

ASA Adjudication on Gallaher Ltd

Gallaher Ltd

Members Hill
Brooklands Road
Weybridge
Surrey
KT13 0QU

Date:

28 August 2013

Media:

Regional press

Sector:

Tobacco

Number of complaints:

1

Agency:

Big Al's Creative Emporium

Complaint Ref:

A12-213116

Background

Summary of Council decision:

Two issues were investigated, of which one was Upheld and one was Not upheld.

Ad

A regional press ad for a tobacco producer regarding the Government's plain pack consultation on cigarette packs had a headline stating "HOW DO YOU SPOT A FAKE PACK OF CIGARETTES?". Text underneath stated "This year, 23.3% of the cigarettes smoked in London have not had UK taxes paid on them.* That's disastrous for corner shop owners, and bad news for the taxman. 19% of independent shopkeepers in London are considering closure as a direct result of the illegal tobacco trade.** A

standardised pack would make faking even easier, and survival for shopkeepers in London even harder ... PLAIN PACKS DON'T MAKE COMMON SENSE". Small print in a footnote stated "* Empty Pack Survey (Q2 2012) ** Tobacco Retailers Alliance (August 2012) ...".

Issue

Cancer Research UK challenged whether the following claims were misleading and could be substantiated:

1. "this year, 23.3% of the cigarettes smoked in London have not had UK taxes paid on them"; and
2. "19% of independent shopkeepers in London are considering closure as a direct result of the illegal tobacco trade".

CAP Code (Edition 12)

[3.13.7](#)

Response

1. Gallaher Ltd (Gallaher) explained that the claim related explicitly to the non-payment of UK duty on cigarettes in London in 2012. It therefore included both cigarettes legally imported into the UK (i.e. as a result of cross-border shopping) and "illegal cigarettes" (whether counterfeit, contraband or so-called "illicit whites"). The combination of such products was known by Gallaher, and notably by HM Revenue and Customs (HMRC), as "non-UK duty paid" (NUKDP). They referred to the glossary of a document produced by HMRC called "Measuring tax gaps 2012".

They said it was widely accepted that the nature of illicit market activities meant it was difficult to quantify the exact value or prevalence of such activities, and that that was recognised by HMRC. They said various methods were used by tobacco manufacturers and government authorities to attempt to quantify the illicit tobacco trade. It was particularly difficult to determine the proportion of NUKDP that was illegal because products that entered the UK from other EU Member States may appear to result from legitimate cross-border shopping, but became part of the illicit trade if they were illegally sold on.

They said the figure cited in the ad for the percentage of NUKDP cigarettes consumed in London in 2012 was generated by an empty pack survey (EPS) in 2012, and the ad expressly referred to that in the footnote. The EPS was carried out by a market research company on behalf of Gallaher and other tobacco manufacturers. The 2012 EPS was not conducted specifically for the purposes of the ad. The market research company had been carrying out empty pack surveys on behalf of tobacco manufacturers in the UK for the previous two years, although Gallaher had not been involved with previous surveys. The EPS was therefore part of a wider, ongoing effort by tobacco manufacturers to understand better the scale of the illicit tobacco trade in the UK.

The EPS involved the collection of 12,700 discarded cigarette packs from 105 locations across the UK during five and a half weeks in 2012 by the market research company. The survey covered all cities in the UK which had a population of over 100,000 inhabitants. As part of the survey, 1,500 packs were collected from 30 different areas in London. Gallaher believed the survey was sufficiently extensive in relation to the size and spread of the areas surveyed.

Gallaher understood that part of Cancer Research's complaint was based on the fact that HMRC did not use empty pack surveys to calculate the illicit market. Gallaher said they had shared the results of the

EPS with HMRC and the results of other surveys conducted in previous years with HMRC, law enforcement agencies and government departments in the UK and Europe. They believed one of the benefits of the EPS was that it provided a more up-to-date analysis compared to HMRC's published figures. In any event, they believed that although HMRC did not use empty pack surveys, it did not automatically follow that the claim could not be substantiated.

Gallaher provided a copy of the methodology and a summary of the findings for the EPS.

2. Gallaher explained that the figure used in the ad was taken from the results of a survey conducted by the Tobacco Retailers Alliance (TRA), the results of which were published on the TRA's website; a copy of which was provided. Gallaher said the survey was clearly and prominently cited as the source of the statement in the ad.

They explained that the TRA was a coalition of 26,000 independent shopkeepers who sold tobacco products. They estimated that the TRA represented 48% of all independent shopkeepers selling tobacco in the UK. They understood from market research data that there were approximately 6,762 independent shopkeepers in London, of which 2,718 were members of the TRA. Therefore approximately 40% of independent shopkeepers in London were members of the TRA.

The TRA had been conducting annual surveys of its members for the previous 15 years (except 2001 and 2008). In its 2012 survey, approximately 25,000 questionnaires were sent to independent tobacco retailers, from which 1,062 useable replies were received. In London, 109 responses were received from the 1,090 questionnaires sent out.

Gallaher acknowledged that the TRA survey was carried out in relation to NUKDP generally, so included cross-border shopping as well as the illegal tobacco trade. Gallaher said the omission of cross-border shopping from the claim in the ad was a genuine, honest mistake and that they had not intended to misrepresent the findings of the TRA survey. Nevertheless, Gallaher did not believe the omission made the ad materially misleading, since the overall point was still valid; putting aside the difficulty of establishing what proportion of NUKDP products was illegal and what proportion of cross-border shopping was legitimate, NUKDP cigarettes were a big problem for independent retailers and Gallaher believed that plain packaging would exacerbate that problem by making counterfeit products easier to manufacture.

Gallaher disagreed with Cancer Research that the claim was misleading because the survey was not of all independent shopkeepers in London, but members of the TRA and the ad did not make that clear. Gallaher pointed out that there were no specific requirements of the CAP Code with regard to the use of survey results, other than the advertiser must ensure that the reader was not misled. They said there was no obligation that a survey must be made of all members of a particular class before the results could be used in an ad. They pointed out that the claim did not include the word "all" and they believed the ad did not give the impression that the statement related to all shopkeepers in London. They believed a reasonably well-informed, observant and circumspect reader would not interpret the claim "19% of independent shopkeepers in London are considering closure" to mean every independent shopkeeper in London was surveyed. They believed the general public was aware that figures quoted in ads were derived from a sample of the total population from which they were taken. For that reason, Gallaher included a prominent reference in the ad (in a footnote at the bottom of the page) to the TRA and the date of publication of the survey results on the TRA's website.

Assessment

1. Not upheld

The ASA noted that the claim was followed by an asterisk that linked to small print which made clear that it was based on the findings of an EPS in Q2 2012. We considered the methodology used in the survey and the results. We understood that the researchers collected empty packets from streets and easy access bins and collected 1,500 discarded packs from 30 different areas of London. Of the sample collected, 23.3% were assessed as being NUKDP because they were either counterfeit products or had been purchased overseas. We considered that the survey size was sufficiently large and the areas covered sufficiently diverse for the results to be representative. We therefore concluded that the claim had been substantiated and was not misleading.

On that point, we investigated the claim under CAP Code (Edition 12) rules 3.1 (Misleading advertising) and 3.7 (Substantiation) but did not find it in breach.

2. Upheld

We understood that the claim was based on the results of a TRA survey amongst its members who were asked whether they were considering closing down as a result of the effects of smuggling or cross-border shopping on tobacco sales. We noted that the results of that survey indicated that 19% of those asked were considering closing down for those reasons. However, we considered that the claim stated the reason for considering closing down was "as a direct result of the illegal tobacco trade" and no mention was given to the effects of cross-border shopping. We noted Gallaher's argument that that was unlikely to materially mislead readers, but we disagreed. We considered that the omission was significant and therefore the claim misrepresented the results of the survey.

We noted that only independent shopkeepers who were TRA members were asked their views and that they represented 40% of the total number of independent shopkeepers in London. We considered that their views might not have been representative of the views of independent shopkeepers in London as a whole and we considered the ad did not make sufficiently clear that only TRA members had been surveyed.

For those reasons, we concluded that the claim had not been substantiated and was misleading.

On that point, the claim breached CAP Code (Edition 12) rules 3.1 (Misleading advertising) and 3.7 (Substantiation).

Action

The ad must not appear again in its current form. We told Gallaher not to repeat the claim "19% of independent shopkeepers in London are considering closure as a direct result of the illegal tobacco trade" in its current form.
