

Advertising on children's sportswear: the law on e-cigarettes, payday lending & fast food

By [Daniel Alfreds](#) written for and published by [LawInSport.com](#) on the 18 June 2015. [View the original article here.](#)



In November 2014 Wonga, the payday lender and principal sponsor of Newcastle United, decided that the junior version of the team's replica kits would [no longer feature](#) its branding.¹ Wonga's chairman stated that the reason for doing this was an attempt to [clean up Wonga's image](#)² following a damaging scandal that involved sending money demands to borrowers from fictitious law firms that resulted in a [£2.6 million fine](#) from the Financial Conduct Authority ("FCA").³

Whilst local groups and MPs had [put Wonga under pressure](#) for years⁴ with regard to its business practices, there was no regulation or law that prevented it from branding junior kits. In fact, Wonga also sponsor Blackpool FC whose junior shirts still contain Wonga branding.

Pay-day lending is one of many contemporary brand categories that are regulated by government to help protect individuals and, in particular, children. This article will look why children should be protected from advertising from categories of sponsors such as e-cigarettes, fast-food and pay-day lenders, and how to

¹ H Osborne, 'Wonga to drop logo from Newcastle United Children's football kits', [the-guardian.com](http://www.theguardian.com/business/2014/nov/14/wonga-agrees-drop-logo-newcastle-united-childrens-football-kits) <http://www.theguardian.com/business/2014/nov/14/wonga-agrees-drop-logo-newcastle-united-childrens-football-kits>, 2014 (accessed 29 May 2015)

² S Read, 'Profits slide as Wonga tries to clean up its image', [independent.co.uk](http://www.independent.co.uk/news/business/news/profits-slide-as-wonga-tries-to-clean-up-its-image-9756814.html) <http://www.independent.co.uk/news/business/news/profits-slide-as-wonga-tries-to-clean-up-its-image-9756814.html>, 2014 (accessed 29 May 2015)

³ Financial Conduct Authority, 'Wonga to pay redress for unfair debt collection practices', <http://www.fca.org.uk/news/wonga-redress-unfair-debt-collection-practices>, 2014 (accessed 29 May 2015)

⁴ K Proctor, 'Wonga: MP leads the attack as pay day loan company faces up to fans', <http://www.thejournal.co.uk/news/wonga-mp-leads-attack-pay-5753965>, 2013 (accessed 29 May 2015)

deal with some of the issues that arise when negotiating a sponsorship contract featuring brands from these sectors.

English legislation and the differing definitions of “child”

Children are some of the most vulnerable members of society. There is a wide variety of legislation that seeks to protect younger members of society such as the [Children Act 1989](#)⁵ and [2004](#)⁶ to the [Children and Families Act 2014](#)⁷ (“CFA”).

The variety of legislation and how it is applied means that there is no stand-alone definition of a ‘child’ or ‘children’ in English law and the NSPCC references [eight separate legal definitions](#).⁸ The general position for many pieces of legislation is that anybody under 18 is considered a child. This is reflected with regard to alcohol, tobacco, betting and many financial services as people under this age are prohibited from using such products or services.

Some regulations such as the Committee of Advertising Practice (“CAP”) Code and Broadcasting Committee of Advertising Practice (“BCAP”) Code define children as being under the age of 16.⁹ There are also further examples of applying a range of age restrictions such as the British Board of Film Classification who have a well-known [variety of classifications](#) for those under the age of 18.¹⁰ Sports governing bodies often have rules with regard to advertising to children but these are outside of the scope of this article.

As a result of this range of interpretations it is important when drafting a clause stating that the sponsor cannot market or advertise to ‘children’ that this term is adequately defined. For example, if the sponsor is a beer brand the agreement should define a ‘child’ as a person under the age of 18 for obvious reasons. This leaves no room for ambiguity and places the rights holder in a position of strength if there is a breach.

E-cigarettes

Sports clubs in high profile leagues and competitions have the right to sell advertising space on their shirts albeit subject to a category of brands prohibited to advertise by both legislation and regulation from advertising in any form.

⁵ Children Act 1989, <http://www.legislation.gov.uk/ukpga/1989/41/contents>

⁶ Children Act 2004, <http://www.legislation.gov.uk/ukpga/2004/31/contents>

⁷ Children and Families Act 2014, <http://www.legislation.gov.uk/ukpga/2014/6/contents/enacted>

⁸ NSPCC, ‘A child’s legal rights – Legal definitions’, <http://www.nspcc.org.uk/preventing-abuse/child-protection-system/legal-definition-child-rights-law/legal-definitions/> (accessed 16 June 2015)

⁹ The Committee of Advertising Practice Code on non-broadcasting section 5 (children)

¹⁰ The BBFC guidelines, <http://www.bbfc.co.uk/what-classification/guidelines> (accessed 29 May 2015)

The ban on tobacco advertising in sport was codified in the [Tobacco Advertising and Promotion Act 2002](#) (the “TAPA”).¹¹ Electronic cigarettes or “e-cigarettes” are electronic devices usually shaped like a conventional cigarette that simulates the experience of smoking by vaporising liquid nicotine rather than burning tobacco.¹² They have had the effect of complicating the general tobacco prohibition as they are not covered by the TAPA.

In 2014 the CAP provided guidance relating to how e-cigarettes could be advertised. Whilst there is no strict prohibition on advertising to children, rule 22.9 of the [CAP Code](#) states that “marketing communications must not be likely to appeal particularly to people under 18 [years old]”¹³.

If an e-cigarette logo appeared on a junior sport shirt, would this appeal to a child? The [received wisdom says ‘yes’](#) as they would associate their team with the brand as has been shown with alcohol advertising.¹⁴ This was clearly the view of Birmingham City whose sponsor, Nicolites, [agreed to donate](#) the space on junior kits to a charity.¹⁵

The French are proposing a harder line when it comes to e-cigarettes. At the end of 2014, Marisol Touraine, France’s Health Minister, set out a series of measures in an attempt to reduce the country’s intake of tobacco. As part of the proposals it is planned that e-cigarettes will be banned from cars with under twelve’s in them, at schools, in closed working environments and on public transport. In addition to this, advertising of e-cigarettes is to be severely restricted as soon as possible and [then completely banned by 2016](#).¹⁶

Australia has been at the forefront of protective measures against tobacco and was the first country to introduce plain packaging for any tobacco product, which has [reportedly led to a steep decline](#) in the number of smokers.¹⁷ Australia’s federal system of governance means that there has been a piecemeal approach to regulating of e-cigarettes. In Western Australia they have been [banned in their entirety](#), Queensland has only recently made it unlawful to sell them to children (as well as advertise) whilst the other states either have no regulation at all or regulate somewhere between these two examples.¹⁸

¹¹ Tobacco Advertising and Promotion Act 2002, <http://www.legislation.gov.uk/ukpga/2002/36/contents>

¹² Dictionary.com ‘e-cigarette’ (accessed 17 June 2015)

¹³ The CAP Code The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (Edition 12), see section 22 (electronic cigarettes), <https://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20CAP%20pdf/The%20CAP%20Code.ashx>

¹⁴ R Smith, ‘Football shirts sponsored by alcohol brands ‘encourage drinking’ research finds’, <http://www.telegraph.co.uk/news/health/news/4927379/Football-shirts-sponsored-by-alcohol-brands-encourage-drinking-research-finds.html>, 2009 (accessed 17 June 2015)

¹⁵ Birmingham City Football Club, ‘Nicolites partnership announced’ <http://www.bcfc.com/news/article/20130613-nicolites-partnership-announced-863942.aspx>, 2013 (accessed 29 May 2015)

¹⁶ AFP, ‘French smokers face e-cig ban in public, plain cigarette packages’, <http://www.france24.com/en/20140925-france-wants-e-cig-ban-public-plain-cigarette-packs>, 2014 (accessed 29 May 2015)

¹⁷ S Medhora, ‘Plain packaging to thank for Australia’s decline in smoking, says Labour’, <http://www.theguardian.com/society/2015/mar/12/plain-packaging-to-thank-for-australias-decline-in-smoking-says-labor>, 2015 (accessed 29 May 2015)

¹⁸ M Howe, ‘Controversy over e-cigarettes and ‘vaping’ heats up’, https://www.thesaturdaypaper.com.au/2014/12/06/controversy-over-e-cigarettes-and-vaping-heats/14177844001315#.VWc7Fc_BwXB, 2014 (accessed 29 May 2015)

In the UK, Wales is set to become the first country to ban the use of e-cigarettes in enclosed spaces which will include restaurants, pubs and working environments. Though the law is not set to be in force until 2017, it has faced surprising opposition from ASH Wales (the anti-smoking charity) along with the British Heart Foundation, British Lung Foundation and the Royal College of Physicians who have [all called for further evidence](#) of the dangers of e-cigarettes.¹⁹

Practitioners need to be wary of changes to regulations, particularly in areas where there is a justified expectation that rules will be drafted or amended. It would never be practical to ask a client to delay a sponsorship opportunity to await clarification on the law as the premium nature of sports sponsorship means that the rights holder may easily find a replacement if the client stalls. It would be prudent, however, to account for any potential regulatory change. A termination provision that would allow the parties to end the agreement in certain situations is essential, such as if advertising of the product becomes illegal. The clause should ensure that it is specific to the nature of the sponsorship, for example, if the brand is the principal shirt sponsor and e-cigarette advertising on television becomes unlawful the agreement should account for this. However, if the sponsor's logo was only visible within the sports ground itself and not in view of television cameras (such as on the concourse) the club should arguably not be able to terminate.

Another way to tackle this issue would be to have an agreed alternative branding for if regulation changes or the team plays in a jurisdiction that bans certain product branding. The 'Loi Evin' (alcohol policy) rules in France state that you cannot have any alcohol advertising to do with sport. This has caused a variety of issues for clubs who play in competitions in France such as during the 2005 Six Nations when the Welsh team's sponsor logo 'Brains beer' was intentionally changed to 'Brawn' when the teams played each other. Whether the sponsorship agreement between the parties accounted for this is unclear but it is important that practitioners can plan in advance for such an issue.

Payday lenders

Payday lending is currently a political minefield that is often [highlighted by media reporting](#).²⁰ The response by Financial Conduct Authority ("FCA") in lowering interest rates²¹ and the CAP [changing advertising regulations](#)²² has tried to address these challenges.

¹⁹ BBC, 'E-cigarette ban in enclosed spaces in Wales pushes ahead', <http://www.bbc.co.uk/news/uk-wales-33025872>, 2015 (accessed 16 June 2015)

²⁰ M Klienman, 'MPs crackdown on payday lending ads', <http://news.sky.com/story/1184466/mps-demand-crackdown-on-payday-lender-ads>, 2013 (accessed 17 June 2015)

²¹ Competition and Markets Authority, Payday lending market investigation 2015

²² M Sweney, 'Payday loan adverts could be banned on television before 9pm', <http://www.theguardian.com/media/2014/nov/27/payday-loan-adverts-banned-television-watershed>, 2014 (accessed 29 May 2015)

The need to protect children from getting into serious financial trouble and to make them aware of the consequences is obvious. The problem for bodies like CAP is that it is very difficult to separate payday lenders from mainstream banks as they both offer similar financial products, though with significantly different terms, such as unsecured loans spread over five years by a mainstream bank or the same unsecured loan repayable after 30 days.

Regulation and the general public's attitude towards payday lenders do not sit together easily as it can take time for the FCA to investigate any concerns and implement policy changes. Whilst the alcohol and gambling lobbies have filled this space with industry wide lobbying through the [Portman](#)²³ and [Senet](#)²⁴ Groups respectively, payday lenders have been unable or unwilling to self regulate meaning that, to date, it has been left to society to highlight the issues.

Chi Onwurah, a Labour MP, placed the pressure, with a group of MPs from the North East of England, on Wonga to remove its branding from the Newcastle junior kits.²⁵ In Bolton, 4,500 people [signed a petition](#) against the club making QuickQuid their principal shirt sponsor and when local politicians entered the fray Bolton decided to engage a different brand.²⁶

Payday lending brands being involved in sponsorship appears to be relatively unique to the UK and not a major issue elsewhere. Countries like France, Germany, Poland and some US states have [placed caps on the interest rates](#) that can be charged on short term loans ranging from 8 – 21.63%²⁷ APR (compared to [270 for a 30 day £100 loan](#) in the UK²⁸). This cultural difference means that children are arguably less likely to be confronted with these types of brand outside the UK and they do not therefore pose as much of a risk to the children.

As in the case of e-cigarettes, practitioners should be aware of any changes to laws or regulations that may make sponsorship unviable. Financial services are also subject to the FCA's financial promotion rules. Whilst this would not affect branding on kits per se as they tend to merely feature a logo, it may become relevant for any ancillary rights that the sponsor acquires such as perimeter boards, website links or programme space. These rules are intentionally strict to help protect both children and adults and cannot simply be ignored. Whilst there are exemptions such as being a ['mere conduit'](#)²⁹, the rights holder will want the contract to contain an obligation on the sponsor to comply with the rules so that there is no chance at all that the rights holder becomes inadvertently liable. Similarly, if the design of advertising

²³ Portman Group homepage, <http://www.portmangroup.org.uk/>

²⁴ Senet Group homepage, <https://senetgroup.org.uk/>

²⁵ H Osborne ibid

²⁶ The BBC, 'Bolton Wanderers drop QuickQuid pay-day loan firm sponsor', <http://www.bbc.co.uk/news/uk-england-manchester-22791288>, 2013 (accessed 29 May 2015)

²⁷ Consumer Finance Association, 'Industry Briefings' <http://www.cfa-uk.co.uk/information-centre/industry-briefings/current-briefings/should-uk-payday-loan-costs-be-capped.html>, 2013 (accessed 29 May 2015)

²⁸ H Osborne, 'Payday loans cost cap – the key questions answered', <http://www.theguardian.com/money/2014/jul/15/payday-loans-cap-questions-answered>, 2014 (accessed 29 May 2015)

²⁹ Article 18, Financial Services and Marketing Act 2000 (Financial Promotion Order) 2005 (SI 2005/1529), http://www.legislation.gov.uk/ukxi/2005/1529/pdfs/ukxi_20051529_en.pdf

needs to be agreed with the rights holder prior to printing, the rights holder should not be able to reject necessary regulation (though they may want to direct how it is presented).

Fast food

The debate about advertising ‘unhealthy’ food and drink to children is inextricably linked with wider societal concerns about childhood obesity. The issue seems to gather momentum every few years and usually culminates in the machinations of a celebrity chef (usually Jamie Oliver), leading politician (often Jeremy Hunt or another health minister) and the Advertising Standards Agency (“ASA”).

In 2007, both the CAP and BCAP codes’ were significantly amended to address food and drink advertising aimed at children (albeit from a mostly unregulated starting point) as a result of the Department of Health’s White Paper on “[Choosing Health](#)”³⁰, with one of the paper’s key aims being to improve the poor nutrition and diet of children. Further to this, in both 2013 and 2014, the ASA [announced](#) that it would conduct research to ensure that regulation of food and soft drink advertising continues to be effective and proportionate when it comes to protecting children.³¹

Whilst there are no current examples of an ‘unhealthy’ food or drink company being the principal shirt sponsor of a top-flight football club in the UK, these industries have a large footprint within the sporting sector. Since 2002, McDonald’s has [worked with the English Football Association](#) to train football coaches and help children’s football at a grass roots level.³² It [also has a partnership](#) with Britain’s four football associations to provide free football kits to youth teams and has Aaron Ramsey as its ambassador.³³ Many of the kits provided as part of this initiative feature the distinctive yellow “M” on the front or on the sleeve. This sidesteps the BCAP and CAP codes as the kits are not being advertised to the public but the sponsorship reinforces a positive message that McDonald’s is helping children to beat obesity by providing funds to help them keep active.

During the 2012 Olympics in London, Cadbury styled itself as the “[Official treat of the London Olympics](#)” as part of its official sponsorship³⁴. This attracted criticism from the [mainstream press](#) as well as from fitness charities like the Children’s Food Campaign³⁵ that thought that the message conflicted with the International Olympic Committee’s (“IOC”) aim to promote a healthy lifestyle. In fact, at the Olympic park all branded food and drink came from just five companies: McDonald’s, Coca-Cola, Cadbury, Heineken

³⁰ The BBC, ‘At a glance: Public health white paper’, <http://news.bbc.co.uk/1/hi/health/4015655.stm>, 2004 (accessed 29 May 2015)

³¹ The Committee of Advertising Practice, ‘CAP and ASA announce new measures to maintain effective regulation of food and soft drink advertising’, <http://www.cap.org.uk/News-reports/Media-Centre/2014/New-measures-to-maintain-effective-regulation-of-food-and-soft-drink-advertising.aspx#.VQIPro7kd1F>, 2014 (accessed 29 May 2015)

³² McDonalds, <http://www.mcdonalds.co.uk/ukhome/Sport/Football.html> (accessed 29 May 2015)

³³ The FA, ‘Aaron Ramsey helps launch new McDonald’s kit scheme’, <http://www.thefa.com/news/my-football/charterstandard/2014/aug/mcdonalds-four-year-kit-commitment>, 2014 (accessed 29 May 2015)

³⁴ Cadbury, ‘Sport v Stripes’, <http://www.cadburysspotstvstripes.com/> (accessed 29 May 2015)

³⁵ Sustain, ‘The Obesity Games’ report – junk food sponsorship of the London 2012 Olympic Games’ http://www.sustainweb.org/news/jul12_the_obesity_games_report/, 2012 (accessed 29 May 2015)

and Nature Valley. Jacques Rogge, the IOC President at the time, stated that there was [a big question mark](#) over having these brands as sponsors.³⁶

At the same time that the Olympics were taking place, [a survey in Australia](#) found that 75% of people supported a total ban on 'junk food' advertised during television programmes aimed at children.³⁷ Whilst this has not become law the food industry itself, initially through the [Australian Food and Grocery Council](#), has imposed regulations that its signatories (including some of the world's largest food conglomerates such as Campbell, Coca-Cola, Kellogg, Mars and Nestle) should abide by certain core principles. These include: not advertising in any media directly aimed at children; any advertising must represent healthy dietary choices; and not to give away food or vouchers at children's events.³⁸ In addition to this the '[Responsible Children's Marketing Initiative](#)' of the Australian Food and Beverage Industry³⁹ has created similar guidelines for some of Australia's big fast food chains like McDonald's and Hungry Jack's (their equivalent of Burger King).

Sweden has taken a more extreme approach and in 1991 [banned any advertising](#) aimed at children under twelve in.⁴⁰ It is important to note that it is only adverts 'aimed' at children that are unlawful. Like the Australian self-regulation there are technical controls to decipher what kind of programmes would be aimed at children so that shows aimed at a broader audience do not fall within this category.

Like all the other issues discussed in this article, it is a matter for society to decide where the line should be drawn. For the time being there does not seem to be a particular problem with advertisements of unhealthy food or drink brands appearing as shirt sponsorship. However, the issue of childhood obesity is not one that is likely to go away and it will be interesting to watch whether a need for further protection of children becomes necessary.

Practitioners need to be aware of how important the defined brand sector is especially when it comes to food and drink. The brand, as a sponsor, will want this to be as wide as possible. If we take Evian as an example, they will want the rights holder to grant them the entire drinks sector so that no competitor in any drink can be associated with the property in question. However, the rights holder will want to narrow this so that they can sell a wider spectrum of sponsorship rights by defining Evian as the 'official water'. This point is applicable to all sponsorship but due to the wide variety of food and drink possibilities it is of particular prevalence here.

³⁶ The Telegraph, 'IOC chief Jacques Rogge admits 'question mark' over McDonald's and Coca-Cola sponsoring Olympics', <http://www.telegraph.co.uk/sport/olympics/news/9385751/IOC-chief-Jacques-Rogge-admits-question-mark-over-McDonalds-and-Coca-Cola-sponsoring-Olympics.html>, 2012 (accessed 29 May 2015)

³⁷ P McLintock, 'Survey finds support for fast food ad ban', <http://www.abc.net.au/news/2012-06-14/survey-backs-fast-food-ad-ban/4070846>, 2012 (accessed 29 May 2015)

³⁸ Australian Food and Grocery Council, Industry Code on Advertising to Children, 2014, <http://www.afgc.org.au/our-expertise/industry-codes/advertising-to-children/>

³⁹ The Australian Food and Beverage Industry, The responsible children's marketing initiative, http://www.abc.net.au/mediawatch/transcripts/1035_marketing.pdf (accessed 29 May 2015)

⁴⁰ G Shrubsole, 'Marketing and advertising that respects children's rights', <http://www.theguardian.com/sustainable-business/marketing-advertising-respect-childrens-rights>, 2012 (accessed 29 May 2015)

Which method of regulation is most effective?

As we have seen, there are four very different approaches involved in the protection of children in sport and their exposure to certain products:

1. specific legislation (tobacco);
2. regulation by government bodies (payday lending);
3. self regulation (fast food); and
4. social pressure (most issues at some point).

The main question is: which is most effective?

Whilst not a controversial matter now, when the TAPA was first introduced many commentators believed it would have a detrimental impact on sports sponsorship. Hindsight teaches us that this was not warranted and, according to the Office for National Statistics, smoking in the under 18s age group is at its [lowest levels](#) since their record keeping began in the 1940s.⁴¹

Regulation backed up by a government body can have the desired effect of preventing direct advertisement to children from certain industries. However, it has clearly failed in protecting them outright as their sporting heroes continue to wear the brands discussed above on their shirts which are then broadcast across the media.

Self-regulation by the relevant industry faces the same indirect problems as regulation but also accusations that child protection is merely a public relations exercise. There has, however, been a clear shift in how the general public and government perceive payday lending as a social ill. What is unclear at the moment is where this will end up with regard to advertising and shirt sponsorship. Rights holders understand that they have a duty towards their fans but commercial pressures will always have a large sway.

In a perfect world specific legislation would be by far the most effective way to confront problems as our elected representatives should be in a position to recognise societies changing attitudes. However, the practicalities are that it can take months or years to pass and implement legislation and if drafted too narrowly it may miss technological change (such as e-cigarettes) and if too broad it could catch everything

⁴¹ J Meikle, 'Smoking falls to lowest level in UK since recording started in 1940s', <http://www.theguardian.com/society/2014/oct/07/smoking-falls-lowest-level-uk-recording-started-1940s>, 2014 (accessed 29 May 2015)



entirely (like all food with sugar). It therefore falls on the regulatory bodies that have been given the authority to monitor advertising to protect children. They are best placed to create rules as they can respond to changes relatively quickly and are usually under government oversight and should therefore be guided by society.

By being proactive and quickly identifying issues that are highlighted by the media, the government or regulators may be able to pre-empt the situations that arises when technology or products are adapted beyond current legal definitions. This will always be difficult however as it is hard for anybody to predict how industries will develop and which will be successful enough to warrant increased government intervention.

It is important to discuss and confront these issues now as they are not going to go away. Technological changes will provide new outlets for sponsorship and advertising whilst the market for certain products will continue to evolve as society's attitude to a wide variety of them changes. The example of e-cigarettes neatly illustrates an industry that did not exist 5 years ago in which the regulator is playing catch up to decide on how to treat it. Where it will go we cannot tell but practitioners need to draft sponsorship agreements carefully in these 'high risk' areas.

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