coronavirus (ASA Ruling on Cosmetic Medical Advice UK, 22 Apr. 2020). In another ruling, a national newspaper ad for a brand of honey was banned for implying that it could be used as a treatment for coughs and that its "anti-microbial" properties could prevent or treat human diseases (ASA Ruling on Manuka Doctor UK Ltd, 6 Jan. 2021). Sections 13 and 15 of the BCAP and CAP Codes limit nutrition claims about foodstuffs to only those expressly listed as authorised on the [EU Register of Health Claims](#).

Moreover, the ASA tends to rely on its general rules on social responsibility (Section 1 of the BCAP and CAP Codes) and material misleadingness (Section 3 of the BCAP and CAP Codes) when targeting ads that seek to profit from the ongoing public health emergency. For instance, in December 2020, following complaints by Stella Creasy, Labour/Co-operative Member of Parliament of the United Kingdom, the ASA banned four Instagram posts made by influencers in association with Klarna Bank for promoting the use of the company's deferred payment service in an "irresponsible manner" in breach of the advertising code (Ruling on Klarna Bank AB, 23 Dec. 2020). The controversial ads encouraged the use

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of credit to purchase beauty and clothing products in order to help with boosting people's mood during the challenging circumstances faced by many consumers in the national coronavirus lockdown period.

More recently, the ASA [banned](#) Ryanair's "jab and go" TV campaign on the grounds that it encouraged the public to act irresponsibly once they had received a coronavirus vaccination shot (Ruling on Ryanair DAC, 3 Feb. 2021). The ban came just days after the Ryanair chief executive, Michael O'Leary, [stated](#) in a BBC Radio 4 interview that he expected a revival of European beach holidays in summer 2021.

The Ryanair ruling deserves perhaps a more detailed consideration because it is the first ad with a marketing message about emerging from the pandemic that was found in breach of the regulator's rules.

'Jab & Go!': addressing the post-COVID-19 life

The two controversial television advertisements launched on Boxing Day and were seen between 26 December 2020 and 4 January 2021. The [first ad](#) featured a medical syringe and a small bottle labelled "vaccine" along with on-screen text stating "vaccines are coming". The voice-over encouraged consumers to snap up Easter and Summer bargain deals to sunny European countries like Italy and Greece, because "you could jab and go". Footage also showed people in their 20s and 30s at holiday destinations. During the last few seconds of the ad further on-screen text reinforced the same message with large lettering stating: "Jab & Go!" The second ad was similar, except that it included a different price offer.

The advertisements attracted 2,370 complaints and were challenged on three grounds: first, that the ads, and particularly the "Jab & Go" claim, were misleading because they gave the impression that large parts of the UK population would be vaccinated against COVID-19 by Summer 2021 and unaffected by travel restrictions related to the pandemic; second, that the promotional statements in the ads were offensive because they trivialised the effects of the pandemic on society; and finally, that the ads encouraged people to behave irresponsibly once they received a coronavirus vaccination shot.

The commercial aircraft carrier submitted that their ads were first broadcast at a time during which the government continued to give "optimistic briefings" implying that a significant proportion of the population would be vaccinated midway through the year. In addition to the timing of the ads' broadcast, the general public's familiarity with information about the vaccines, the rollout schedule, the continuously changing international travel restrictions and inherent uncertainty in the travel industry, as well as the use of conditional language in the voice-over ("could"), were all important contextual factors which would enable the average viewer to understand the ads envisaged "a hypothetical Easter or summer holiday."

However, it was exactly this context, marked by uncertainty and complexity, that placed an additional level of responsibility on advertisers to act cautiously when linking developments in response to the coronavirus pandemic with buyers' decision-making processes, especially at a time when consumers were likely to feel apprehensive about booking holidays.

A misleading and irresponsible ad

The ASA found that both ads breached [Rule 3.1 of the UK Code of Broadcast Advertising](#) (BCAP Code) by materially misleading consumers about the impact that COVID-19 vaccines would have on their ability to travel abroad during Easter and summer 2021. The regulator considered that the information available at the time the ads were broadcast left no doubt that it was "highly unlikely" that societal groups falling outside the priority list for 'phase one' of the planned vaccination rollout schedule (i.e., the most vulnerable individuals in society) would be maximally protected in time to go on holiday in either Summer or Easter 2021.

Moreover, while the vaccines have been proved to provide some protection against developing serious illness, much is unknown about how the vaccine may prevent its spread from one person to another. Hence, vaccinated individuals are [advised](#) to continue adhering to social distancing and wearing face coverings. Such measures were likely to remain in place for both vaccinated and non-vaccinated people "in at least the short- to medium-term", the ASA stressed.

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The overall impact created by the elements of the ad, including links to the planned vaccination rollout in the ad and the accompanying footage (featuring a group of young people jumping together into a pool and a couple being served by a waiter without a mask) overshadowed the conditionality of the word “could” and conveyed a misleading message: i.e., that most people who wished to go on holiday would be vaccinated in time to be in a position to do so and could go on holiday without restrictions as a direct result of being vaccinated against COVID-19.

The ads were also found to have breached [Rule 1.2 of the BCAP Code](#), which requires marketers to prepare advertisements with a sense of responsibility to the wider society. The emphasis on the vaccines from the very outset, as well as the suggestion of immediacy and speed of access through the claim “Jab & Go”, encouraged people to behave irresponsibly by prompting those not yet eligible to be vaccinated to arrange vaccination at a time when health services came under intense strain. Moreover, the featured imagery of people enjoying typical holiday activities without observing social distancing would lead some viewers to infer that it was possible for anyone to get vaccinated by Easter or summer 2021 and go on holiday once vaccinated without necessarily adhering to restrictions, posing risks for their own and others’ health.

But not an offensive ad

The ASA ruled, however, that the Ryanair ads did not breach the harm and offensiveness rules under [Section Four](#) of the BCAP Code. Although their “celebratory” tone was “distasteful” to some viewers, they were not found to be insensitive to the wider impact of the pandemic and were unlikely to cause serious or widespread offence against generally accepted societal standards. Presumably, the position would have been different, had the ad made light of the emotional toll the pandemic has taken on individual and collective well-being or otherwise trivialised its effects.

Interestingly, the evaluation made by Clearcast, the non-governmental organisation which pre-approves ads for broadcast on the UK’s main commercial channels, was out of step with the ASA’s assessment. Clearcast took the view that the Ryanair ads contained “a hopeful message” that holidaying in summer 2021 without social distancing was a real possibility and when the ads were approved (when England was coming out of its second lockdown) “it looked like better times were coming”.

The Ryanair ruling serves as a useful reminder that, in the aftermath of the Prime Minister’s [announcement](#) about England’s roadmap for easing coronavirus measures, marketers who promote services or events that necessitate lifting of business or travel restrictions need to exercise caution when dealing with post-lockdown life. This is especially the case when links are made between fast-moving developments in the country’s response to the pandemic and the consumer’s confidence in purchasing a product or service. Finally, the Ryanair ad creates an opportunity to look into the regulator’s approach to the application of its harm and offence rules in the COVID-19 context.

Harm and offence in the time of coronavirus

At the time of writing, and since the onset of the pandemic, only five coronavirus-related rulings engaged the harm and offensiveness rules under Section Four of the advertising codes. With the exception of the Ryanair ruling, complaints were upheld in all four cases. However, only one of those was found to have crossed the line in terms of harm. The ASA’s justifications for banning the remaining three were couched in offensiveness terms.

More specifically, a newspaper and Instagram post by a hemp shop were deemed ‘harmful’ because they described COVID-19 as a “hoax” and “incited” people to break the law by discouraging them from wearing face coverings in shops (ASA Ruling on Geraint Christopher t/a Hemp in Avalon, 2 Dec. 2020). Concerns about harm in coronavirus-related advertising content seem to be associated with marketing messages which raise the risk that consumers’ trust in public health advice could be undermined, with potentially serious consequences not only for their own but also others’ health. This broad approach to societal harm is noteworthy in this context. Some [parallels](#) may be drawn with the Ofcom’s (the UK’s communications regulator) approach, which has also found harm arising from broadcast content contradicting official governmental guidance.

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Offensiveness manifested itself in a product listing on Amazon as well as paid-for display ads and website claims about face coverings that made use of alarmist language likely to cause fear without justifiable reason (ASA Rulings on Easy Shopping 4 Home Ltd and Novads OU, 4 Mar. 2020). A newspaper ad for mattresses was also banned for being offensive because it associated immigrants with diseases such as the coronavirus (Ruling on Vic Smith Bedding Ltd, 11 Mar. 2020). That stated, the ASA seems to have overlooked in the former cases the potential for significant harm to the wider society arising from exploiting people's health-related fears or anxieties. Also, by examining the Vic Smith Bedding ad through the lens of offensiveness, the regulator seems to have discounted the potential harm to ethnic minority groups who have been assaulted or [denied services](#), like transport, because of fear that they may pass on the virus. It may also be suggested that the ASA minimised the importance of the role of advertising in potentially exacerbating or [reinforcing](#) socially harmful attitudes. The media have also reported cases of xenophobia and racist [attacks](#) against students of Asian descent due to the virus originating in China.

Arguably, each of the rulings referred to above regarding medicinal claims, food supplements and alternative treatments could have the effect of exploiting consumers' health-related fears to persuade (or in certain instances even mislead) them to buy the service or product. Yet, reference to the harm and offensiveness rules was made in none of them. Given the sensitivities of the pandemic and its ongoing impact, the potential for societal harm which can arise from appeals to insecurities that encourage ill-advised purchasing decisions should not be underestimated.

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