third parties will fetter a company's ability to control content relating to their business and their products and services; and
- an employee training programme to avoid misuse of social media.

Why this matters

'Digital media is very much on [the FSA's] radar'. What is very clear from the discussions our clients have had with the FSA is that the FCA intends to proactively and vociferously supervise firms and enforce the applicable regulations.

The use of social media by financial services companies should create interesting and, as yet, untapped, business opportunities and an ever-expanding target audience that spans over generations and countries.

However, the risks of failing to comply with the financial promotion rules and any other applicable regulation governing the use of social media to promote products and services ranges from fines to public censure, which ultimately pose the risk of greater, long-term damage to a company's reputation.

Social media is developing at an exciting, unprecedented pace presenting new and innovative commercial opportunities. Navigating the regulations can be a minefield. However, done carefully, the use of social media opens up a whole host of opportunities for financial service companies.

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Could new CAP behavioural rules apply to connected TV?

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Who: CAP
Where: United Kingdom
When: 2013
Law stated as at: 7 February 2013

What happened

When the ASA and CAP announced new rules for third-party online behavioural advertising, effective from 4 February 2013, it may not have occurred to them that the new regime is wide enough to catch apps on connected TVs. Although the new rules are primarily intended to apply to the delivery of targeted advertising by ad networks, the rules are likely to apply to certain activities of operators of connected TV platforms or of other connected devices.

What is more, the strictest rule in the new code provisions, reserved for the most intrusive type of behavioural tracking and

expected by CAP and the ASA to come into play only rarely, could well be engaged.

Negative reaction to Phorm

The tracking in question was first trialled in the United Kingdom by an organization called Phorm in 2007, in conjunction with BT. However, such was the negative regulator and consumer reaction that Phorm did not proceed much beyond this trial with BT or any other ISP, with no other similar offering breaking cover.

If this were to occur now, new Rule 31.2 states that third parties using this technology 'must obtain explicit consent from web users before doing so'.

The technology is deployed at ISP level, so that visits to all or, virtually, all websites accessed using the device in question are tracked for OBA purposes, leading to the serving of targeted display advertising on the device in question.

Could the rules apply to Smart TVs?

However, the question arises as to whether this is happening in a connected/Smart TV context. At risk of being caught by the rules are operators who allow third-party applications on their platform or device and who collect data from multiple applications and use it to personalize the service by recommending content or presenting aggregated browsing (eg, 'most popular' items). This means that smart TVs, games consoles and connected TV platforms that have recommendation engines based on aggregated cross-platform data, which is obtained from third-party applications, could all fall within the scope of the new rules.

Service notice via an icon

Parties whose activities are caught by the rules must, on the face of it, provide notice of their collection and use of viewing behaviour and obtain explicit consent before this starts. Consent could be built into the set-up journey.

Since currently, the 'only game in town' for providing notice involves the display of the IAB/EASA/EDAA 'advertising option icon' system, which is displayed after the technology has been deployed and provides an opt out mechanism, this is not going to satisfy the prior 'explicit consent' rule.

Therefore, if this interpretation of Rule 31.2 holds good, operators involved in 'TV OBA' will have to devise their own system for delivering the requisite notice and facility for opting in. Either way, the provision of notice in logo form and explicit consent processes could clutter up an otherwise carefully and well-designed user interface and user experience.

Providing Do Not Track option

Even if the stricter 'explicit consent' rule does not apply, there is still the need to provide notice and a 'do not track' choice opportunity. This could necessitate technical development to enable two methods of generating and populating recommendations on devices, depending on whether the user has opted out or not.

Prohibition on creating child segments

Furthermore, the rules prohibit parties from creating interest segments specifically designed for the purpose of providing targeted content to children aged 12 or under, which suggests that an operator cannot provide recommendations or aggregated browse sections for this age group.

In the event of a complaint in this area, it would be for the ASA to determine whether a particular practice was subject to the new rules.

One would hope that the ASA will acknowledge that the drafting of the new rules is inadvertently wide and should not catch content recommendations. It seems that the new rules are another example of regulation, which inadvertently captures the activities of connected TV Platforms, including Smart TVs, and other connected devices owing to increasing technological convergence.

If a complaint raises an issue that requires further investigation and the United Kingdom is the relevant country of origin, the ASA will investigate in the normal way, with an emphasis on resolving matters with third parties informally where possible. In the worst case scenario, sanctions include publication on the ASA website and ad alerts.

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