Advertising code at fault over e-cigarette public health ad ban

written by Clive Bates | 24 September 2017



This year's Stoptober campaign encourages smokers to try vaping – bravo!

Update 24 September: Cancer Research UK says its hasn't "*been prevented from doing anything by the ASA that we are aware of, so don't know why this story appeared*" and PHE ads were still running on TV last night. So please treat the posting below as an analysis of the legal situation.

So newspaper reports suggest we have the ridiculous situation of the UK Advertising Standards Authority (ASA) banning adverts for vaping that are part of a public health quit smoking campaign, 'Stoptober'. *The Sun* reports *UP IN SMOKE: Anti-smoking adverts by Cancer Research see charity in row over barmy Brussels rules that would BAN them*.

The ASA is quoted in The Sun's article:

> *The ASA said yesterday: "Our rules prohibits ads for unlicensed, nicotine-containing e-cigarettes, in line with European law which took effect in 2016. Ads for products and brands are prohibited and have not been seen or heard on*

TV or radio since last year."

I have not seen the Cancer Research ads, but the TV advert from Public Health England (screen shot above) clearly mentions e-cigarettes so would be caught by the ASA's reasoning.

The Sun concludes that the problem lies with the 'barmy' EU directive? But does it? *Not so fast…*

The prohibitions on e-cigarette advertising in the directive

The EU Tobacco Products Directive 2014/40/EU Article 20.5 defines the following prohibitions on 'cross border' advertising of e-cigarettes. These prohibitions are wholly unjustified, but not the subject of this note. (I have added emphasis for reasons that will become clear)

> ***5.*** *Member States shall ensure that:*
>
> *(a) commercial communications in Information Society services, in the press and other printed publications, with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers are prohibited, except for publications that are intended exclusively for professionals in the trade of electronic cigarettes or refill containers and for publications which are printed and published in third countries, where those publications are not principally intended for the Union market;*
>
> *(b) commercial communications on the radio, with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers, are prohibited;*
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> *(c) any form of public or private contribution to radio programmes with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers is prohibited;*
>
> *(d) any form of public or private contribution to any event, activity or individual person with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers and involving or taking place in several Member States or otherwise having cross-border effects is prohibited;*

(e) audiovisual commercial communications to which Directive Directive 2010/13/EU applies, are prohibited for electronic cigarettes and refill containers.

The UK implementation of the EU directive – the meaning of 'commercial communication'

The UK implementation of this language is mainly in the Tobacco and Related Products Regulations (TPRP) 2016, Section 7 – the bans on e-cigarette advertising in the press and 'information society services' (i.e. internet) are expressed as follows in the regulations:

42.—(1) No person may in the course of a business publish, or procure the publication of, an electronic cigarette advertisement in a newspaper, periodical or magazine. […]

43.—(1) No person may in the course of a business include, or procure the inclusion of, an electronic cigarette advertisement in an information society service provided to a recipient in the United Kingdom. […]

The key point here is that, *commercial communication* in the TPD is interpreted in the UK regulations as *communication in the course of a business* – i.e. someone trying to sell stuff. That reference to business is intended to exempt non-commercial communications – i.e. public health campaigns by charities or public sector bodies. This is the clear policy intent. However, this policy intent has not been properly reflected in the UK implementation of the directive Article 20(5)(e) on audiovisual services, the paragraph that deals with television advertising.

The UK implementation of the EU ban on e-cigarette TV advertising

Some complexity arises because television advertising is not addressed directly in the regulations, but in the Broadcasting Code of Advertising Practice (BCAP), specifically in Section 10: Prohibited categories (10.1.11)

10.1 Advertisements for products or services coming within the recognised character of or specifically concerned with these are not acceptable: […]

> *10.1.11. electronic cigarettes and refill containers or any advertisement which has the aim or direct or indirect effect of promoting such a product*

This rule lacks the 'in the course of a business' language that has been used in transposing the Tobacco Products Directive to UK regulation to exempt non-commercial public health campaigns. This looks like a clear defect in the Code and it should be amended to use the same formulation that has been used in the regulations that transpose the directive.

The language of the BCAP does however refer to "*advertisements for products…*" and "*the aim or direct or indirect effect of promoting such a product*". Without being explicit and unambiguous this language does seem to be referring to conventional advertising of a product. So even under this wording, the public health advertisers have a case – as long as they do not advertise a specific product or brand.

But what if public health ads are misleading?

All ads are covered by the general provisions of the advertising codes for non-broadcast and broadcast media – generally to be legal, decent, honest and truthful – and these codes would apply to Cancer Research and Public Health England ads. The special provisions for e-cigarettes in the codes that implement the Tobacco Products Directive should relate to *commercial* communications only.

Conclusion

It is important that respected public health institutions should be able to promote generic approaches to quitting smoking, including the use of e-cigarettes, and the treatment of this advertising should be distinct from advertising 'in the course of a business' or a commercial communication.

The fault does not lie with EU law, at least as interpreted in the UK, it lies with inconsistent transposition of the EU directive in the BCAP. The government's clear policy intent – as expressed in its regulations – is to limit the advertising prohibitions of the directive to commercial (i.e. in the course of a business) communications, not to public health messages. The BCAP should be amended and the any ban on Cancer Research Uk or Public Health England using these messages should be lifted.