

UNFAIR COMMERCIAL PRACTICES

PS12009 – BAT: SURREPTITIOUS ADVERTISING OF GLO ON SOCIAL NETWORKS

Measure No. 29837

THE ITALIAN COMPETITION AUTHORITY (*L'AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO*)

AT ITS MEETING on September 30, 2021;

HAVING HEARD the Rapporteur, Professor Michele Ainis;

IN ACCORDANCE WITH Part II, Title III of Legislative Decree No. 206 of September 6, 2005, containing the “*Consumer Code*” and subsequent amendments (hereinafter, the “*Consumer Code*”);

IN ACCORDANCE WITH the “*Regulation on preliminary investigation procedures concerning misleading and comparative advertising, unfair commercial practices, violation of consumer rights in contracts, violation of the prohibition of discrimination and unfair terms*” (hereinafter, the “*Regulation*”), adopted by the Authority in a resolution dated April 1, 2015;

IN ACCORDANCE WITH the communications received on June 25, 2021, in which the Parties submitted commitments pursuant to Article 27(7) of the Consumer Code and Article 9 of the Regulation;

IN ACCORDANCE WITH the procedural documents;

I. THE PARTIES

1. British American Tobacco Italia S.p.A. (hereinafter, also “BAT”), in its capacity as a professional, pursuant to Article 18(1)(b) of the Consumer Code. The company is a global leader in the tobacco and nicotine industry and owner of the “Glo Hyper” brand, a tobacco heating device.

2. Mr. Stefano De Martino, in his capacity as a professional, pursuant to Article 18(1)(b) of the Consumer Code, owner of a sole proprietorship by the same name. The business activities of Stefano De Martino are connected to the Instagram profile “*stefanodemartino*,” which has 4.4 million followers.

3. Mr. Stefano Sala, in his capacity as a professional, pursuant to Article 18(1)(b) of the Consumer Code, owner of a sole proprietorship by the same name. The business activities of Stefano Sala are connected to the Instagram profile “*stevenlivingroom*,” which has 327 thousand followers.

4. Ms. Cecilia Rodriguez, in her capacity as a professional, pursuant to Article 18(1)(b) of the Consumer Code. Ms. Rodriguez is connected to the Instagram profile “*chechurodriguez_real*,” which has 4.3 million followers.

5. The National Consumer Union (*Unione Nazionale Consumatori*), in its capacity as the reporting consumer association.

II. COMMERCIAL PRACTICE THAT IS SUBJECT TO THE PROCEEDINGS

6. The proceedings under examination pertain to a surreptitious type of advertising consisting of the publishing, by the aforementioned professionals (so-called, influencers), of Instagram posts concerning the Glo Hyper tobacco heating device, produced and marketed by BAT. Specifically, in said posts, the influencers invited respective followers to publish, in turn, their content on Instagram, while mentioning (“tagging”) Glo and the influencer, and including hashtags linked to the brand. Furthermore, the influencers agreed to re-publish (“re-post”), on their profile and on Glo Hyper’s profile, the best content posted by followers. The posts published by followers in response to the invitation thus lacked the warnings on the promotional nature of the contents disseminated on the Web.

7. Such practice can be traced to the phenomenon of influencer marketing, an established mode of communication consisting of the dissemination on blogs and social networks (such as Facebook, Instagram, Twitter, YouTube, Snapchat, Myspace) of photos, videos and comments from bloggers and influencers that show support or approval (endorsement) of certain brands, generating an advertising effect.

8. In this specific case, the influencers used a promotional strategy named “call to action,” intended to create an interaction with followers who were encouraged to respond to the invitation and disseminate content on Instagram related to the Glo Hyper brand in the expectation of obtaining greater visibility of their profiles in exchange, thus generating an advertising effect to the brand’s benefit.

III. FINDINGS OF THE PROCEEDINGS

III.1 Timeline of the Proceedings

9. On May 27, 2021, written communication was sent to the company BAT and the influencers, Parties to the proceedings, regarding the initiation of the preliminary investigation procedure PS/12009 for alleged violation of Article 20(2), Article 22(2) and Article 23(1)(m) of the Consumer Code. In particular, the Parties were alleged to have engaged in surreptitious advertising to the benefit of the Glo Hyper brand through the publication of posts by the influencers — who are affiliated with the brand through a declared client-contractor relationship — in which they invited their followers to disseminate new Instagram posts containing tags and hashtags related to the Glo product without asking them to include warnings in order to clarify the promotional nature of the call to action (such as #adv, #sponsoredby...).

10. On the same date, inspection activities were conducted at the registered office of the company BAT, party to the proceedings, as well as at the registered offices of the advertising agency Gruppo Roncaglia S.r.l., which is not party to the proceedings.

11. On June 3, 2021, the company BAT accessed the procedural documents.

12. On June 25, 2021, the company BAT and the influencers, Parties to the proceedings, filed their own statements of defense.

13. On the same date, the company BAT and the influencers, Parties to the proceedings, submitted commitments.

14. On July 8, 2021, the company BAT filed an addition to the previously submitted commitments.

15. On August 3, 2021, the Parties were notified of the date of conclusion of the preliminary investigation phase, pursuant to Article 16(1) of the Regulation.

16. On August 17, 2021, an opinion was requested from the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*), which issued it thereafter on September 20th.

III.2 Evidence gathered and commitments submitted by the professionals

17. With reference to the profile disputed in the notice to BAT and the influencers regarding the initiation of the proceedings — i.e. the occurrence of a case of surreptitious advertising of the Glo Hyper product through the dissemination of a call to action directed toward followers on Instagram — the procedural documents confirmed that the commercial strategy adopted by BAT sought to make use of the content created by users (known as user-generated content, UGC) in response to the invitation, for the purpose of promoting the launch of the Glo Hyper device.

18. In its statements of defense, the company BAT maintained that its actions were correct and disputed any assumption that the messages were disseminated for the purpose of surreptitious advertising, given the presence of hashtags such as #adv in the influencers' posts containing the invitation, as well as the absence of a client-contractor relationship between the company and the followers. In addition, the company emphasized its cooperative conduct, having removed the posts after the notice of the initiation of proceedings was communicated. Finally, the professional noted that the proceedings regard a case that is unprecedented in Italian territory, nor have there been any related precedents within the EU.

19. The influencers involved have confirmed that they are contractually bound to publish some stories and posts containing the call to action, inserting, however, necessary warnings by means of hashtags of reference (#sponsoredby, #adv, etc.).

As noted above, each professional submitted a proposal for commitments in June 2021.

III.2.1 Commitments submitted by BAT

20. The commitments submitted by BAT, which are annexed to this measure in their final version and form an integral part thereof, include the following measures:

i. Commitment to the adoption of Influencer Marketing Guidelines

The professional, in order to adopt appropriate measures to prevent future forms of surreptitious advertising on social media, agrees to involve — through the distribution of internal guidelines on influencer marketing (Guidelines) — senior roles in the areas responsible for marketing management.

Specifically, the Guidelines will contain express indications, briefly described herein:

- the influencers' obligation to insert hashtags such as #adv, or an acronym of equivalent meaning, before the name of the advertised product, or #productprovidedby in the event that the brand supplies the product free of charge.
- with specific reference to the call-to-action technique, the influencers' obligation to encourage followers to insert hashtags such as #adv before the brand name associated with the product, under penalty of exclusion from any prize/reward (such as the publication of their photo on the Instagram profile of the influencer and/or Glo Italia).
- an excerpt of the Guidelines in the form of bullet points with binding requirements for influencers will form an integral part of agreements between BAT and the influencers or their agencies.

- the Guidelines will also include: (i) references to the key principles of the obligations of advertising transparency, also with respect to the Authority's decision-making practices; (ii) provisions directed toward influencers regarding obligations to insert hashtags such as #adv and the rules to follow in the event of calls to action for the purpose of guaranteeing transparency of communication to the final consumer; (iii) instructions relating to contractual models approved by the Legal Department in dealings with influencers and agencies that contract them on behalf of BAT; such models will be characterized, among other things, by the presence of clauses that aim to guarantee the obligation of communication transparency, also by means of deterrent and sanction mechanisms in the event of violation of the aforementioned clauses, such as penalties or the Company's right to withdraw from the agreement.
- BAT reserves the right to apply sanctions against employees who do not comply with the Guidelines, including their demotion and, in the most serious cases, termination for just cause. All employees will be informed of this during in-company training on the Guidelines.
- assignment by a Board of Directors of an internal Antitrust Compliance Officer (ACO), a position already in existence within BAT, with the task of overseeing the correct implementation of the Guidelines. The commitment will be implemented within thirty days of notification of acceptance of the commitments. A Board of Directors and an in-company training seminar will also be formed by September 30, 2021.

ii. Commitment relating to the use of influencers directly contracted by BAT

If the professional contracts the influencers directly without the use of agencies, the relative agreement (with advance approval by the Legal Department in accordance with the Guidelines), in addition to describing the obligation to comply with the Guidelines, will contain standard clauses with deterrent mechanisms (reduction of fees and/or penalties and/or suspension of payments/withdrawal from the agreement) in the event of violation of the aforementioned obligation.

This commitment will be implemented within thirty days of notification of acceptance of the commitments with the establishment of appropriate contractual clauses to be automatically inserted in the BAT/influencer agreement "template."

iii. Commitment relating to the use of influencers indirectly contracted by BAT

If the professional contracts the influencers indirectly through the use of an agency, the agreement between the professional and the agency will contain clauses establishing the obligation of the latter to monitor the influencers' activities. In order to ensure compliance with the Guidelines, deterrent mechanisms and sanctions will be included in the agreement (e.g. reduction of fees and/or penalties and/or suspension of payments in the event of partial monitoring; termination of the agreement in the event of lack of monitoring). The agreement will also include a contractual obligation for the agency — intended as a termination condition of the agreement — to replicate similar deterrent and sanction mechanisms in the independent agreements concluded between the agency and the influencers or other agencies.

This commitment will be implemented within thirty days of notification of acceptance of the commitments with the establishment of appropriate contractual clauses to be automatically inserted in the BAT/agency agreement "template."

iv. Commitment relating to the implementation of future calls to action

If the professional promotes a call to action on their channels that is addressed to their own followers, they shall ask them to indicate “adv” and “sponsoredby” before the name of the BAT-branded product. Followers who do not use the #adv warning before the brand in spite of the aforementioned recommendations will be excluded from any prize/reward (such as the publication of their photo on Glo Italia’s Instagram profile or other profiles) where required by the call to action.

This commitment will be implemented within ten days of notification of acceptance of the commitments with a General Counsel Directive to the Company’s internal divisions involved in the matter.

v. Commitment not to incentivize influencers to use their social channels for the promotion of their products

This commitment will be implemented within ten days of notification of acceptance of the commitments with a General Counsel Directive to the Company’s internal divisions involved in the matter.

vi. Commitment to remove all photos/pages similar to those in dispute and published on the Instagram pages of Glo and the influencers contracted by BAT, with the dispatch of a specific and appropriate notice to the company Zenith Italy S.r.l. so that they are removed from the Instagram profiles of said influencers.

This commitment has already been fulfilled.

*vii. Commitment to produce a compliance report within ninety days of notification of acceptance of the proposed commitments or within a shorter period specified by the Authority.***III.2.2 Commitments submitted by the influencers**

21. The commitment proposals of influencers Stefano De Martino, Stefano Sala and Cecilia Rodriguez, which are annexed to this measure in their final version and form an integral part thereof, although formally distinct, concern the same measures described below:

22. Such measures include:

- 1) the removal from their Instagram profiles of any publication in connection with the facts subject to dispute in the proceedings;
- 2) for any form of future advertising and marketing activities — including whenever the promotional message is conveyed by any followers of the influencer through the call to action — the use of the following tags, to be placed before the name of the brand, company or promoted product: “#adv” “#advertising,” “#sponsoredby,” “#advertising,” “#promotedby” and/or “#in collaboration/partnership”;
- 3) for any form of future advertising and marketing activities — including whenever the promotional message is conveyed by any followers of the influencer through the call to action — involving the final publication of the best posts on the social page and/or website in connection with the influencer and/or the company that owns the brand/product, such invitation must contain the express warning that posts by followers that lack the necessary tags will not be considered.

IV. OPINION OF THE COMMUNICATIONS AUTHORITY

23. Since the commercial practice that is the subject of this measure was conducted on the internet, an opinion from the Italian Communications Authority was requested on August 17, 2021, pursuant to Article 27(6) of the Consumer Code.

In an opinion received on September 20, 2021, the aforementioned Authority decided that in the present case, the Internet is a tool capable of significant influence in the achievement of the commercial practice that is the subject of the proceedings.

V. ASSESSMENT OF COMMITMENTS

V.1 Preamble

24. It should first be noted that in the ever-expanding “digital world,” posts, tweets, photos and videos published on social media are common tools for users to communicate with the outside world and establish an emotional connection with the recipients of their own story.

25. Thus arises the necessity — in the event in which the content disseminated on the Web derives from a client-contractor relationship between the influencer and the featured brand — to inform consumers of their exposure to an actual advertising message and not a spontaneous and impartial account of the person’s daily life.

26. In this sector, therefore, it is fundamentally important to guarantee maximum transparency and clarity for consumers on any advertising content of communications disseminated on social networks, given that surreptitious marketing is particularly insidious since it can deprive the recipients of their natural defenses that are triggered in the presence of declared advertising intent.

27. The requirements of transparency and clarity described above must also be adequately addressed with respect to the new social media marketing technique involving downstream activity of followers, such as that which is the subject of these proceedings.

28. Thus, the ways in which commercial communication on the Internet is identified — through the use of such hashtags as #adv or #sponsoredby — are valuable means of recognition of the advertising message, either when promoted (upstream) by personalities with a more or less consistent number of followers — influencers and micro-influencers — or when the message comes from an ordinary user (downstream) who is encouraged to post such contents in exchange for a benefit, even if not directly economic in nature, such as obtaining greater visibility on the Web.

V.2 Assessments of commitments

29. Given the context of the assessment of the Parties’ proposals in these proceedings, the Authority finds that the commitments undertaken by the professionals fully address the general principles of recognition outlined above and are appropriate to remedy the potential illegality of the commercial practice in dispute.

V.2.1 BAT’s commitments

30. First of all, it should be noted that BAT’s commitments apply the principles underlying the regulations on transparent advertising regarding an unprecedented social marketing technique that

involves downstream activity of followers, censures of which have been unprecedented in Italian or foreign law up until today.

31. In substance, the commitments presented by BAT include measures that complement one another. In particular, the issuance by BAT's top management of complete and structured Guidelines aimed at maximum sensitivity of company functions involved in digital communication and marketing is implemented in concrete terms in the contractual relationships that the professional will establish directly or indirectly with influencers and agencies. As such, these Guidelines will form an integral part of every agreement between BAT and the influencers, as well as those concluded between the agencies utilized by BAT and said influencers.

32. For the purpose of guaranteeing effective compliance with the rules of transparency, a highly impactful condition is that the contractual obligation to comply with the Guidelines will be accompanied by the provision of deterrent and sanction mechanisms for influencers who violate the directives received, leaving to the discretion of BAT or the agencies the sole determination of the extent of the sanction, which will depend on the severity of the violation and the value of the agreement. In addition, particular emphasis is placed on the inclusion of contractual clauses aimed at holding agencies responsible for monitoring the activities of influencers, providing for, also in this case, the application of deterrent and sanction mechanisms in the event of the agency's violation of this obligation.

33. Considering the singularity of the marketing tool used by the Professional, which involves two different registers of actors — influencers and followers — through the call to action, the commitments submitted constitute a significant element of regulation on the promotional activity thus conducted. In fact, at BAT's request, followers will be bound in similar future initiatives to indicate "adv," "sponsored," under penalty of exclusion from any prize/reward. This method of warning — which is also found in the influencers' commitments — appears suitable to regulate interactions resulting from the call to action, in accordance with the obligations of advertising transparency.

34. In conclusion, these are comprehensive measures that structurally and permanently reinforce a company policy that is already sensitive to the matter and extend it to the techniques of user-generated content, thus overcoming the censured profiles.

V.2.2 Influencers' commitments

35. First of all, it should be noted that a joint assessment of the proposed commitments has been conducted with regard to the three influencers who submitted these measures to the Authority, since the commitments have substantially similar and uniform aspects.

36. The influencers have submitted commitments that are altogether adequate in addressing the potentially improper profiles in dispute, removing the pages containing the posts in dispute as well as agreeing to communicate in a transparent manner the promotional purpose, where applicable, of the content disseminated on social media. The proposed measures can also have a useful wide-ranging effect, since the professionals involved have agreed not only to insert "in any future advertising and marketing activities" — including whenever the promotional message is conveyed by followers through a call to action — adequate warnings about the promotional nature of the message, but also to warn followers that only posts containing such hashtags may be "reposted" from the influencer or company that owns the

brand/product. As such, the influencers agree to instruct their followers to publish posts in which the advertising purpose is transparent.

37. The synergy among the commitments by the professional and influencers associated with it through a client-contractor relationship effectively integrates the disciplinary framework already outlined in previous measures of the Authority in the context of social media marketing.

38. From this point of view, the commitments in question address the general interests of consumer protection underpinning the regulatory obligation to make advertising clearly recognizable, since the commercial purpose of the communication will be evident regardless of the person from which the communication originates, whether an influencer, a micro-influencer or an ordinary user of platforms on the Web.

V.2.3 Conclusions

39. With regard to the conduct in dispute, the measures proposed by BAT and the influencers involved are adequate in providing consumers with complete and accurate information about the nature of their communications, making explicit, where applicable, the commercial nature and advertising purposes of their initiatives on social media, as well as rendering their conduct permanently compliant with the aforementioned general principles.

In the present case, the commitments of the brand owner and the influencers have the effective common goal of ensuring compliance with the rules of transparency, which is fundamental to a proper dynamic of influencer marketing and its rapid evolution.

40. In view of the foregoing considerations, the commitments submitted are found to satisfy the requirements envisaged by Article 27(7) of the Consumer Code.

CONSIDERING, therefore, that the commitments submitted by the company British American Tobacco Italia S.p.A., as well as Mr. Stefano De Martino, Mr. Stefano Sala and Ms. Cecilia Rodriguez, in the terms detailed above, are suitable to counter potential improper profiles in the commercial practice under investigation;

CONSIDERING that, the aforementioned commitments will be mandatory for the company British American Tobacco Italia S.p.A., as well as for Mr. Stefano De Martino, Mr. Stefano Sala and Ms. Cecilia Rodriguez;

CONSIDERING, therefore, that the proceedings can be closed without establishing an offense;

HAS DECIDED:

a) to make obligatory, with regard to the company British American Tobacco Italia S.p.A., as well as Mr. Stefano De Martino, Mr. Stefano Sala and Ms. Cecilia Rodriguez, pursuant to Article 27(7) of the Consumer Code and Article 9(2)(a) of the Regulation, the commitments proposed by the aforementioned professionals, as described in the forms annexed to this measure;

b) to close the proceedings without establishing an offense, pursuant to Article 27(7) of the Consumer Code and Article 9(2)(a) of the Regulation;

c) that the company British American Tobacco Italia S.p.A., as well as Mr. Stefano De Martino, Mr. Stefano Sala and Ms. Cecilia Rodriguez, within ninety days of the date of notification of this decision, shall inform the Authority that the commitments have been implemented.

Pursuant to Article 9(3) of the Regulation, the proceedings may be officially reopened if:

- a) the professionals do not implement the commitments;
- b) the factual situation changes with respect to one or more elements on which the decision is based;
- c) the decision to accept the commitments is based on incomplete, incorrect or misleading information submitted by the Parties.

Pursuant to Article 27(12) of the Consumer Code, in the event of non-compliance with the present resolution, the Authority will apply a pecuniary administrative penalty from €10,000 to €5,000,000. In the event of repeated non-compliance, the Authority may order the suspension of commercial activity for a period not exceeding thirty days.

This measure will be communicated to the interested parties and published in the Bulletin of the Italian Competition Authority.

THE SECRETARY-GENERAL
Filippo Arena

THE PRESIDENT
Roberto Rustichelli
