European Advertising Standards Alliance

EASA Best Practice on Claims Substantiation

2012
Introduction

Over the last years the annual EASA statistics reports have shown that misleading marketing communications are the biggest issue when it comes to complaints about advertising across Europe. Most complaints are related to claims made in advertisements, such as performance claims, green claims, availability claims or price claims.

It is evident that advertisers need to be able to substantiate claims related to verifiable facts in their marketing communications. The Consolidated ICC Code, furthermore, stipulates that such substantiation should be available so that evidence can be produced without delay and upon request to the self-regulatory organisation responsible for the implementation of the code (Art 8).

However, among the SROs, there is no common approach or procedure when investigating the veracity of objectively verifiable claims in advertisements. For example, while some SROs request and then evaluate the documentary evidence of advertisers in case of a complaint, others request and rely on a written statement of the advertiser that he holds the necessary evidence. This in turn can lead to a divergence in adjudications about the same advertisement: the SRO that evaluates the evidence can come to the conclusion that it is not sufficient to substantiate the claim made in the advertisement and will uphold the complaint. The SRO that requested the statement only, on the other hand, will have no means to judge the veracity of the claim and will trust the advertiser’s declaration. The complaint would be dismissed. Not only could this divergence be a problem for advertisers, the lack of coherence also leaves advertising self-regulation open to criticism.

Therefore, the present best practice recommendation attempts to set up a common standard for the procedure regarding the substantiation of claims in advertising to try and ensure more coherence across Europe and beyond.
Best Practice

What is the substantiation of claims?

One of the fundamental principles of advertising self-regulatory systems is the reversal of the burden of proof. This requires the advertiser to prove that the claim he is making is truthful, rather than the complainant having to demonstrate that it is not. Therefore, before offering an advertisement for publication, advertisers should be able to provide documentary evidence to substantiate their direct or implied claims, which can be objectively judged. If requested by the self-regulatory organisation, e.g. in case of a complaint, the advertiser should produce the necessary evidence without delay to the SRO.

What types of claims need to be substantiated?

Any advertising claim that the average consumer\(^1\) is likely to regard as objective, i.e. a claim that can be objectively judged to be true or false, should be capable of being substantiated, regardless of the product involved or the means of communication. This includes claims about the price, the terms and conditions, the performance of a product, its availability or its impact on the environment. The name of the product can also constitute a claim, as well as an image.

Claims expressing a subjective opinion do not have to be substantiated by the advertisers provided they do not imply that the expression of opinion are objective claims and provided they are not materially misleading. The same is valid for obvious exaggerations (“puffery”) and claims that the average consumer who sees the advertisement is unlikely to take literally.

Examples: The claim that a car has ‘the best fuel economy in its class’ is a matter of objective fact. By contrast, the claim that a car is ‘the most elegant in its class’ is clearly a matter of subjective opinion, so the question of substantiation does not arise. Similarly, the claim that a car will provide ‘the most wonderful driving experience of your life’ is immediately recognisable as puffery.

When should SROs require substantiation of claims?

Substantiation may be required in various circumstances (e.g. copy advice, complaints investigation or during a monitoring exercise). An SRO will allow the use of claims, descriptions, statements,

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\(^1\) The term “average consumer” means any person “who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors” (Directive 2005/29/EC).
illustrations, testimonials, etc. whose truthfulness and accuracy the advertiser is able to demonstrate.

The reversal of the burden of proof allows SROs to ask advertisers, at any time, to supply documentary evidence proving the accuracy and truthfulness of claims, statements, testimonials, etc. Failure to comply with a request for evidence can be regarded as a breach of the Code and the advertiser will be required to withdraw or modify the claim.

It is advisable to always ask for the documentary evidence (and not rely on the advertiser’s verbal or written assertion that he holds the necessary evidence) or at a minimum ask for the documentary evidence in every case where the claim can materially mislead consumers, where the advertised products can affect the health and well-being of consumers or if the advertisements are addressed to children or other sensitive populations.

**How do the claims need to be substantiated?**

The type of substantiation needed to prove a claim will vary depending on the claim. Therefore, the SRO will need to decide on a case by case basis which type of substantiation is adequate.

The following list includes a non-comprehensive list of examples:

**Market claims** (or similar):

- Statistical research. This will need to include an appropriate robust sample using acceptable methods and models.
- Sales or stock figures.

**Scientific claims**:

- Scientific studies of a recent date, which have been properly controlled and where appropriate, carried out by an independent and competent institute (credibility of the data).
- Dependent on the nature of the research, the use of blind tests, the use of control groups (placebo) and/or a minimum number of participants, i.e. a statistically significant number of participants, have to be included.
- Studies should be evaluated using commonly applied criteria.

**Testimonials**:

- Testimonials alone do not constitute substantiation and the claims expressed in them must be supported, if necessary, with independent evidence of their accuracy.
Comparative claims:

- Evidence that relates both to the advertiser’s and the competitor’s products that are the implicit or explicit subject of comparison.

Sources and references

If the advertisers refer in their advertisements to sources, it is advisable that the existence of these sources can also be checked by consumers.

Evaluation of evidence: criteria

There is room for flexibility in the way self-regulatory bodies evaluate claim substantiation. For example, advertisers themselves may submit assessments or approvals issued by public or private bodies, or produce test/trial results of their own. What matters most is that evidence be consistent and based on generally accepted scientific data: claims should be supported by objective evidence with reproducible results, not on subjective self-certification.

Evaluation of evidence: the role of experts

It may be a value for an SRO to have access to relevant experts able to evaluate evidence in support of claims requiring scientific assessment.

For the assessment of simple, uncontroversial claims, SROs may find it useful to have an element of ‘in-house’ expertise, in order to save time and contain costs. This might be achieved by appointing to the Complaints Committee one or two members, with specialized knowledge (e.g. a physician, and/or a pharmacist).

Time period for providing evidence

On the principle that advertisements should only make claims that can be proven to be accurate and truthful, it should not take the advertiser long to produce evidence when an SRO requests it. Ideally the evidence should be immediately available and should not need to be assembled in response to a request. In any case if advertisers require time to produce their evidence it should not be a long period, i.e. a matter of days rather than weeks.
Confidentiality

Some or all of the evidence provided by the advertisers may need to be treated confidentially by the SRO, especially in relation to business sensitive data or if the evidence relates to trade secrets. However, it might be necessary to refer to details of the documentary evidence (e.g. the methodology or results of the study) when helping to inform the decision of the jury.

Adjudication

The SRO may regard claims as misleading or in extreme cases even as dishonest in the absence of adequate substantiation.

Appeals procedure

Self-regulatory organisations are recommended to provide the possibility of appeal when new evidence can be offered. If it is the advertiser that has brought additional evidence to bear, it must provide an explanation as to why the evidence was not available during the investigation.

Regulation

With regard to specific products or issues national legislation or European regulation may require advertisers to comply with specific requirements with regard to claims made in advertisements.

At European level it concerns mainly nutrition and health claims made on foods as well as claims made in cosmetics advertising.

Nutrition and health claims:

The Regulation on nutrition and health claims made on foods was adopted by the Council and Parliament in December 2006. The Regulation lays down harmonised rules across the European Union for the use of nutrition claims such as “low fat”, “high fibre” or health claims such as “reducing blood cholesterol”.

In order to have a comprehensive overview of the permitted nutrition claims and of both permitted and rejected health claims, the Commission has established a Register which is regularly updated.

For complete information, you can consult the following official documents:

Regulation on Nutrition and Health Claims made on foods

Guidance on the implementation of Regulation (EC) N° 1924/2006
**Cosmetics Claims:**

A Cosmetics Directive has been adopted as early as 1976, but has been revised seven times since. Its goal is to ensure the free circulation of cosmetic products in the internal market and to ensure the safety of cosmetic products placed on it.

Article 20 of the new regulation 1223/2009 stipulates that the European Commission must draw up a list of common criteria that would justify the use of claims in the labelling, making available on the market and advertising of cosmetics products.

The common criteria are supposed to come into force in July 2013. By 11 July 2016, the EC committed to submit a report to the European Parliament and the Council regarding the use of claims in cosmetics advertising on the basis of the adopted common criteria.

For complete information, you can consult the following official document:

[Regulation on cosmetics products (No 1223/2009)](#)

**Environmental claims:**

There is so far no EU legislation specifically harmonising environmental marketing. Environmental claims are partly covered by specific community legislation regulating the environmental performance of a category of products and prohibiting the misleading use of the claim, logo or label used in reference to this specific legislation.

Outside those aspects covered by specific EU legislation, the general provisions of the Unfair Commercial Practices Directive are to be used when assessing environmental claims and establishing whether a claim is misleading either in its content or in the way it is presented to consumers.

DG Sanco is currently conducting a stakeholder dialogue into misleading environmental claims.

For complete information, you can consult the following official document:


[Guidance Paper](#) (including in section 2.5.2 an overview of specific EU legislation on environmental claims)

[General Q&A on the Guidance](#)
Definitions

**Blind tests:** A blind or blinded experiment is a scientific experiment where some of the persons involved are prevented from knowing certain information that might lead to conscious or unconscious bias on their part, invalidating the results.

For example, when asking consumers to compare the tastes of different brands of a product, the identities of the latter should be concealed — otherwise consumers will generally tend to prefer the brand they are familiar with. Similarly, when evaluating the effectiveness of a medical drug, both the patients and the doctors who administer the drug may be kept in the dark about the dosage being applied in each case — to forestall any chance of a placebo effect, observer bias, or conscious deception.

**Control group:** Participants in a control group are used as a standard for comparison. For example, a particular study may divide participants into two groups - an "experimental group" and a "control group." The experimental group is given the experimental treatment under study, while the control group may be given either the standard treatment for the illness or a placebo. At the end of the study, the results of the two groups are compared.

**Minimum number of participants:** Depending on what the research sets out to prove a minimum number of participants may be required.

**Neutrality:** Research is supposed to be unbiased no matter where the funding comes from. The neutrality of research is another standard that tends to be checked in a peer review.

**Peer review:** Evaluation of a person's work or performance by a group of people in the same occupation, profession, or industry.