

Brexit and vaping

written by Clive Bates | 15 December 2019



In this post, I try to anticipate what Brexit means for the UK, for the Tobacco Products Directive and what that might mean for UK and European vapers. It's in two parts because we need to speculate a little on how Brexit will play out and then how that will affect the TPD compliance in the UK as the TPD evolves from TPD2 to TPD3.

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PART 1. Brexit: what next?

Now we have clarity: the United Kingdom will leave the European Union on 31 January 2020. We can now turn our attention to what this might mean: both in general, and specifically for vaping and tobacco harm reduction. To understand the latter, we need some understanding of the former. At this stage that will involve some guesswork.

The strategic trade-off - market access versus regulatory autonomy

Sadly, the election campaign had little to say about how the UK would approach the future relationship with the European Union. The heart of this question is the same as it has always been: how to resolve the trade-off between ease of access to EU markets and the autonomy to diverge from EU regulation. The closer the UK sticks to EU rules, the more advantageous the tariff regime will be and the less bureaucratic friction there will be in the trading relationship. The more the UK wishes to diverge from EU rules, the harder it will be for UK companies to do business in the EU and for European supply chains to function efficiently. The EU's DG Trade is pretty clear:

Spot-on. Reminder: [#EUUCO](#) has said from the outset that [#EU](#) wishes to have as close a relationship as possible with [#UK](#) and that future relationship will be based on balance of rights & obligations. [@EU_Commission](#) will continue to negotiate fairly and in best interest of EU. <https://t.co/OoJRPeuTFi>

— Sabine Weyand (@WeyandSabine) [December 15, 2019](#)

The attractions and distractions of cakeism

The Brexiteers' approach to this strategic trade-off so far has mainly been to pretend it does not exist and that no hard choice is necessary. The concept of 'cakeism' - to have your cake and to eat it - has sustained the Tories belief in a pain-free Brexit (see: [A brief history of having cake and eating it](#)). It allowed them to avoid discussing the darker side of Brexit: the extent to which the UK will become beholden to EU rules (or possibly US rules) it has no say in making. Of course, the UK does not need to be a rule-taker in this way, but then it has to contend with economic pain to be suffered if it doesn't. So where in the range of possible trade-offs will the UK aim? No-one knows at this point.

That choice can no longer be ducked. On 31 January 2020, the UK enters a transition period in which it carries on with business pretty much as usual with the EU. The big change is that the UK is "out of the room"... no MEPs, no-one attending the European Council meetings and working groups, no UK-nominated Commissioner and far fewer Brits in the Commission. That transition period ends by default on 31 December 2020. The UK and EU can agree to extend the transition by one or two years but they will need to make a decision on this by 1 July 2020 - just five months after Brexit day. The Tory manifesto ruled out any extension to the transition period, and any attempt to backtrack on that would reopen a civil war inside the Tory party. (That doesn't mean it is impossible).

Signs of an emerging UK approach - alignment on goods?

The first signs of where this is heading are now emerging. An article in the Financial Times, [Boris Johnson hails moment of 'closure' over Brexit agony](#) (£) hints at one view from within the government.

Some in Mr Johnson's team believe the prime minister, armed with a comfortable majority, will seek to closely align Britain with the EU on goods regulation to secure a trade deal that preserves jobs in newly won Tory industrial seats.

"There's no point in diverging on goods trade," said one cabinet minister. "We will probably end up agreeing some sort of mutual recognition on most rules and regulations, while looking for more flexibility on services."

Note this is not the official government line. But the FT is quoting interesting sources: “Mr Johnson’s team” and a “cabinet minister” – so these are not refugees from the Remainer wing of the Tory party.

Not so fast - the no alignment faction

The traditional cakeist approach is also alive and well. The Sunday Times reports [*Britain on collision course with EU over trade rules in Brexit talks*](#) (15 December).

However, Johnson’s team make clear that when they outline their demands in February Britain will seek to maintain the ability to set its own rules in key areas, even if that means some tariffs are imposed.

“We don’t want to be in alignment,” the source said. “We want a free-trade deal with as close to zero tariffs as they are happy to do. But if they think we are going to be signing up to stick to their data laws and their procurement rules, that’s not going to happen.”

The Brexit Political Declaration

The (non-binding) [*Political Declaration*](#) that accompanies the Withdrawal Agreement, suggests “deep regulatory and customs co-operation” will be at the heart of any future agreement on goods. It does not (of course) resolve the inherent trade-offs between facilitating access and regulatory alignment – but it does create a political commitment to a non-trivial trade deal for goods.

21. However, with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition, as set out in Section XIV of this Part.

That is certainly not a commitment to the ‘WTO Brexit’ that some dream of.

The European Union approach - pursuing a “level playing field”

There will also be pressure for regulatory alignment from the European Union. This is because the EU will insist that the trade-off described above is made by the UK. There will be no cakeism. The EU refers to “level playing field” provisions: the idea that ease of access to EU markets must be conditional on the alignment of environmental, labour standards, state aids, consumer protection and procurement standards and practices. From the EU’s perspective, it does not want a competitor on its boundary with all the privileges of EU membership in terms of market access but none of the obligations for high standards of protection of the environment, health, consumer protection etc. It sees this as “regulatory dumping”.

Again, there are signs of the direction of travel from the FT: [EU leaders warn UK over ‘level playing field’ demands](#) (£)

Emmanuel Macron has warned that the EU will curtail the speed and ambition of post-Brexit trade talks if Britain diverges from Brussels’ regulations, as European leaders set out their red lines for negotiations with UK prime minister Boris Johnson following his election win.

The French president and German chancellor Angela Merkel were among leaders to stress that British access to the EU’s market would be linked to a willingness to sign up to “level playing field” standards after the UK leaves the union on January 31.

“What we say, simply, is that the more ambitious the agreement, the more substantial the regulatory alignment must be,” Mr Macron said, insisting that talks could “go pretty quickly if [the UK] say, when it comes down to it, ‘we do not want to change very much””.

And EU negotiator, Michel Barnier, has been clear on the EU’s view of these trade-offs. See The Guardian article [Michel Barnier tells UK: ignore EU regulatory standards at your peril](#) (29 Oct)

The EU and UK have agreed to negotiate a free-trade agreement as part of **Boris Johnson's revamped Brexit deal**, but Barnier stressed that tariff and quota-free access to the EU were linked to maintaining regulatory standards. "Access to our markets will be proportional to the commitments taken to the common rules," he said. "The agreement we are ready to discuss is zero tariffs, zero quotas, zero dumping."

And the incoming European Council President stresses the 'true level playing field':

I would like to congratulate [@BorisJohnson](#) on his victory.

We expect a vote on the withdrawal agreement as soon as possible. [#EU](#) is ready for the next phase. We will negotiate a future trade deal which ensures a true level playing field.

— Charles Michel (@eucopresident) [December 13, 2019](#)

Which view will prevail?

But I think history favours the EU, as it has won everything so far.

There are several reasons why high alignment could be politically advantageous to the UK:

- It is less damaging economically and Johnson has committed to repay the Northern voters who 'lent' him their votes - it's hard to appear to be doing that if automotive and aerospace factories are closing
- It reduces drama at the border between Northern Ireland and Great Britain - where Johnson has promised, unrealistically, that there will be 'no checks'
- It requires less staffing and infrastructure at UK ports. The UK would not be ready for it a very simple trade deal.
- It will reduce some of the pressure for Irish re-unification and Scottish independence
- Almost all business organisation would prefer trading arrangements to stay as far as possible unchanged - so it would reduce some of the rancour from the business lobby

Though as with Brexit itself, the main barrier to the UK acting in its national self-interest is the political conflict between Brexit hardliners and the soft-Brexit pro-EU tendency in the Tory Party.

But there are other factors that will assist the EU:

- The 31 December 2020 cliff-edge (and the trading and regulatory void that would follow no-trade-deal or minimal trade deal). A trade deal will be easy and therefore achievable in the time if as little changes as possible - this is Macron's point.
- The EU's requirement for unanimity among the 27 member states, and ratification by the European Parliament and national and some regional parliaments - this creates a high bar for agreement on the EU side and little room for compromise. The EU negotiators will *only* be able to offer the UK deals that are appealing to each of the EU-27.
- It is much easier for the EU to have no trade deal with the UK than for the UK to have no trade deal with the EU
- The UK may need to keep its limited negotiating capital for politically

contentious issues like fishing, food and farming, medicines, and Gibraltar

Here's a pretty good take from Raphael Hogarth, writing in The Times, [*Remainers are too pessimistic about a swift deal with the EU*](#) (16 Dec)

The prime minister will start by talking tough on those issues but EU officials know that his great talent is to surrender and declare victory. That, they say, is what he did with the withdrawal agreement: agree to a border down the Irish Sea and claim he hadn't. A big majority may give him the space to do that again.

PART 2: Brexit, Tobacco Products Directive and vaping - the outlook

So where does that leave us on vaping and tobacco harm reduction? I still believe what I wrote about Brexit and vaping in May 2016 [[here](#)] was a reasonable take - though it is still too soon to tell.

- *We are likely to negotiate a settlement that requires compliance with single market regulations. So we could leave the EU and still have the TPD, with no say on its future. This is not certain but the most likely outcome in my view (see above). Whether we exit or remain, the most likely outcome is continued TPD compliance indefinitely through some arrangement like the EEA. [...]*
- *Even if the UK can change it after a few years, I doubt we will. Why would this be a priority in the UK when Parliament is likely to be jammed up with legislation that has to be changed and civil servants and ministers overwhelmed with sorting out more pressing exit conditions?*
- *Even if we could change the TPD and did, would it make much difference? I doubt it. Tobacco/nicotine policies have a habit of going in one direction only and being indifferent to evidence. Look at the snus ban, for example - supported by the UK.*

Long-term UK compliance with the TPD is likely but not certain

I think it is *likely* (not certain) that the UK will continue to comply with the [EU Tobacco Products Directive](#) in both its current form and future versions as and when the TPD is updated. That obviously applies until at least the end of the transition period. But I suspect that it will apply well beyond that - either because of regulatory alignment and level playing field provisions in a future trade deal or simply because the UK government will see little point in diverging from this particular directive.

We can already guess what will be covered by regulatory alignment because the Northern Ireland Protocol of the Withdrawal Agreement sets out the list of regulations on goods that must be applied in Northern Ireland. Article 5(4) and Annex 2 of the NI Protocol to the Withdrawal Agreement includes the TPD (see [page 395](#)).

At this stage, I believe it would be better for UK activists to work on the defensive assumption the UK will continue to comply while working to clarify and influence the UK government approach. If and when a UK approach to the TPD becomes clearer, then adjust strategy.

A new Tobacco Products Directive (TPD3) is getting underway

For vaping, the current TPD is probably best characterised as a collection of pointless limitations and bureaucratic harassments. I think does harm to public health in a variety of ways:

- the ban on advertising is a gift to the incumbent cigarette trade;
- the nicotine strength limits may have precluded the more efficient e-cigarette designs that have been an outstanding success in the United States;
- the warnings just add to the confusion about addiction, risk and nicotine;
- the snus ban is ridiculous.

But compared to some of what we are seeing elsewhere, TPD2 is workable. That may be about to change. We are in the initial stages of the development of a new

The report on the implementation of TPD2 - May 2021

The most first major milestone will be the publication of report on the implementation of the TPD2 (as described in [Article 28 of the TPD](#)) This must be published by 20 May 2021. The report is intended to inform the updating of the directive in response to changes in technology and legal developments.

In the report, the Commission shall indicate, in particular, the elements of the Directive which should be reviewed or adapted in the light of scientific and technical developments, including the development of internationally agreed rules and standards on tobacco and related products. The Commission shall pay special attention to:

This is the term of reference that relates to vaping:

(g) market developments concerning electronic cigarettes and refill containers considering, amongst others, information collected in accordance with Article 20, including on the initiation of consumption such products by young people and non-smokers and the impact of such products on cessation efforts as well as measures taken by Member States regarding flavours;

The Commission has already assembled the team to put together the inputs for this report and they will be working over the course of the next

- [SCHEER](#) - Scientific Committee on Health, Environmental and Emerging Risks. This is a European Commission advisory committee that will provide scientific advice to the review. It is chaired by one of the most anti-vaping officials in Europe, Roberto Bertollini of WHO Europe. [See [members](#)]. I wrote a [blog with video](#) about Bertollini in 2013, citing Professor Jean François Etter's excoriating criticism of Bertollini's presentation to the European Parliament as it considered TPD2.
- [Open Evidence](#) - a consultancy spun out of the University of Catalonia. This is the project it will contribute to the report: [Consumer preference and perception of specific categories of tobacco and related products](#)

- [ICF](#) - a major international consultancy - this group will assess the impact of the Directive. It will be holding meetings with stakeholder groups, but I do not know with whom or when, or how to engage with them.

The approach of the European Parliament

The European Parliament is also gearing up. Its lead committee on tobacco policy, [ENVI](#), has already held private meetings on e-cigarettes and a more substantive meeting with a presentation from the Commission is planned for January (I don't know when). Insiders suggest that the Committee has become preoccupied by the recent developments in the United States and are following that narrative, raising concerns in their internal discussion about:

- Lung injuries and deaths
- The rise in youth vaping
- Flavours

These are extremely volatile issues now.

The approach of the European Commission

In addition to the report under Article 28 (above), [TPD2 Article 20\(10\)](#) required the Commission to prepare a report (of lesser significance) on risks associated with refillable devices. That was published in 2016: *Report on the potential risks to public health associated with the use of refillable electronic cigarettes* [Com \(2016\) 269 Final](#). It covered four themes.

1. Accidental ingestion of e-liquid
2. Dermal contact
3. Mixing or customisation of liquids
4. Use of e-liquids with untested devices and hardware customisation

The Commission concluded that TPD2 and related secondary and national legislation “*provide an adequate and proportionate framework for the mitigation of such risks.*” However, it hinted that more scrutiny was necessary in the following areas.

Member States and the Commission should carefully monitor the market of refillable e-cigarettes, as well as the notifications received under Article 20(2)

of the TPD. Further research on certain aspects of e-cigarettes relevant to refillables, such as emissions testing and the safety of flavours or mixtures of flavours, should also be carried out. Additional research on these topics would benefit all users of e-cigarettes (disposable, rechargeable and refillable).

The top ranks of the European Commission have only just changed over, and it is too early to tell what attitude the new Commission will have. But the previous Commissioner, Vytenis Andriukaitis, managed to be both extremely hostile and (over) confident in his views. See this, for example, [EU health chief: Next Commission will strengthen tobacco rules](#), in which he provides clues about his and possibly the Commission approach:

No concept of harm reduction:

“My question to the industry is the following: is it harmful or not to smoke? Does it cause cancer or not? Harm is harm. No matter if it’s less or more,” he added.

Favours medicalisation:

Andriukaitis insisted it was better to use smoking cessation aid such as Nicorette. He added that if there was a real possibility to help heavy smokers kick the habit with the help of electronic cigarettes, then a specific methodology should be followed.

“If one uses electronic cigarettes as a method to stop smoking, it has to be managed by medical doctors and specialists, to be sold in pharmacies and not in supermarkets.”

“But in reality, you see a different picture. The industry proposes dangerous products and they use different loopholes in the directive. And they use different advocates to say they are less harmful. Young adolescents who have never smoked before try to smoke electronic cigarettes. It’s ridiculous,” Andriukaitis said.

Prohibitionist:

Andriukaitis said tobacco was an “accidental product” in Europe as no one on the continent smoked before Columbus brought it here. He said nicotine was a completely different issue compared to alcohol, whose consumption indeed needs to be controlled, but alcohol has had 10,000 years of culture in the continent.

Industry conspiracy theories:

The industry proposes dangerous products and they use different loopholes in the directive. And they use different advocates to say they are less harmful. Young adolescents who have never smoked before try to smoke electronic cigarettes. It's ridiculous," Andriukaitis said.

My response: I responded to these absurd comments: see my comment on Euractiv [here](#).

The WHO Framework Convention on Tobacco Control and TPD3

The 9th Conference of the Parties (COP9) will be held in Europe 9-13 November 2020. The meeting will be co-organised and chaired by the Dutch government. My guess (only a guess) is that the organisers and chair will seek 'decisions' that will line up the EU to take action in response (e.g. see [COP-8 Decision on Novel and Emerging Tobacco Products](#)). COP Decisions on policy rarely contain binding commitments but aim to edge the parties in a particular direction. Each party can then respond in its chosen way, drawing on the FCTC COP decision as an 'authorising' instrument - something that it is responding to.

The approach of the Brussels-based tobacco control groups

The biggest problem with European tobacco policy is the Brussels hive-mind. Dozens of public health or anti-tobacco organisations all have the ears of MEPs, Parliament staff, Commission officials, other lobbyists and each other all the time. It would take too long to go through them all, and in any case, there is very little originality in their positions. These are largely determined by group-think and the most restrictive measures they think they can get away with. The position statements usually follow a standard format: a cherry-picked and misleading assessment of science, followed by policy prescriptions that are not supported by the evidence presented backed up with careless disregard for unintended consequences, the welfare of smokers, or any respect for the autonomy of European citizens.

One example will suffice at this point. The position statement of the European Heart Network: [E-cigarettes - a cardiovascular health concern](#) - November 2019. Here is the policy agenda embedded in the statement:

- *There is a need for longitudinal studies to elucidate the long-term effects of e-cigarette use on the cardiovascular system and whether e-cigarette use is less hazardous to cardiovascular health than conventional cigarette smoking in the longer term.*
- *Medical journals should refrain from publishing studies that are partly or fully funded by entities that have an industry-related conflict of interest.*
- *Health professionals should inform patients and the public of the risks related to e-cigarette use.*
- *Flavours should be prohibited. This should certainly be the case for those flavours that may not be safe and those that are likely to attract children and young people.*
- *The same buying restrictions and age limits should be set for e-cigarettes as for conventional cigarettes.*
- *Restrictions on marketing, including advertising, labelling and packaging, of e-cigarettes should be the same as for conventional cigarettes.*
- *The use of e-cigarettes in public places should be prohibited. Given the fact that second-hand exposure has some impact on bystanders' health, that use of e-cigarettes may make it more complicated to enforce smoke-free legislation, and that use of e-cigarettes may change the norm in terms of use of conventional cigarettes in public places, e-cigarette use in public places should be prohibited.*
- *Tax measures should be used as appropriate: applying a special excise duty or tax on e-cigarettes has the dual benefit of discouraging use - especially for young people - and raising income for governments. EHN recommends taxing e-cigarettes at a rate high enough to discourage uptake.*

Most readers will know what is wrong here, so I will return to a critique later. This sort of junk policy is ubiquitous in Brussels, but if enough of them reinforce the same messages, they can gain traction with the EU institutions. In my view,

these groups and their pseudo-experts are the biggest problem we face: they make the political weather on tobacco policy in Brussels.

Implications for consumers and public health advocates

Five takeaway points

1. *The next TPD is happening now.* Evidence is being taken and assessed. Reports are in preparation. Positions are being formed and hardened. If you want to be effective, start engaging now.
2. *The outlook is worrying.* Instinctive bias against vaping, the easy and lazy politics of being tough on 'tobacco' combined with contagion from the US moral panics is raising the hostile temperature in Europe.
3. *The UK will (probably) comply with TPD indefinitely.* It is likely (not certain) that the UK, despite Brexit will remain compliant with the TPD through the Brexit transition and beyond.
4. *Assume TPD compliance until signs to the contrary appear.* For now, it is better to make the defensive assumption that UK will comply with TPD3 and adjust later if a different direction becomes clearer.
5. *The UK will be out of the room this demands innovation.* Not only will politicians, officials and experts be excluded, but it will be more difficult for UK advocates to engage - with whom and with what standing?

The latter is not a reason to give up. On the contrary, it is a reason to get organised as a pan-European movement. It is also a reason for UK vapers to keep the pressure on the UK government to protect their interests through both the Brexit process and TPD process, which will be going on concurrently.