

ASH response: Consultation on the advertising of electronic cigarettes

CAP and BCAP's proposals for changes to their Codes and guidance in response to the Tobacco Products Directive taking effect in the UK

Issue date: 29/09/2016

Closing date: 31/10/2016

Introduction

ASH is a public health charity set up by the Royal College of Physicians in 1971 to advocate for policy measures to reduce the harm caused by tobacco. ASH receives funding for its full programme of work from the British Heart Foundation and Cancer Research UK. It has also received project funding from the Department of Health to support tobacco control. ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry.

Whether or not the current regulatory framework provides the right balance between permitting some advertising to adult smokers and protecting children and non-smoking adults from promotion, which may have adverse consequences, remains to be seen and needs to be monitored. ASH believes that where flexibility can be exercised in order to allow adult smokers access to marketing material such as pricing and product information, including generic information about relative risk, it should.

Answers to Questions

Part A: CAP's proposal to approximate the advertising prohibitions in the Tobacco and Related Products Regulations 2016 in the CAP Code

A.2 Products for which advertisements are prohibited

In media subject to the regulations:

1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why. YES

2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine-containing e-liquid? If not, please explain why. YES

3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why. YES

4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited? YES

A.3 Prohibition on advertising in newspapers and magazines

5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why. YES

A.4. Prohibition on advertising in online media and some other electronic media

6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above.

Do you agree that this proposal is consistent with the law? If not, please explain why. YES

7. Are there any types of media that you consider to be information society services which are not referenced above? NO

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service? NO

A.5. Prohibition on promotional claims on retailers' websites

CAP considers that the following types of claims are likely to be factual in nature and therefore, all other things being equal, permitted under the Code:

- the names of products (so long as the names are not promotional in nature, for example names which include product claims)
- descriptions of product components including, where applicable, the opening and refill mechanism
- price statements (however, see "promotional marketing" below)
- instructions as to how products can be used
- product ingredients
- flavours
- nicotine content

9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why. YES

10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why. YES

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list? YES

Generic statements about relative risk should be allowed, along the lines that "*electronic cigarette use is considered by Public Health England and the Royal College of Physicians to*

be much less harmful than smoking" and should link to Public Health England¹ and the RCP² statements to this effect.

We believe such generic statements of relative risk are essential given the growing misperceptions of the relative risks of vaping and smoking. The ASH Smokefree Great Britain Survey³ found that between 2013 and 2016 the perception of harm from electronic cigarettes has changed. The general public and smokers are increasingly failing to recognise that electronic cigarettes are less harmful than smoking. In 2016 only 15% of adults correctly identified that electronic cigarettes are a lot less harmful than smoking whereas 21% correctly identified they were a lot less harmful than smoking in 2013. In addition, more than three times as many people in 2016 than in 2013 think they are as harmful or more harmful than smoking.

We also asked smokers who've never tried an e-cigarette why they hadn't (respondents could choose multiple options). Concerns about potential harms was the most commonly cited reason. It is notable that a quarter of respondents were also concerned about "substituting one addiction for another" – this could indicate some misunderstanding about the relative harm from nicotine. Those smokers who haven't yet tried an electronic cigarette are also more likely to have poor understanding of the harms from nicotine than smokers who have tried electronic cigarettes. Only 8% of smokers who haven't tried an electronic cigarette correctly state that nicotine's contribution to the risk from smoking is none or very small, whereas 44% wrongly believe it is at least half the risk or more.

These misperceptions potentially discourage smokers who might otherwise switch to vaping from doing so, or where they have switched make it more likely that they continue dual use; and may make it more likely that vapers who have quit using electronic cigarettes revert back to smoking.

CAP considers that the following types of claims and activities are likely to be promotional in nature and therefore prohibited:

- **descriptive language that goes beyond objective, factual claims, for example the use of adjectives**
- **promotional marketing, as defined in Section 8 of the CAP Code. Promotional marketing can provide an incentive for the consumer to buy by using a range of added direct or indirect benefits, usually on a temporary basis, to make the product more attractive. A non-exhaustive list of sales promotions includes: "two for the price of one" offers, money-off offers, text-to-wins, instant-wins, competitions and prize draws.**
- **significant imagery that is not related to the product.**
- **comparative claims with other e-cigarette products or the general market.**

Once finalised, CAP intends to set out these lists in a guidance note accompanying the Code rule prohibiting advertisements in online media.

12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why. YES

13. Are there other types of generic claims that should be included in this list? NO

¹ Public Health England. E-cigarettes: an evidence update. [PHE publications gateway: 2015260](#). 28 August 2015.

² RCP. [Nicotine without smoke: Tobacco harm reduction](#). London. RCP 2016.

³ ASH. Use of electronic cigarettes (vapourisers) among adults in Great Britain. London. May 2016.

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional? NO

15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why.

Please provide any examples and evidence you might have in support of your response.

YES ASH recommends that CAP should take the position that sharing is not a function of the business - provided that it does nothing to encourage sharing (for example by urging people to "Like and share this message" in order to receive some kind of incentive). The content of social media should be informational and not promotional, but if it pops up in the timeline of someone who has not sought it out, that is a function of the public response, and not of the business itself. This would avoid the need for overly restrictive 'privacy options'.

A.6. Non-broadcast media channels not subject to TRPR

16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why. YES

17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended. NO

Answer: The second sentence of the last paragraph of section 22 is unclear and we do not understand what is meant by it. In particular the MHRA is both the agency responsible for medicines licensing and for overseeing regulation of electronic cigarettes under the EU Tobacco Products Directive. In this sentence the distinction is not completely clear as it refers to products "which are authorised by the MHRA". In addition there is a typo in the third line which says "sections" plural when it should be 'section' singular. We believe it would be clearer to change this to read "*Rule 22 applies to both electronic cigarettes which come under the EU Tobacco Products Directive and those authorised as medicines, except where there is a carve out for medicines in rules 22.5 and 22.12.*"

A.7 Proposed changes to the CAP Code

18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended. NO

Answer: In the second bullet 'Online media and some other forms of electronic media' the meaning of 'some other forms of electronic media' is unclear – what these other forms of media are needs to be specified.

Part B: Other issues relevant to both the CAP and BCAP Codes

B.1 Preventing indirect promotion of nicotine-containing e-cigarettes

19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine-containing e-cigarettes that are not authorised as medicines? YES

20. Are there any criteria you consider should be added to the list? NO

In media subject to the Regulations:

21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised? YES

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why. YES

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why. YES

B.2. Ongoing suitability of current CAP and BCAP content, placement and scheduling rules

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

See above answer to Q11. In order to address the serious misperceptions about relative risk we believe that it is essential that generic statements about the relative risk can be made. If these were considered to be "substantiated health claims" then we would consider that this should be allowed by CAP and BCAP. The sort of claim that should be allowed, as stated above in answer to Q11, should be along the following lines, that "*electronic cigarette use is considered by Public Health England and the Royal College of Physicians to be much less harmful than smoking*" and should link to Public Health England¹ and the RCP² statements to this effect. This would require also the words "health or" to be removed from Rule 33.5.

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why. YES

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements? YES

There are two types of concern raised about electronic cigarette advertising. On the one hand there is a concern that restricting it will impede uptake by smokers. However, awareness of electronic cigarettes is widespread among adults. The ASH Smokefree GB Survey 2016 survey (carried out in March prior to implementation of the Directive) found that 96% of smokers and 93% of the general population had heard of electronic cigarettes. Knowledge of electronic cigarettes grew rapidly at a time when advertising of these products was not widespread.

On the other hand concerns have also been raised about electronic cigarette advertising encouraging youth smoking uptake and use by adult never smokers and this is one of the reasons why some forms of electronic cigarette advertising were prohibited in the EU Tobacco Products Directive.

The most recent Smoking Drinking and Drug Use survey, of attitudes and behaviour towards smoking among young people aged 11-15 in England, found the lowest recorded smoking rates among children since records began in 1982. It's worth noting that rates have continued to fall since e-cigarette sales first really began to take off in 2010. In 2010 5% of 11-15 year olds were regular smokers falling to 3% in 2014 and in 2010 27% had ever tried smoking, falling to 18% in 2014.

Therefore it doesn't look like e-cig advertising in advance of the introduction of the interim content rules by CAP and BCAP in November 2014 had an impact on the number of children trying smoking, or becoming regular smokers.

ASH has carried out research annually into attitudes and behaviour with respect to electronic cigarettes and is continuing to monitor these subsequent to the implementation of the advertising restrictions imposed by the EU Tobacco Products Directive.

Regular use (once a month or more) among children was rare and largely among those who currently or have previously smoked. 2% of respondents said they used electronic cigarettes once a month or more, including 1% who used them weekly. These figures are similar to 2015.⁴

Furthermore, a recent report carried out for Cancer Research UK⁵ which reviewed the evidence of the impact of electronic cigarette advertising on children found research showed low brand awareness in the UK, and that susceptibility to tobacco smoking appeared to be no different for children who had been exposed to electronic cigarette advertising than those who hadn't.

With respect to adults, use of the electronic cigarettes is confined to current and ex-smokers and use amongst never smokers remains negligible and has not changed since 2012.³

⁴ ASH. Use of electronic cigarettes (vapourisers) among children in Great Britain. London. October 2016.

⁵ Bauld L. Angus K. de Andrade M. Ford A. Electronic Cigarette Marketing: Current Research and Policy. Commissioned by Cancer Research UK. October 2016.