

ASA Ruling on British American Tobacco UK Ltd.

 Upheld in part

| Internet (social networking)

| 18 December 2019

Background

Summary of Council decision:

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

Ad description

Seven Instagram posts by Vype, an e-cigarette brand:

a. A post on Instagram, from 10 February 2019, showed an e-cigarette with the text “FROM ONE WINNER TO ANOTHER. WELL DONE” and “RAMI MALEK BOHEMIAN RHAPSODY LEADING ACTOR”. The post included the

caption “And the winner is... #epen3 #vype #productoftheyear #vapecommunity. Oh and... #ramimalek #bohemianrhapsody #baftas #bestactor #baftas2019. Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack”.

b. A post on Instagram, from 14 February 2019, showed an image of Lily Allen holding an e-cigarette with text which stated “LFW HOUSE OF HOLLAND CATWALK 16.02.19”. The post included the caption “The latest #HoHxVape collection will be revealed this weekend at #LFW, with @lilyallen and @houseofholland #govype #vape #vapecommunity #vapenation #vapelife #vaper #vapestagram #instavape #londonfashionweek #LilyAllen #HenryHolland #HouseOfHolland” and “Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack”.

c. An Instagram story, from 16 February 2019, showed a woman using an e-cigarette and included text which stated “Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack”.

d. A post on Instagram, from 20 February 2019, showed Lily Allen holding an e-cigarette. The post included the caption “Wishing our friend #lilyallen the very best at tonight’s #BritAwards where she’s nominated for Best British Female Solo Artist! #vype #govype #vape #vapecommunity #vapenation #vapelife #vaper #vapestagram #instavape #lilyallen #bestbritishfemalesoloartist #britawards2019 Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack”.

e. A post on Instagram, from 21 February 2019, showed Lily Allen behind DJ decks with a Vype banner in the background. The post was tagged with the location 'Menagerie Restaurant & Bar' and included the caption "We've taken #LFW to #Manchester. Great night with @lilyallen on the decks and @houseofholland partying with us. Were you there? #vype #epen3 #govype #vape #vapecommunity #HoHxVype" and "Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack".

f. A post on Instagram, from 21 February 2019, showed Olivia Jade Attwood smoking an e-cigarette with the caption "We've taken #LFW to #Manchester. Great night with @lilyallen on the decks and @houseofholland partying with us. Were you there? #vype #epen3 #govype #vape #vapecommunity #HoHxVype" and "Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack".

g. A post on Instagram, from 7 March 2019, showed a person's hand holding an e-cigarette marked with 'HOUSE OF HOLLAND' and 'vype', while wearing an event admission bracelet with 'HOUSE OF HOLLAND'. The post included the caption "Who could forget the time we took Vype to #LFW with our good friends @houseofholland. See more from #behindthescenes in our stories. #HoHxVype #ThrowbackThursday #vype #govype #vape #vapecommunity #vapenation #vapelite #vaper #vapestagram #instavape and "Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack".

Issue

Action on Smoking and Health, Campaign for Tobacco-Free Kids and STOP (Stopping Tobacco Organizations and Products) challenged whether:

1. ads (a) to (g) breached the Code by promoting unlicensed, nicotine-containing e-cigarettes and their components on Instagram;
2. ads (b), (c) and (d) breached the Code by being likely to appeal particularly to people under 18 years old; and
3. ad (c) breached the Code by featuring someone with an e-cigarette who appeared to be under 25 years old.

Response

1. British American Tobacco UK Ltd said they ensured the information they provided online was factual in nature. This was done by ensuring the content of their posts related to their product, either by focusing on its characteristics, linking it to events where the product was presented or to collaborations focused on the product or by providing news on awards won by the product. They said their online communications aimed to impart factual information regarding their products but stopped short of direct or indirect promotion. British American Tobacco believed that Instagram was analogous to a website because it was an online media where only factual content was permitted, and users who were over 18 years old only saw information that was relevant for them, based on content they had actively sought out in the past, and their age. They said that the Vype Instagram account in question had a restricted profile such that for a user to follow the Vype account, the user must have declared themselves 18

years or older. In addition, they said the Vype Instagram page contained a message that stated “Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack.”. They added that all of Vype’s Instagram posts also contained text which stated “Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack”.

British American Tobacco said that Instagram users actively sought information about a product by following specific Instagram accounts or hashtags related to the product or to topics and events associated with the product. Regarding more generic hashtags, they said users only saw posts associated with a product if they had previously interacted with content related to that product - for example, by following Vype’s Instagram account or other vaping-related accounts or vaping hashtags. Given the way Instagram worked, British American Tobacco said that Instagram users who saw Vype-related content in their feeds did so because they had previously expressed an interest in, or sought out information regarding, the e-cigarette category and/or their products.

In relation to Instagram Explore, British American Tobacco said that it was an active choice by users to engage with that function. They said the Instagram Explore feed was based on an algorithm driven by the user and that content shown to them through that function based on similar content a user had followed and posts the user had engaged with. They therefore said that users must have actively engaged with vaping and/or Vype content and then actively utilised the Explore tool, for users to be presented with Vype-related content.

British American Tobacco said they were not able to sell their products through social media platforms such as Instagram. Instead, they used these platforms to interact with their users when they ask questions or request information and to communicate factual information about Vype that adult vapers and smokers might not be aware of nor able to find on their e-commerce website. With regard to whether or not the content was factual or promotional, British American Tobacco said that followers of the Vype Instagram account signed up to see product information relating to products that were alternatives to smoking. They said that Vype's followers were interested in wider factual information which related to the products, the brand collaborators and other followers. Based on that interest, they provided Vype followers with factual information of events which were either centred on the launch or presentation of a new product or, alternatively, related to an award presented to their own product. They said the imagery that was used in those posts ensure that there was a genuine and logical connection to the product.

British American Tobacco believed that the use of product-focused hashtags, as well as broader hashtags, only allowed information about Vype to reach users actively seeking it or users seeking information around vaping in general.

2. British American Tobacco believed the fashion brand House of Holland featured in ad (b) to be an internationally recognised label with premium international stockists. They said they took steps to verify the age of followers of House of Holland and they provided information showing followers were most often

aged 25-34, followed by 18-24 and then 35-44. They also provided information to verify the age of followers for Henry Holland, which gave the same result.

Lily Allen was referenced in both ads (b) and (d) and British American Tobacco believed the majority of her Instagram following was aged 25 and over. They said they had taken steps to verify Lily Allen's following on her Instagram channel (@lilyallen) and provided evidence to confirm that the majority of followers were aged 25-34, followed by the 18-24 and then the 35-44 age groups.

British American Tobacco did not believe ad (c) was likely to have particular appeal to under 18s. They said the ad was a 'boomerang' video of a model shown backstage at London Fashion Week holding a Vype product that was designed in collaboration with House of Holland. They did not believe the model or the makeup she was wearing was likely to appeal particularly to under-18s in the context of the London Fashion Week setting.

3. British American Tobacco said the post was designed to confirm Vype's attendance at London Fashion Week and included a model who was a vaper, was part of the cast of the House of Holland show and was wearing makeup appropriate for that event. They believed the model looked over 25.

British American Tobacco said that before the filming of ad (c), their representatives took steps to verify the age of the model depicted, who confirmed she was over 25 years old. They said they were since made aware that the model was in fact aged 24. As a result, British American Tobacco said the Instagram Story was removed from the Vype account.

Assessment

1. Upheld

CAP Code rule 22.12 reflected a legislative ban contained in the Tobacco and Related Products Regulations 2016 (TRPR) on the advertising of unlicensed, nicotine-containing e-cigarettes in certain media. The rule stated that, except for media targeted exclusively to the trade, marketing communications with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which were not licensed as medicines were not permitted in newspapers, magazines and periodicals; or in online media and some other forms of electronic media. It further stated that factual claims about products were permitted on marketers' own websites and, in certain circumstances, in other non-paid-for space online under the marketer's control.

The ASA firstly considered whether the ads directly or indirectly promoted a nicotine-containing e-cigarette. In each of the ads an unlicensed e-cigarette was prominently featured with the brand name Vype appearing in several places. Each ad also contained text which stated "Vype e-cigarettes contain nicotine. 18+ only. Read leaflet in pack", which indicated that the products contained nicotine. We therefore considered the ads directly promoted unlicensed nicotine-containing e-cigarettes and consequently the restriction that applied to online media under rule 22.12 was applicable.

As above, rule 22.12 did allow for factual claims to be made about such products on marketers' own websites and, in certain circumstances, in other non-paid-for

space online under the marketer's control. We therefore considered whether Instagram was an online media space where such advertising, using factual claims only, was permitted. We understood that, while promotional content was prohibited on retailers own websites, rule 22.12 specified a particular exception that the provision of factual information was not prohibited. The basis of the exception to the rule was because consumers had to specifically seek out that factual information by visiting the website. CAP guidance on "Electronic cigarette advertising prohibitions" stated that in principle there was likely to be scope for the position relating to factual claims being acceptable on marketers' websites, to apply to some social media activity. A social media page or account might be considered to be analogous to a website and able to make factual claims if it could only be found by those actively seeking it. We understood that it was possible for posts from a public Instagram account to be distributed beyond those users who had signed up to follow the account. Firstly, because posts would automatically be distributed to those users following the hashtags they contained. Secondly, because it was also possible for posts from a public Instagram account to appear on another user's Instagram Explore page, where content was automatically generated for the user to see. We considered both mechanisms were consistent with content being pushed to consumers without having opted into to receive the message it contained and therefore that neither mechanism was equivalent to actively seeking out information about e-cigarettes. Given those characteristics, we considered that material from a public Instagram account was not analogous to a retailer's own website and that material posted from such an account was therefore subject to the prohibition

on advertising of unlicensed, nicotine-containing e-cigarettes, meaning that neither promotional nor factual content was permitted.

Notwithstanding the above, we considered that in any case the ads contained content which clearly went beyond the provision of factual information and was promotional in nature. Ads (a), (b) and (d) to (g) contained text that went beyond factual information about their product, such as unrelated content about awards ceremonies or other events, and the imagery of Lily Allen, Olivia Jade Attwood and House of Holland branding were all significantly featured without being directly related to the product itself. Ad (c) consisted of a 'boomerang' video which featured looped video of a model smoking an e-cigarette and the presentation of the ad and its setting, resulted in it appearing highly stylised. All the ads therefore went beyond factually describing the e-cigarette or its features and were instead promotional in nature. Because we considered that material distributed from a public Instagram account was not analogous to a website, meaning that neither promotional nor factual content that promoted nicotine-containing e-cigarettes was permitted, we concluded that the ads should not have appeared in that manner and therefore breached the CAP Code.

On that point, the ads breached CAP Code (Edition 12) rule 22.12 (Electronic cigarettes).

2. Not upheld

Notwithstanding that we did not consider the ads were permitted on Instagram as set out in point 1, we considered whether ads (b), (c) and (d) were likely to appeal particularly to people under 18 years of age. CAP

Code rule 22.9 restricted e-cigarette ads from appealing more to under-18s than they did to over-18s. Ad (b) featured multiple references to the fashion brand House of Holland, both in the post's image "HOUSE OF HOLLAND CATWALK" and caption, "#HouseOfHolland" and "#HenryHolland". We understood House of Holland was a fashion brand that produced clothes for adults and did not produce a range of clothes for children. We therefore considered references to the brand itself would be unlikely to appeal particularly to under 18s. However, ad (b) also featured Lily Allen holding an e-cigarette, and that was also the case in ad (d), where she was seen holding an e-cigarette alongside a caption which referenced the Brit Awards "Wishing our friend @lilyallen the very best at tonight's #BritAwards where she's nominated for Best British Female Solo Artist". We understood Lily Allen was a musician whose career began in the mid-2000s and was therefore likely to have gained popularity over a broad age range, rather than appealing particularly to under-18s. We considered there was an adult tone to the ads and that they were not reflective or associated with youth culture. We therefore concluded ads (b) and (d) were unlikely to appeal particularly to people aged under 18. We acknowledged that ad (c) featured a model who appeared to be young, but we did not consider she appeared to be under 18. The video appeared to be filmed backstage at a fashion event, and, combined with the model's heavy make-up and the video's looped style, we considered resulted in it appearing highly stylised. We considered the ad may have some appeal to under-18.; However, we did not consider the stylisation nor the ad's setting were reflective of youth culture in particular, and we therefore concluded the ad was unlikely to appeal particularly to people aged under 18.

On that point, we investigated ads (b), (c) and (d) under CAP Code (Edition 12) rule 22.9 (Electronic cigarettes), but did not find them in breach.

3. Upheld

Notwithstanding that we did not consider the ad was permitted on Instagram as set out in point 1, CAP Code rule 22.10 prevented anyone shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. While we acknowledged British American Tobacco took steps to verify the model's age before the ad was published and welcomed their action to remove the ad once they became aware of the issue, we understood ad (c) showed someone who was 24 years old at the time the ad was released. We therefore concluded the ad breached the CAP Code on that basis too.

On that point, the ad (c) breached CAP Code (Edition 12) rule 22.10 (Electronic cigarettes).

Action

The ads must not appear again in the form complained about. We told British American Tobacco UK Ltd that marketing communications with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which were not licensed as medicines should not be made from a public Instagram account in future, unless they had taken steps to ensure they would only be distributed to those following their account and would not be seen by other users. If advertising in media

permitted under rule 22.12, they must not show people who are, or seem to be, under 25, using e-cigarettes or playing a significant role.

CAP Code (Edition 12)

[22.9](#) [22.10](#) [22.12](#)

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