

ASH Smokefree Generation consultation supporting document

Closing date: 6th December 2023

Introduction

1. This document sets out additional input and regulatory recommendations that were not possible within the word limits of the online consultation.

Regulatory gaps that need to be filled

2. There are gaps in the regulations of e-cigarettes. They do not cover design, packaging and labelling other than basic product standards under [Regulation 36](#), e.g. that products be child-resistant and tamper-evident and under [Regulation 37](#) that they carry a warning label. There are also gaps relating to other novel nicotine products such as nicotine pouches, and non-novel nicotine e-cigarettes and vaping products, which are not included in the regulations.
3. Although the age of sale is 18 currently handing out free vapes to children of any age is not illegal, a loophole the government has committed to end. Another loophole is that although the ASA regulates advertising through [CAP code 22](#) this does not cover instore promotion. In addition Regulation [38 \(4\)](#) prohibits offers such as 2 for 1, 3 for £10 and on the packaging or product itself such offers are not prohibited instore and such offers are often available online, this is another loophole which needs to be fixed.
4. Furthermore as long as the notification is compliant the product is allowed on the market. The MHRA currently does not have powers to test products to determine whether they are compliant with the notification. Nor does it have powers to remove notifications once published, for products which are subsequently found to be non-compliant, this is the responsibility of the manufacturer/importer. Under [Regulation 39](#) it is the responsibility of the producer to take any action needed on non-compliant products.
5. For example when the producer of Elf Bar was found to be selling products which had larger tank sizes than legally allowed, the regulations did not provide the powers for the MHRA to remove the product from the market as the product notification was compliant. See <https://www.betterretailing.com/industry-news/elfbar-voluntarily-withdraws-non-compliant-600s-from-uk-market/>
6. The notification fees producers are required to pay the MHRA can only be used for the administration of the notification scheme and not for testing, or enforcement. See <https://www.legislation.gov.uk/ukxi/2016/521/made>
7. Also additional powers are needed to prohibit the importation of products which are not compliant with UK standards .

ASH regulatory recommendations

8. ASH therefore recommends that the regulations be changed:
 - To allow the use of notification fees from producers to be used for the purposes of testing and enforcement with the fee amount set to be sufficient to fulfil these requirements.

- To enable the MHRA to remove notifications from publication.
- To allow the MHRA to require the removal from the market of products found to be non-compliant, to be enforced by trading standards.
- In addition to setting standards for product packaging and presentation to require notification of product packaging and presentation as part of pre market submissions.
- To provide Border force with direct powers under the vaping legislation to prohibit UK entry for non-compliant vapes.
- To require all vaping products regardless of nicotine content to be notified.
- To prohibit branding and imagery appealing to children and set standards for packaging, labelling and information
- To prohibit instore promotion and require vapes to be kept behind the counter, with powers to prohibit displays completely if putting them behind the counter is not sufficient to discourage youth use.
- To include non-novel nicotine vaping products and other novel nicotine products, in particular nicotine pouches in the regulations, so that they can be brought into the regulatory process.

ASH draft retail register/licensing legislation

9. The ASH consultation response recommended the extension of powers to deactivate retailers' Economic Operator ID for underage sales of tobacco and related products, and to publish data collected under the 2019 regulations about sales and which retailers are in possession of an EOID. ASH also recommended introduction of a retail register/licensing scheme for e-cigarettes (whether they contain nicotine or not) and other consumer nicotine-containing products. ASH sets out below draft legislation to demonstrate how this could be implemented in legislation.

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1. Legislative objectives

- (1) The objectives of this legislation are:
- (a) protecting and improving public health by reducing smoking prevalence.
 - (b) protecting children from harm.
 - (c) preventing crime and promoting public safety.

2. Interpretation

In this legislation—

“appropriate minister”— means the Secretary of State for Health and Social Care

“Council” means local authority with responsibility for trading standards functions (County Councils, Unitary authorities and London and metropolitan boroughs in England).

“E-cigarette” means nicotine and non-novel nicotine devices and vaping products

“ICB” means Integrated Care Board as defined in the Health and Social Care Act 2022

“novel nicotine product” includes all non-tobacco novel nicotine products other than e-cigarettes which do not have a marketing authorisation as a medicine.

“OHID” is the Office for Health Improvement and Disparities

“registration authority” means OHID

“Tobacco product” includes, but is not limited to, cigarettes, handrolling tobacco, snuff, shisha and heated tobacco products.

“TRPR 2016” means the Tobacco and Related Products Regulations 2016 as amended by The Tobacco Products and Nicotine Inhaling Products (Amendment etc) (EU Exit) Regulations 2019 (2019 regulations)

“2019 Regulations” means the Tobacco Products (Traceability and Security Features)

Regulations 2019(b) as amended by the Tobacco Products (Traceability System and Security

Features) (Amendments) (EU Exit) Regulations 2020.

“1933 Act” means the Children and Young Persons Act 1933 as amended by the Children and Young Persons (Protection from Tobacco) Act 1991 and the Children and Young Persons (Sale of Tobacco etc.) Order 2007

Part 2 Miscellaneous

3. Age verification policy for tobacco, e-cigarettes and novel nicotine products

(1) A person commits an offence if the person—

- (a) carries on a tobacco, e-cigarette or novel nicotine product business, and

(b) fails to operate an age verification policy in respect of premises at which the person carries on the business.

(2) An “age verification policy” is a policy that steps are to be taken to establish the age of a person attempting to buy a tobacco product, cigarette papers e-cigarette or novel nicotine product on the premises (the “customer”) if it appears to the person selling the tobacco product, cigarette papers or vapour product that the customer may be under the age of 25.

(2) The appropriate Minister may by regulations amend the age specified in subsection (2).

(4) The appropriate Minister may publish guidance on matters relating to age verification policies, including, in particular, guidance about—

(a) steps that should be taken to establish a customer's age,

(b) documents that may be shown to the person selling a tobacco product, cigarette papers, e-cigarette or a novel nicotine product as evidence of a customer's age,

(c) training that should be undertaken by the person selling the tobacco product, cigarette papers, e-cigarette or novel nicotine product,

(d) the form and content of notices that should be displayed in the premises,

(e) the form and content of records that should be maintained in relation to an age verification policy.

(3) A person who carries on a tobacco product, cigarette papers, e-cigarette, or novel nicotine product business must have regard to guidance published under subsection (4) when operating an age verification policy.

(4) A person guilty of an offence under subsection (1) is liable to the penalties set out in sections 16. And 17.

4. Novel nicotine products

(1) Part 6 of the 2016 regulations, “Electronic Cigarettes” is amended to include non-novel nicotine products, and to add novel nicotine products with the following subsequent changes to the 2016 regulations

(2) Notification

(a) “Novel nicotine products” is added to 31. (1); 31.(2)

(b) 31.(3) (c) is amended to add “where appropriate” after “in heated form” and after “when inhaled”.

(3) Annual reporting requirements

(a) “Novel novel nicotine products” is added to 32.(1) and (5)

(4) Product information and labelling requirements

(a) “Novel novel nicotine products” is added to 37.—(1)

(b) To specify that 37.(7) and (8) only apply to electronic cigarettes

(5) Product presentation requirement

(a) “Novel novel nicotine products” is added to 38.—(1)

Part 3 Registration for retailers of e-cigarettes and novel nicotine products

5. Public register of retailers of e-cigarettes and novel nicotine products

- (1) OHID must, in accordance with the provisions of this Act, maintain an electronic register of persons carrying on an e-cigarette or novel nicotine product business (“the Register”).
- (3) On the basis of information contained in the Register, the registration authorities must make available for public inspection—
 - (a) the name and address of premises at which e-cigarette or novel nicotine product businesses are carried on; and
 - (b) such other information as may be prescribed by OHID as the registration authority

6. Application for registration for sale of e-cigarettes and novel nicotine products

- (1) All persons carrying on e-cigarette and/or novel nicotine product businesses must apply to the registration authority (OHID)
 - (a) to be registered; or
 - (b) to add further premises to the person's entry in the Register.
- (2) An application under subsection (1) must—
 - (a) state the name and address of the applicant;
 - (b) where it is an application under subsection (1)(a), state the address of each of the premises at which the applicant proposes to carry on sale of ;
 - (c) where it is an application under subsection (1)(b), state the address of each of the further premises at which the applicant proposes to carry on a relevant business;
 - (d) in the case of premises consisting of a moveable structure, a stall, a tent or a vehicle, the name of each council in whose area the business is carried on.
 - (e) be made electronically in such form and manner as may be prescribed.
 - (f) contain such other information as may be prescribed by the registration authority
- (3) For the purpose of subsection 2 (a) a person's name and address is—
 - (a) in the case of an individual—
 - (i) the individual's name and, if different, the individual's trading name, and
 - (ii) the address of the individual's usual place of residence;
 - (b) in the case of a company—
 - (i) its name and, if different, its trading name, and
 - (ii) the address of its registered office;
 - (c) in the case of a partnership other than a limited liability partnership—
 - (i) the name of each partner and, if different, the partnership's trading name, and
 - (ii) the address of each partner's usual place of residence;
 - (d) in the case of a limited liability partnership—
 - (i) its registered name and, if different, its trading name, and

- (ii) the address of its registered office.
- (e) contain such other information as may be prescribed.

7. Fees

- (1) The Secretary of State must, before this legislation comes into force, consult on:
 - (a) the extension of notification fees under the 2016 regulations for tobacco and herbal products for smoking to include payment for enforcement of the legislation;
 - (b) the extension of notification fees under the 2016 regulations for e-cigarettes to include non-nicotine containing e-cigarettes and novel nicotine products; and
 - (c) the extension of notification fees under the 2016 regulations to include payment for enforcement of the legislation
- (2) The fee extension should be sufficient to cover the administrative costs, as well as a share of the cost to councils of regulating and enforcing the registration scheme.

8. Duty to notify certain changes

- (1) A registered person must give the registration authority notice of—
 - (a) any change in the person's name or address;
 - (b) the fact that the person is no longer carrying on a relevant business at an address noted in the person's entry in the Register.
- (2) The notice must be given within 28 days of the date of the change to which it relates.

9. Changes to and removal from the Register

- (1) The registration authority may correct the Register (following notification under section 3 or otherwise) as it considers appropriate.
- (2) The registration authority must amend the Register so as to remove—
 - (a) references to registered premises in respect of which a premises closure order has effect;
 - (b) a person's entry from the Register where that person has, within a period of 5 years ending with the day on which the removal is made, been convicted of an offence in relation to novel nicotine product and has been sentenced for that offence to a custodial sentence (whether suspended or not).
- (3) The registration authority may remove a person's entry from the Register if—
 - (a) as a result of a correction or an amendment under subsection (1) or (2)(a), there are no premises noted in the person's entry in the Register; or
 - (b) it is not satisfied that the person is carrying on a relevant product business.
- (4) The registration authority must reinstate a person's entry in the Register if—
 - (a) the entry was removed under subsection (3)(b); and
 - (b) the person notifies the registration authority, within the period of 28 days from the date of service on that person of the notice of the removal under subsection (3), that the person is still carrying on a tobacco, e-cigarette or novel nicotine product business.

(5) Where the registration authority corrects, amends, removes or reinstates a person's entry in the Register under this section, it must as soon as reasonably practicable serve a notice on the person of the correction, amendment, removal or, as the case may be, reinstatement.

Part 5 Reporting

10. Publication of data collected under the 2019 regulations

- (1) Part 3 of the 2019 regulations, "Traceability system", is amended as follows.
- (2) To add a new section "Publication of stored data" requiring the Commissioners for Her Majesty's Revenue and Customs to publish the following information in searchable form.
- (3) Economic Operator IDs
 - (a) The name of all organisations, including manufacturers/importers, distributors/wholesaler and first retail outlet with an economic operator ID and the trading name, if different.
 - (b) The economic operator ID and facility identifier code(s) for each organisation listed in (a).
 - (c) The address of each place of business used by the retailer for each organisation listed in (a).
- (4) Tobacco sales
 - (a) Total sales at national and council level, by volume and value. Data to be provided:
 - (i) monthly for cigarettes, cigarillos and handrolling tobacco, and
 - (ii) quarterly for all other tobacco products, e-cigarettes and novel nicotine products
 - (b) Sales by brand and package type, to be provided

11. Collection and publication of sales data and market research information collected under the 2016 regulations

- (1) Part 4 of the 2016 regulations, "Reporting about tobacco products", section 21. "Sales data and market research information", is amended to add to 21.-(1)
 - (a) "that producer's annual net operating profits, both in the UK and global total."
 - (b) "that producer's annual taxes (excise duties, VAT and corporation tax).
 - (c) "that producer's total sales volume broken down by council and ICB annually"
 - (d) "that producer's brand prices, updated contemporaneously"
 - (e) "that producer's annual spending on market research and preferences of consumer groups (including in particular young people and current smokers),
 - (f) "that producer's spend on provision of displays at retail and the number of displays in total broken down by council, ICB and type of retailer.
- (2) Part 4 of the 2016 regulations, "Reporting about tobacco products", section 26. "Use of information" is amended to add to 26. (c) "and regulation 21."
- (3) Information for calendar years between 2015 and 31st May of the year of coming into force of this legislation must be published at the time the legislation comes into force.

Part 6 Penalties and enforcement

12. Offences

(1) A person who carries on an e-cigarette or novel nicotine product business at premises without being registered commits an offence.

(2) A registered person who carries on an e-cigarette or novel nicotine product business at premises other than premises stated in the person's entry in the register commits an offence.

(3) Subsection (2) does not apply in the case of an e-cigarette or novel nicotine product business carried on at premises consisting of a moveable structure, a stall, a tent or a vehicle.

(4) A registered person who carries on an e-cigarette or novel nicotine product business at premises consisting of a moveable structure, a stall, a tent or a vehicle in the area of a council other than one stated in the person's entry in the register commits an offence.

(5) A registered person who fails, without reasonable excuse, to comply with section 4. (age verification) or section 9. (duty to notify certain changes) commits an offence.

(6) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine.

13. False or misleading information

(1) A person is guilty of an offence if that person provides information to a person pursuant to any obligation under section 17. if—

- (a) the information is false or misleading in a material particular; and
- (b) the producer or retailer who provides the information either knows it to be false or misleading in a material particular, or is reckless as to whether it is false or misleading in a material particular.

14. Defences

(1) In any proceedings for an offence brought against a person who sells any novel nicotine product in breach of section 17. or 18. of this legislation, it is a defence that all due diligence to avoid committing the offence was exercised.

15. Penalties

- (1) A person guilty of an offence under sections 4., 17. (1), (2), (4) or (5) and 18. is liable
- (a) On summary conviction to imprisonment for a term not exceeding three months, or a fine or both, or
 - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both.

16. Tobacco, e-cigarette and novel nicotine product premises closure order

(1) Councils can issue closure orders for premises in line with the objectives of this Act.

- (2) This section also applies where a person ("the offender")—
- (a) is given a fixed penalty notice in respect of a tobacco, e-cigarette or novel nicotine product offence; or
 - (b) is convicted of a tobacco, e-cigarette or novel nicotine product offence.

(2) In the following provisions of this section “the relevant offence” means the offence mentioned in subsection (1)(a) or (b).

(3) A court of summary jurisdiction may, on application made by complaint by the council in whose district the premises in relation to which the relevant offence was committed are situated, make a premises closure order in respect of those premises (“the relevant premises”).

(4) A premises closure order is an order prohibiting the sale on the premises to which it relates of any cigarette, papers or e-cigarette or novel nicotine products to any person.

(5) The prohibition applies to sales of tobacco, cigarette papers, e-cigarette or novel nicotine product to any person whether made—

(a) by the offender or any other person; or

(b) by means of any machine kept on the premises or any other means.

(6) The order has effect for the period specified in the order, but that period must not be less than 28 days or more than 3 years.

(7) The council making the application must, after making reasonable enquiries, give notice of the application to every person appearing to it to be a person affected by the application.

(8) The court may make the order if (and only if) it is satisfied that—

(a) the council has complied with subsection (7); and

(b) the offender has been—

(i) given a fixed penalty notice in respect of a tobacco, e-cigarette or novel nicotine product offence in relation to the relevant premises on more than one occasion; or

(ii) convicted of a tobacco, e-cigarette or novel nicotine product offence in relation to the relevant premises.

(9) Persons affected by the application may make representations to the court as to why the order should not be made.

(10) If—

(a) a person affected by an application for a premises closure order was not given notice under subsection (7), and

(b) consequently the person had no opportunity to make representations to the court as to why the order should not be made, that person may, by complaint, apply to the court for an order varying or discharging it.

(11) On an application under subsection (10) the court may, after hearing—

(a) that person, and

(b) the council which applied for the premises closure order,

make such order varying or discharging the premises closure order as it considers appropriate.

(12) While a premises closure order has effect, the order shall be a statutory charge and shall be binding on every person who is for the time being an owner or occupier of the premises specified in the order.

(13) For the purposes of this section—

(a) a fixed penalty notice which is given to the offender in respect of a tobacco, e-cigarette or novel nicotine product offence is to be disregarded if it is withdrawn or if proceedings are brought against the offender for the offence to which the notice relates;

(b) the persons affected by an application for a premises closure order in respect of any premises are—

(i) the occupier of the premises; and

(ii) any other person who has an estate in the premises.

17. Deactivation of Economic Operator identifier codes

(1) Part 6 of the 2019 regulations, Deactivation of identifier codes is amended to add to subsection 18. (2)

“Where an economic operator has been convicted of an offence under the Children and Young Persons Act 1933”

(2) Where an economic operator in possession of an economic operator ID code has a conviction, other than a conviction treated as spent for the purposes of the Rehabilitation of Offenders Act 1974, for an offence under the Children and Young Persons Act 1933, Trading standards are required to inform the Commissioners for Her Majesty’s Revenue and Customs.

18. Enforcement

(1) It is the duty of each weights and measures authority to enforce sections sections 17. (1), (2), (4) or (5) and 18. within their area.

(2) For the purposes of paragraph (1) the provisions of parts 2, 4 and 5 (enforcement) of the Consumer Protection Act 1987(1) (“the 1987 Act”), except for sections 12, 13 and 27, are to apply as if—

(a) these was safety legislation (2) within the meaning of that Act; and

(b) the persons on whom functions are conferred by this legislation were enforcement authorities within the meaning of that Act.

(3) The reference to six months in section 14(6) of the 1987 Act (imprisonment on summary conviction not to exceed six months), as that section has effect by virtue of paragraph (1), is to be read in its application as a reference to three months.