

The ofcom as a super regulator media essay



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Introduction

The broadcasting culture and the Ofcom regulatory framework enshrine the freedom of broadcasters to choose topics they want to cover in the programmes they broadcast and in appropriate manner. Whilst the broadcasters have the right to hold opinions and impart information and ideas to their audiences without interference, the audiences are also entitled to receive those ideas and opinions. With reference to this, the essay (a) critically discusses the challenges and potential pitfalls that the Ofcom Broadcasting Code (the Code) presents for sports broadcasters and assesses Ofcom's powers of enforcement should a breach of the Code occur; and (b) assesses the extent to which the content of the Code is shaped and influenced by the law and policy of the European Union. After considering the Ofcom as a super regulator, the essay identifies the major principles and rules of the Code. This is followed by an examination of the challenges and potential pitfalls that the Code presents for sports broadcasters. The essay goes to assess the Ofcom's powers of enforcement where there is a breach of the Code. Finally, the essay assesses the extent to which the content of the Code has been shaped and influenced by the law and policy of the European Union.

a) The Ofcom as a super regulator

Before 2005 there were various regulators, such as the Broadcasting Standards Commissions ("BSC"), the Independent Television Commission ("ITC") and the Radio Authority ("RA"), which regulated the exploitation of media rights. The net result was that many anomalies arose by virtue of the changing roles of those platforms (Verow, Lawrence and McCormick, 2005:

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324). The Ofcom was formally established on 29 December 2003 under the Communications Act 2003 as the United Kingdom's "super regulator" to oversee all regulation in the media and communication sectors. In terms of broadcasting regulatory functions, it takes over the BSC, ITC and the RA. The creation of the Ofcom has rapidly changed the structure of television regulation in the United Kingdom (Carey, 2010: 242).

The Code

Section 319 of the Communications Act 2003 entrusts the Ofcom with the power to set and revise a code for the standards of contents of radio and television programmes. The Ofcom has revised the Code on various occasions. The most recent version of the Code took effect on 28 February 2011. It covers all programmes broadcasted on or after 28 February 2011. It applies to radio and television content in services licensed by the Ofcom. With the exception of the BBC, the Sianel Pedwar Cymru ("S4C") and the S4C Digital, all United Kingdom's broadcasters must have the appropriate licence in order to operate a broadcasting service. All Ofcom licensees as well as the BBC and the S4C are required to comply with the Code.

The Code governs, among other things, standards and practice in programme content, advertising and programme sponsorship. Section 1 of the Code requires broadcasters to protect those under the age of 18 by providing rules on scheduling and content information. Television broadcasters must observe the 21:00 watershed. The watershed does not apply to radio broadcaster, but a particular regard must be made to times when children are likely to be listening. Section 1 also curbs, among other

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things, violence, dangerous behaviour as well as offensive language appearing before the watershed or in an inappropriate context. In addition, section 1 insists on broadcasters to take care over the physical and emotional welfare of and the dignity of people under 18 who take part or are involved in programmes.

Section 2 requires broadcasters to apply accepted standards to the contents of television and radio services in order to provide adequate protection for the public from the inclusion of harmful and/or offensive material in such services. Programmes must not include material which condones or glamorises violence, dangerous, or anti-social behaviour or is likely to encourage others to copy such behaviour. Section 3 requires broadcasters to, among others things, protect member of the public from the inclusion of harmful and/offensive materials, such as offensive language, distress, and discriminatory treatment or language. Section 4 requires broadcasters to exercise proper degree of responsibility with respect to the content of religious programmes.

Section 5 provides for due impartiality and due accuracy and under prominence of views and opinions. Broadcaster must report news, in whatever form, with due accuracy and present them with due impartiality. Any mistake must be acknowledged and corrected immediately. Viewers must be made aware of what they are seeing. If a presenter gives a personal view or makes an authored programme, this must be made clear and alternative viewpoints adequately represented, either in the programme or in series of programme should be taken as a whole. Section 6 deals with elections and referendums by requiring impartiality to be strictly maintained

in constituency reports. Section 7 requires broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes. For example, if a team coach is approached for a post-match interview and refuses to appear, the broadcast should make clear that s/he has chosen not to appear and should give their explanation if it would be unfair not to do so. Section 8 requires broadcasters to avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in the programmes. Any infringement of privacy should be warranted.

Sections 9 and 10 of the Code are most relevant provisions to sports broadcasting. Section 9 deals with commercial references in television programming. Section 10 deals commercial referencing in radio programming. The BBC, S4C and S4C Digital are not Ofcom licensees and, therefore, not subject to sections 9. However, they are subject to the legislation on listed events and, therefore, the regulations on listed events as set out in the relevant provisions of the Code. Section 9 requires broadcasters to maintain independent editorial control over programming. It also obliges broadcasters to ensure the distinction of editorial content from advertising. It prohibits “ surreptitious advertising” which makes reference to a product, service or trade mark within a programme with the intention to advertise without making this clear to the audience.

Section 9 provides rules for the sponsorship of television programmes. It provides regulations relating to, among others things, prohibited sponsors and the format and content of the sponsor’s credit. This is often referred to as a “ sponsor bumper” or “ billboard” (Lewis and Taylor, 2009: 1239).

Section 9 provides that the purpose of the sponsor credit should be simply to

inform viewers that the relevant programme is sponsored and who the sponsor is. Therefore, section 9 requires the credit not to contain advertising messages or “calls to action” to viewers and to be kept separate from commercial breaks and from the programming itself. Accordingly, section 9 permits credits at the beginning and/or end of the programme and going into and coming out of commercial breaks.

However, section 9 does not specify limits as to the permitted duration or number of sponsor credits. Section 9 simply indicates that, for these purposes, undue performance should not be given to a sponsor and credits within programme trailers should remain brief and secondary. Radio and television broadcasting are subject to different legislative requirements and terminology. Therefore, section 10 of the Code contains specific rules to radio broadcasting. The fundamental principle in section 10 is to ensure the transparency of commercial communications as a means to secure consumer protection. Viewers must not be misled. There has to be transparency and editorial independence. Advertising products has to be kept separate from the content of programmes.

Challenges and pitfalls of the Code for sports broadcasters

Sports broadcasters should be free to choose sporting events they want to cover in their sport broadcasting programmes. This principle underlines the broadcasting culture and the regulatory framework in which the Ofcom operates. However, the right to choose sporting events to broadcast is subject competition rules, intellectual property law as well as human rights. Television broadcasting is the most frequently area the competition authorities have been involved in the business of the sport. The Office of Fair
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Trading (“OFT”) and the European Commission have scrutinised arrangements that appeared to restrict market competition in the market for the acquisition of premium sports contents. Broadcasting organisations are subject to Articles 101 and 102 of the Treaty for the Functioning of the European Union (“TFEU”).

The grant of exclusive rights for sport broadcasting can have implications on the freedom of other broadcasters to choose sporting events they would like to cover in their sports broadcasting programmes. However, the grant of exclusive rights is not per se contrary to the EU competition law. This is particularly the case in relation to the audiovisual industry where exclusivity may, in fact, have pro-competitive effects. The OFT has investigated allegations of BSkyB abusing its dominant position in its exclusive right to broadcast certain live sporting events by exerting an anti-competitive ‘margin squeeze’ on its rivals, pricing its channels, and giving anti-competitive discounts to distributors (OFT, 2002). The OFT found that BSkyB was dominant in, among others, the wholesale supply of certain premium sports. Since the being dominant does not infringe competition rules, the OFT considered whether BSkyB had abused its dominant position in relation to margin squeeze, mixed bundling and discounts and found that there was no abuse of its dominant position.

In order to transmit sports content, sports broadcasters need a prior consent or authorisation from the sports organisation running the event in question, since they are the owners of the sports content. English law does not recognise the existence of proprietary rights in a sports event per se. However, this does not mean that such rights do not exist. Instead, those

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rights are created, exploited and protected not as sui generis rights, but by virtue of the application in combination of principles of real property law, contract law and intellectual property law. Many sports rights including broadcasting rights are predicated on the event organiser having exclusive control over access to the venue at which the sports event is held. Under English law, sports broadcasting rights consist of a license to enter the venue, film the proceedings and transmit the resulting footage to the public (Arnold, 2001: 51).

Section 1 of the Copyright, Design and Patent Act 1988 (“ CDPA”) provides that copyright subsists in, among others, broadcasts and cable programmes. Section 2(1) confer upon the owner of copyright in a work exclusive right to, among others, broadcast the work or make it available to the public by electronic transmission. For broadcasts, the copyright is owned by the maker of the broadcast (CDPA, s. 12). Copyright underpins the enormous industry that surrounds the creation and broadcast of audiovisual images of sports events. Sound recordings include player interviews, audio files, and tapes of radio broadcast. Films encompass audiovisual footage of sports events and news conferences, training sessions and player interviews, interspersed with coverage of pundits.

Therefore, whilst there may not be any copyright inherent in a sporting performance per se, if that performance is recorded on audio and/or video-tape, that recording and its subsequent communication to the public by broadcast or electronic transmission will be protected by copyright. This means that the freedom of broadcasters to choose what sports events to cover in their sports programmes is restricted as they cannot broadcast

copyrighted sporting material as this will amount to copyright infringement. However, the CPDA permits a present assignment of future copyright which takes place as soon as the copyright work to which it relates is created. For example, the BBC records and broadcasts coverage of a Premier League football match, then in the absence of such an assignment the owner of the copyright in the signal would be the BBC. However, in its broadcasting agreement with the BBC, the Premier League will have taken an assignment of copyright in the signal from the BBC and licensed back to the BBC the right to incorporate the signal into the BBC programming for specific number of times during the term of the agreement.

Further, sport news access is effected through the use of the fair dealing exception in the CDPA. The provision allows for the copyright material to be used without the permission of the copyright owner where it acknowledges the rights holder and the use is appropriate in terms of the importance of the event. Further, broadcasters in the United Kingdom have adopted a News Access Code of Practice, which provides regulation of the use of sports footage in terms of the programmes in which it is used and the length of extract that is appropriate. In the *BBC v British Satellite Broadcasting (BSB)* [1991] 3 All E. R. 833, BSB tested the fair dealing concept during the 1990 World Cup by extensively using extracts of footage to which exclusive broadcast rights had been acquired by BBC and ITV. The question was whether the use of the BBC's broadcasts constituted fair dealing for the purpose of reporting current events under the CDPA. The court found in favour of BSB and as a result of this case, the major broadcasters drew up the News Access Code of Conduct.

According to the Code, broadcasters have the right to hold opinions and impart information and ideas to their audiences without any interference and audiences are also entitled to receive those ideas and opinions. However, the licensed broadcasters are also required to comply with the standards set out in the Code. These include standards which protect members of the public from offensive and/or harmful material. However, this may pose a challenge to sports broadcasters, particularly where the fans chant offensive and/or harmful material, including discriminatory language or invade the pitch. There is also an ever-increasing use of foul language by players on live football matches due to frustration or being angry when decisions go against their teams. Besides this, it is worth noting incidents, such as the infamous clothes malfunction in the 2004 Super Bowl between Justin Timberlake and Janet Jackson with estimated 6.6 million children from age two to eleven were watching when Janet Jackson exposed her right breast to the audience (Thornton, Champion and Ruddel, 2011: 75).

In addition, the standards set out in the Code must be applied in a manner which best guarantees an appropriate level of freedom of expression. This is because the Code takes into account the Human Rights Act 1998 ("HRA") as well as the European Convention on Human Rights ("Convention") (Ofcom, 2011: 2). The right to freedom of expression in Article 10 of the Convention encompasses the right of the audiences to receive creative material, information and ideas without interference but subject to restriction prescribed by law and necessary in a democratic society. Further, consideration must also be made to Article 8 of the Convention on the right to a person's private and family life, home and correspondences. The Ofcom

has also taken into account Article 9 (freedom of thought, conscience and religion) and Article 14 (the right to enjoyment of human rights without discrimination on grounds such as sex, race and religion).

In *R. (on the application of Gaunt) v Office of Communications (OFCOM)* [2011] EWCA Civ 692, the court held that the provisions of the Code had to be interpreted, and applied in particular cases, in compliance with Article 10 of the Convention. The appellant radio presenter appealed against a decision of the High Court dismissing his application for judicial review of a finding by the defendant Ofcom that a broadcast interview conducted by him breached the Code. The Ofcom had found the language used by the presenter and the manner in which he treated his interviewee had the potential to cause offence to many listeners contrary to the Code. The High Court held that the Ofcom's finding was not a disproportionate interference with the presenter's right to freedom of expression as the offensive and abusive nature of the broadcast was gratuitous and had no factual context or justification.

Dismissing his appeal, the Court of Appeal held that when deciding whether the interview offended the Code, the interview had to be considered as a whole and in its context. When the presenter's extremely aggressive tone, his constant interruptions, his insults, his ranting, the consequent lack of any substantive content, and the time for which the interview was allowed to run on were combined, it was clear that Ofcom was right to conclude that there had been a breach of the Code. It was impossible to accept the contention that the publication of the Ofcom finding, which contained no sanction other than the stigma of the publication of an adverse finding by a statutory regulator, represented an interference with the presenter's right to freedom

of expression under Article 10 of the Convention. The fact that the topic covered by the interview was of public interest was of limited force once the contents of the interview were considered.

The Code does not address all issues which could arise in sports broadcasting. As a result, sports broadcasters may face a number of individual situations which the Code does not specifically refer to. It contains some examples, but they are not exhaustive. However, the principles set out in the Code make it clear that the Code is designed to achieve and help broadcasters make the necessary judgements (Ofcom, 2011: 6). Sports broadcasters can make programmes about any sport issue they choose, but they must at all times ensure that the programmes comply not only with the general law, but also with the Code. The Ofcom may provide general guidance to sports broadcasters on the interpretation of the Code. However, neither such advice will affect Ofcom's discretion to decide on cases and complaints after the programme has been broadcasted nor the exercise of its regulatory responsibilities (Ofcom, 2011: 6).

There may be problems of differentiating between user generated contents (UGC) and professional contents offered on UGC platforms. There may also be blurring boundaries between audiovisual media services provided by sports newspapers and sports channel websites as well as online newspapers and sports news portals. A service fall outside the Authority for Television On-Demand ("ATVOD") if the video content appears as integral part of online version of newspaper, for example, alongside a text based story. However, the audiovisual content on a website will fall within scope of the ATVOD if it constitutes a consumer destination in its own right and the <https://assignbuster.com/the-ofcom-as-a-super-regulator-media-essay/>

content can be viewed and enjoyed without reference to the publication offering. There have been challenges against ATVOD determinations for qualifying video services as on-demand programme service (ODPS).

In February 2011, the ATVOD held that the Sun Video section of The Sun website was an ODPS within the meaning of section 368A of the Communications Act 2003 and should have been notified to and regulated by the ATVOD as such (Lewis, 2012). According to section 368A, to be an ODPS, a service must fulfil five criteria. These are that the principal purpose of the service should be to provide programmes which their form and content are comparable to TV-like services, must be accessible on-demand, there must be a person responsible for editorial, it is made available for use by members of the public, and it is within the United Kingdom's jurisdiction.

ATVOD has the power to decide which services constitute an ODPS and to provide guidance on the matter. Any exercise of ATVOD's power is subject to appeal to Ofcom. The Sun's owners, News Group, appealed to the Ofcom based on the first criterion that the principal purpose of the service was to provide programmes the form and content of which were comparable to TV-like services. It further argued that the Sun Video section was part and parcel of the whole site, which was an integrated offering. The ATVOD's view was that the Sun Video section of The Sun website was an ODPS. In applying the five ODPS criteria, the ATVOD looked at the Sun Video section of The Sun website as a service in its own right and then applied the five ODPS criteria to that section.

The Ofcom upheld the News Group's appeal, setting aside ATVOD's decision and replacing it with its own. The Ofcom said that it was important to consider the whole of what is provided in order to determine whether there was any audiovisual material on the website whose principal purpose was to provide TV-like programmes. It set out a two-part test which it used and said should be used when assessing whether a service is an ODPS. The test comprises what Ofcom referred to as the "principal purpose part" and the "comparability part" of the test. With regard to the "principal purpose" part of the test, Ofcom said that where audiovisual content is provided together with other contents one all of the material in context must be looked at. Thus, it necessary to consider whether, taken as a whole, the audiovisual material forms part of a service whose principal purpose is to provide that audiovisual material, or is simply ancillary to the provision of some other service. If the answer to the first test is in the affirmative, the question under the comparability test should be whether the audiovisual material is comparable to TV-like programmes. The Ofcom decided that the principal purpose test was not satisfied, but did not go further to analyse the comparability test.

Ofcom provided some examples of characteristics of a service that its principal purpose could be said to provide audiovisual material. These include (a) the service having its own homepage; (b) the videos being catalogued and accessed separately; (c) the videos being presented and/or marketed as a TV channel; (c) the duration of the videos is substantially longer; (d) little or no linkage between the videos and other material; (e) where the service provides both written and audiovisual material, the

audiovisual material is significantly more than the written material, the written is brief or introduces the audiovisual material, and the videos are the primary means of conveying to users the information they are seeking; and (f) the videos are ancillary to, or enhance, a non-audiovisual service. The Ofcom applied these tests holding that the aim of the Sun Video section was to collate and supplement the content from the rest of the website. No part of the website was a service whose “ principal purpose” was the provision of TV-like programmes.

The Ofcom’s decision could be seen as a victory for the operators of similar sites, particularly for online newspapers and magazines that are rich in video content. However, such sites may still be caught by ATVOD’s regulatory regime in future. A website providing a mixture of videos and written content could be deemed an ODPS. The Sun Videos displayed some ODPS features and fulfilled a number of the characteristics suggested by Ofcom which satisfied the principal purpose test, but on balance, the Ofcom held that Sun Video did not do so sufficiently to make it an ODPS. The Ofcom said that there was no blanket exclusion for newspaper websites.

The Ofcom’s powers of enforcement of the Code

The Ofcom neither previews programmes nor requires advance schedule information (Carey, 2010: 243). The broadcasters are responsible to ensure that the material broadcast does not offend against the (Carey, 2010: 243). It enforces the Code by means of a condition in every licence requiring observance and adherence to the Code. It has published on its website the procedures for investigating complaints and the application of statutory sanctions to broadcasters (Ofcom, 2011). The Ofcom may impose statutory

sanctions against a broadcaster who has breached the Code deliberately, seriously or repeatedly. However, the Ofcom often issues directions to the licensee not to repeat the programme in question, or to broadcast the correction or a statement of Ofcom's findings. Other breaches of the Code may be penalised in fines and, in most extreme cases, forfeit of the licence. The maximum financial penalty for commercial television or radio licensees is £250, 000 or 5% of the broadcaster's qualifying revenue, whichever is the greater. For the BBC, the maximum financial penalty payable is £250, 000.

In 2008, the Ofcom fined MTV Networks Europe £255, 000 for widespread and persistent breaches of the Code (repeated broadcast of blatant "foul" language before the 21. 00 watershed) in respect of its certain channels (Lewiston, 2008). In the same year, the Ofcom fined the ITV a total of £5, 675, 000 for what it considered to be the worst breaches of the Code it has ever come across. The breaches related to the use of premium rate telephone lines in some of the broadcaster's programmes. The fine is the highest ever imposed by Ofcom and reflected not only the seriousness of the ITV's failures, but also their repeated nature (Hughes, 2008: 162). However, the failure of the Ofcom to fine the ITV anywhere near five per cent of its qualifying advertising revenue has been criticised in some quarters for sending out the wrong signal (Hughes, 2008: 162).

In 2011, the Government has proposed to reform the appeals process under section 192 of the Communications Act 2003 for Ofcom regulatory decisions by introducing an enhanced form of judicial review that would, for the first time in statutory history, allow consideration of the merits of Ofcom decisions. The Government believes that changing the standard of review <https://assignbuster.com/the-ofcom-as-a-super-regulator-media-essay/>

would lead to more focused appeals whilst reducing the need for oral and cross examination of factual and expert witnesses. This would result in shorter hearings and more focussed pleadings than is presently the case. However, this would impose constraints on the right of appeal that do not apply to these sectors (McInnes, 2011: 14).

b) The influence of the EU law and policy on the Code

The main EU regulation of the sports broadcasting was the EC Directive 89/552/EEC on Television without Frontiers Directive (“ TWF Directive”), as amended by Directive 97/36/EC and by Directive 2007/65/EC on Audio Visual Media Services Directive (“ AVMS Directive”). The Audiovisual Media Services Directive amended and renamed the TWF Directive by providing less detailed but more flexible regulation. It also modernised TV advertising rules to better finance audiovisual content. The aims of the original TWF Directive were to harmonise television broadcasting law throughout the European Union, including by way of establishing minimum requirements relating to the protection of minors, rules on advertising as well as the encouragement of production of European works (Lewis and Taylor, 2009: 1239).

However, dated back to 1989, the TWF Directive dealt only with traditional television services. However, the advances of technology since its first implementation have been so vast that it became increasingly in need of updating to provide harmonised regulations to all forms of audiovisual services regardless of the type of technology used to deliver them (Lewis and Taylor, 2009: 1239; Wardade, 2009: 336). Consequently, the AVMS Directive was adopted in December 2007 requiring Member States to

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implement it within two years (AVMS Directive, Art. 3). The AVMS Directive provided two tiers of regulation, depending on whether the audiovisual service was scheduled broadcast or on demand. It sought to be less restrictive for on demand services on the basis that the consumer had greater control over what it pulled down as opposed to scheduled which are received passively if a viewer switches on to a particular channel (Ridgway, 2008: 110; McEneaney, 2008: 60).

The Code took into account a number of requirements relating to television in the TWF Directive, as amended by AVMS Directive. However, by the time the AVMS Directive was implemented at the national level, it had already been superseded by technological developments (Wardade, 2009: 341). Thus, the TWF Directive and its amendments has been repealed by Directive 2010/13/EU) on Audiovisual Media Services ("AMS Directive"), which came into force on 5 May 2010. The AMS Directive was implemented in the United Kingdom by the Audiovisual Media Services (Codification) Regulations 2010, which came into force on 18 August 2010. Extracts of the AMS Directive can be found in Appendix 2 of the Broadcasting Code.

The Code brings into effect certain provisions from the AMS Directive. Prior to the introduction of regulations to implement the AVMS Directive, product placement in programmes was expressly prohibited on scheduled television services. However, there was no regulation on on-demand services in the United Kingdom at all. The AMS Directive has relaxed the rules on product placement on on-demand services. The AMS Directive was implemented in the United Kingdom in February 2010 by Audiovisual Media Services (Codification) Regulations 2010).

Article 11 of the AMS Directive permits product placement under certain circumstances. Firstly, the AMS Directive requires the responsibility and the editorial independence of the media service provider to remain unaffected. This attempts to balance the free movement of services within the European Union and the need to ensure a high level of public health, consumer and child protection (Garde, 2011: 92). The Ofcom has implemented Article 11 of the AMS Directive by revising section 9 of the Code which came into force on 28 February 2011. Rule 9. 8 provides that product placement must not influence the content and scheduling of a programme in a way that affects the responsibility and editorial independence of the broadcaster.

Secondly, the AMS Directive requires that programmes with product placement not to directly encourage the purchase or the rental of the placed goods or services. Rule 9. 9 of the Code implements this more broadly by providing that references to placed products, services and trade marks should not be promotional. Thirdly, the AMS Directive requires programmes containing product placement not to give undue prominence to placed products, services or trade marks. Rules 9. 5 and 9. 10 of the Code implements this by further specifying that two factors may be indicative of undue prominence, namely the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification; or the manner in which a product, service or trade mark appears or is referred to in programming.

Further, the AMS Directive requires viewers to be clearly informed of the existence of product placement and that the programmes with product placement should be identified at the start and the end of the programme,

and when a programme resumes after an advertising break so as to avoid confusing audiences. Rule 9. 14 of the Code implements the information requirement laid down in the AVMS Directive. On 14 February 2010, the Ofcom disclosed the two versions of the universal neutral logo which is used to inform viewers of the existence of product placement on television and the rules surrounding its use. The Rule 9. 11 of the Code reproduces the requirements of article 11(4) of the AMS Directive by prohibiting the placement of cigarettes and tobacco products and prescription-only medicines. However, rule 9. 13 extends the list by banning the placement of alcoholic drinks, foods or drinks high in fat, salt or sugar, gambling; infant formula, all medicinal products, c