

E-cigarette advertising code consultation

written by Clive Bates | 6 April 2014



Scandalous? Or a smart way of selling an aspirational and life-saving switch from smoking to vaping?

On 27 February, the [UK Committee of Advertising Practice](#) published a [consultation document](#) on new rules to cover advertising of e-cigarettes - the closing date for responses is 28 April. This would cover all UK e-cigarette advertising until the [Tobacco Products Directive Article 20\(5\)](#) is implemented in 2016, and would continue to cover all advertising not then banned under the TPD.

I hope the TPD advertising ban will be subject to legal challenge - it deserves to be - and will be replaced by something much more like these rules. The Tobacco Advertising Directive [2003/33/EC](#) bans all tobacco advertising that can theoretically have cross-border effect (TV, radio, publications, internet etc), but this is justified at Recital 3 on the basis that smoking kills in excess of 500,000 people per year in the EU. No such justification applies to e-cigarettes. The proposals from the UK regulator are much more proportionate and realistic

balancing of the various risks and opportunities. Here is my response to the consultation, which I hope also gives my views on why I think e-cigarette advertising is positive for health, justifying a liberal approach to the commercial freedom to advertise ...

Note: the response as submitted in an MS Word document can be downloaded [here](#).

Response to consultation - general remarks

(Note: to be included as a response to question 28)

In praise of e-cigarette advertising

From a public health perspective, it is a huge success when smokers switch to e-cigarette use or 'vaping' - almost the same as quitting completely. It is a success if the 'buzz' is with vaping and smoking feels and becomes outdated. To that end, edgy, sexy, fun advertising for vaping should be understood as a good thing for health. Advertising is also important in building brands and consumer confidence.

Advertising is vital in communicating and rewarding innovation, which is especially important in a fast developing sunrise industry. Advertising is important in challenging incumbent industries (the cigarette market) by allowing disruptive upstarts to communicate with the incumbents' customers. Even if these are tobacco companies, it is positive if BAT's e-cigarette arm competes effectively for Philip Morris's cigarette market and *vice versa*. Too much control or prohibition of advertising protects the incumbent products and vendors, while favouring those entrants with well developed retail distribution networks and experience of marketing without advertising: namely, the existing cigarette vendors.

The attitude of the public health establishment

The tobacco control has largely misunderstood, downplayed or ignored the pro-health role of e-cigarette advertising and tended to focus on risks, real and imagined, with its worries about children, gateway effects, that e-cigarette ads might somehow be 'renormalising' smoking, or that it is part of a tobacco industry

conspiracy. Take, for example, this article published in the BMJ: [Promotion of e-cigarettes: tobacco marketing reinvented](#) – it is largely an account of effective advertising not to the taste of the authors, but with no evidence of harm or unintended consequences. They have pointed to the resemblance between some e-cigarette ads and some vintage cigarette ads, as if that is, *self-evidently*, a bad thing. In fact, it should surprise no one that [some e-cig ads share semantics and semiology with cigarette advertising](#): they are both advertising a similar recreational behaviour to aspirational smokers. *However, e-cigarette adverts are not adverts for smoking.* The e-cigarette ads are advertising brands that are completely different to cigarettes and advertising products that are 99-100% less dangerous. No-one has so far produced a plausible explanation for how this can be advertising cigarettes or encouraging smoking. Paradoxically, the risk aversion found in significant parts of the public health establishment protects the *status quo*, and in this case, that means protecting the cigarette franchise.

Marketing to young people

There are concerns about advertising directed at young people, defined as those under 18. Almost all stakeholders agree that the products and related advertising are intended for adults and any deliberate appeal to adolescents is both unethical and commercially unnecessary. The target customer is clearly existing smokers, and that market potential remains huge for the e-cigarette companies, estimated at US\$800 billion world wide, of which they have captured less than one percent at present. Even so, it is important to be proportionate in our concern for young people. Use amongst under 18s is extremely low, and to the extent this is an alternative to smoking it is likely to be beneficial.

Consistency with alcohol advertising code

The approach proposed seems consistent with that taken for alcohol (non-broadcast, broadcast) which is a proportionate balancing of risk management and commercial freedoms, including protections for children without infantilising adults. We should note that e-cigarettes are significantly less risky than both cigarettes and alcohol. E-cigarettes do not cause intoxication and violence or have many of the chronic health impacts of excessive alcohol consumption. It would be wise therefore to regard application of the alcohol restrictions to e-cigarettes as an outer boundary in terms of a proportionate response to risks.

Attitude of e-cigarette companies

It is clear that the larger companies want more controls over advertising and can feel discomfort if one firm acts irresponsibly and tarnishes the reputation of the industry. This is largely welcome, but it is important not to allow the innate conservatism of some of the larger companies to lead to excessive controls on advertising. Advertising is part of the innovative environment and small companies or entrants may want to use it more aggressively than the larger companies. As argued above, this is likely to have pro-health consequences.

Companies may respond arguing they can live with the proposals, but the real test is whether the restriction of commercial freedom has a health or social protection justification.

The proposed code is a reasonable reconciliation of these perspectives

On the whole, the proposed rules are a good compromise. They do more than enough to respond to the largely unfounded fears of some in the public health establishment, while leaving space for the necessary creativity and buzz within a responsible framework for the emerging e-cigarette industry. It is to be hoped that the arbitrary, disproportionate, discriminatory and legally baseless ban on most forms of advertising envisaged in the EU Tobacco Products Directive is overturned in court, and a code more like the rules envisaged in this consultation becomes the norm for controlling e-cigarette advertising.

Response to consultation - responses to specific questions

Rule 1: Marketing communications / advertisements for e-cigarettes must be socially responsible

Question 1: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. I would prefer this to be expressed in the negative: *must not be socially*

irresponsible. This is because the definition of 'socially responsible' is highly subjective and open to moralistic interpretations. The slight change of wording places a stronger onus on the complainant to show that the advert is irresponsible, rather than on the advertiser to show that it is responsible.

Question 2: What specific advertising approaches, if any, that are not covered by the following rules do you consider might be identified as problematic within the wording of the rule?

The problem would be excessive restrictions arising from prudish or excessively risk-averse interpretations of 'socially responsible'. There would for example be complaints that e-cig ads were socially irresponsible because they resembled cigarette ads. It would be better if the complainant had to demonstrate a harm arising from the claim of irresponsibility.

Rule 2: Marketing communications / advertisements must contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light. This rule is not intended to prevent cigarette-like products being shown.

Question 3: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. There are two objections to this:

Firstly, this practice is already covered by the [Tobacco Advertising and Promotion Act \(2002\)](#) and [relevant statutory instrument on brand sharing](#). Those trying to advertise tobacco products should be aware that this law applies and has stronger sanctions than an ASA code.

Secondly, if it is decided that this rule is an important reminder and will remain in the code, the protection in the second sentence should be extended to include vaping: the behaviour, not just the product. Suggested wording: *This rule is not intended to prevent use of e-cigarettes or cigarette-like products being shown.*

Question 4: Do you have any comments or evidence which can help to inform CAP and BCAP's goal of preventing the indirect promotion of tobacco products while still permitting e-cigarettes to be advertised?

This goal is met by the controls of the Tobacco Advertising and Promotion Act (2002). It would be more appropriate to remind advertisers of this carefully worded legislation than to create new rules that may introduce ambiguities or even conflicts with the legislation - implying that some practices are permitted, when they are not actually permitted under the Act.

Rule 3: Marketing communications / advertisements must not contain health or medicinal claims [unless the product is licensed for those purposes by the MHRA]. E-cigarettes may however be presented as an alternative to tobacco.

Question 5: Do you agree with the proposal to prohibit health claims for e-cigarettes? If not, please explain why and provide any suggestions you may have for improvement.

No, this is inappropriately restrictive. Not all health claims are medical claims of the type licensed by the MHRA. Health claims other than those regulated by MHRA should be permitted, subject to the general requirement that they are true and fair. At this point it would be better to use the exact wording of the governing [Medicines Directive, 2001/83/EC](#) as implemented in the UK by [Human Medicines Regulation 2012 \(regulation 2\)](#) which defines medicines by presentation as:

any substance or combination of substances presented as having properties of preventing or treating disease in human beings

Furthermore, [advertising of medicines in the UK is governed by the MHRA](#) and includes both statutory and voluntary controls. This rule should be reworded to correctly dovetail with medicines regulation. *Marketing communications / advertisements must not contain claims that they have properties of preventing or*

treating disease [unless the product is licensed for those purposes as a medicine by the MHRA, and is subject to the controls on advertising medicines]. E-cigarettes may however be presented as an alternative to tobacco. Health claims other than those covered by medicines regulation must be true and fairly expressed, and be supported by evidence.

Question 6: Do you agree with the proposed definition of health claims for the purposes of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. Some provisions are required to govern health claims that fall outside the definitions that would require the products to be regulated as medicines. For example: 'vapour contains no tar' could be construed as a health claim but it would not be regarded as medical claim. In fact, it is not clear that declaring that 'e-cigarettes are more healthy alternative to smoking' would constitute a claim to be treating or preventing disease. There is no serious dispute that this claim is correct - yet ASA ruled it inadmissible in the recent [Ten Motives](#) case. That claim would not be classed as medical claim but the advertiser should be able to communicate this as long as it is true, which it is.

Question 7: Do you agree with the proposal to prohibit medicinal claims? If not, please explain why and provide any suggestions you may have for improvement.

Yes. There is no option but to exclude medical claims as these have to be managed under medicines legislation.

Rule 4: Marketing communications / advertisements must make clear that the product is an e-cigarette.

Question 8: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. I question whether this is necessary - no compelling rationale is given for this in the consultation document. It is unclear what function this serves, and what would be lost if an advertiser chooses to advertise an e-cigarette brand without saying it is an e-cigarette. Not all advertising is literal and prosaic, and this requirement may constitute an unnecessary barrier to advertising creativity,

or campaigns that build over time. Unless some harm would arise from this, it is hard to see why it would be needed.

Additionally, there is a danger than the language 'e-cigarette' will become obsolete or that different devices will have different descriptive names. It is difficult to anticipate the development of this industry in a way that would make this rule broadly applicable in the present or enduringly applicable in the future.

Rule 5: Marketing communications / advertisements must state clearly if the product contains nicotine [or if it does not]. They may include factual information about other product ingredients.

Question 9: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. This is unnecessary, and it is not clear what harms it is supposed to prevent.

There is no analogous requirement to state that alcohol or caffeine products contain alcohol or caffeine respectively. It is very unlikely that a person would be able to buy e-cigarettes unaware that they contain nicotine - this is addressed on the packaging.

Rule 6: Marketing communications / advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.

Question 10: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No, 'encourage' is too broad as it is impossible to stop a given advert having some impact outside its target audience. It is impossible to strictly delineate target audiences, and to design advertising that does not have an effect outside the target audience. Any adult has the right to buy these products and it is quite possible that they will appeal to ex-smokers, who miss their nicotine consumption and would like to have it back but with minimal risk. It follows that we should not

be too concerned about some 'spillover' of advertising, as adults should be free to make choices about using these products and should not be infantilised by excessive caution in advertising. However, it should not be acceptable for a company to actively pursue non-nicotine users - the code should focus on the *intent* of the advertiser, not a peripheral outcome. Suggested wording: *Marketing communications / advertisements must not target non-smokers or non-nicotine-users.*

Question 11: Do you consider that this rule is proportionate? If you consider that advertising of e-cigarettes expressly to non-users of nicotine is acceptable or if you would prefer a rule which required all marketing to be explicitly addressed only to existing nicotine users please provide your comments and any evidence

This rule, modified as suggested above, is proportionate.

Rule 7: Marketing communications / advertisements must not link e-cigarettes with gambling, alcohol or illicit drugs

Question 12: Do you agree with the proposal to prohibit linking e-cigarettes with illicit drugs? If not, please explain why and provide any suggestions you may have for improvement.

Yes. Illicit drugs are not legal and their advertising is not permitted. Even though vapour products may be a viable harm reduction option for consumers of some illicit drugs, it is not appropriate to advertise these advantages commercially.

Question 13: Do you consider that alcohol should be included in this rule? Please explain why and provide any evidence you consider relevant.

No. Alcohol consumption is a legal activity and alcohol advertising is permitted. One possible situation in which e-cigarettes have an advantage is in a pub that permits vaping. There is no rationale for preventing these associations - even though it is unlikely that any company will use them.

Question 14: Do you consider that gambling should be included in this rule? Please explain why and provide any evidence you consider relevant.

No. Gambling is a legal activity and gambling advertising is permitted. Casinos

are a setting where vaping may be permitted. There is no rationale for preventing these associations - even though it is unlikely that any company will use them.

The over-arching requirement not to advertise in a way that is socially irresponsible should cover any possible detriments arising from associations with alcohol and gambling. Although it is likely that companies involved would accept this rule, it is important that the new code does not curtail commercial freedoms without a proper justification.

Rule 8: Marketing communications / advertisements must not link e-cigarettes with activities or locations in which using them would be unsafe or unwise; such as driving.

Question 15: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

No. There is no evidence that driving while using an e-cigarette is dangerous or more dangerous than smoking or eating while driving, which are both permitted.

It is not analogous to hands on mobile phone use, which also involves distraction into a conversation. In fact, to the extent that e-cigarette use offsets nicotine withdrawal symptoms, it may reduce risk. A rule like this should be reserved for those situations where there is official advice or legislation against using the product. It should not be for the advertising regulators to determine what this is.

Question 16: Are there any other situations, other than driving, in which you consider that e-cigarette use is so demonstrably harmful that their depiction in advertising should be prohibited?

If this rule persists, then rather than list activities, it would be better to state the general case ('unsafe or unwise') and give an example rather than create an exclusive list. Given that e-cigarette use is possible in some circumstances where cigarette use is not, discretion is required. For example, vaping while snowboarding might seem unwise, but it could be simply adventurous and aspirational without creating material danger (beyond that of the snowboarding itself).

Rule 9: Marketing communications / Advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture. They should not feature or portray real or fictitious characters who are likely to appeal particularly to people under 18. People shown using e-cigarettes or playing a significant role should not be shown behaving in an adolescent or juvenile manner.

Question 17: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Yes. This is based on 18.14 of the [Code provisions on alcohol](#). The experience and precedents developed through alcohol related adjudications will form useful guidance to the application of this age-related language to e-cigarettes. There is therefore a high premium on keeping the language near to identical with alcohol given that in both cases the identical issue is faced: how to limit advertising that appeals to under-18s. There is no hard and fast delineation between appeal to the target group (adults) and the unintended group (under 18s), so it is important to retain the language - *particularly to people under 18* - implying that under 18s are the main target audience, whether intended or not.

Rule 10: People shown using e-cigarettes or playing a significant role must neither be, nor seem to be, under 25. People under 25 may be shown in an incidental role but must be obviously not using e-cigarettes.

Question 18: Do you agree with the inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Yes. This has been used for control of alcohol advertising and as the e-cigarette code will be addressing the same problem, the approaches should be aligned.

Rule 11: Marketing communications / advertisements must state that products are not suitable for under-18s.

Question 19: Do you consider that a rule is necessary which requires that ads state that products are not suitable for under-18s? Please provide any evidence which you consider may assist CAP and BCAP's consideration of this rule.

No, these warnings are counterproductive and, paradoxically, an inducement to under 18s through implicit adult branding. I agree with the 'boomerang effect' argument mentioned in the analysis in the consultation document. There is some support for this in [focus group research commissioned by ASH in 2000](#), when I was chief executive. Unsurprisingly, some adolescents dislike being classified as children and are attracted to things that have been defined as adult 'forbidden fruit' for the by the authorities.

I think the level would stay about the same, because I think some people would start because they weren't allowed

yr 8 girls, 12-13 yrs, smokers, Newcastle

It probably wouldn't discourage them, it would make them more keen to try it...when you're told not to do something, you want to do it more!

yr 10 girls, 14-15 yrs, smokers, Birmingham

There is at least a clear danger that these warnings would make the product more attractive to under 18s. The rule should not proceed unless and until there is compelling evidence that unintended consequences would not be material.

Rule 12: Marketing communications must not be directed at people under 18 through the selection of media or the context in which they

appear. No medium should be used to advertise e-cigarettes if more than 25% of its audience is under 18 years of age

Question 20: Do you agree with inclusion and wording of this rule? If not, please explain why and provide any suggestions you may have for improvement.

Yes. This is appropriate and consistent with the approach taken for alcohol.

Rule 13: [Amendment to existing BCAP rule]

32.2 These may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18: [...]electronic cigarettes

Question 21: Do you agree with e-cigarettes being included in this list of scheduling restrictions?

Yes. This is consistent with directing advertising away from under 18s.

Rule 14: Radio Central Copy Clearance - Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

Question 22: Given BCAP's policy consideration, do you agree that all advertisements for e-cigarettes must be centrally cleared? If you disagree, please explain why

Yes. By analogy with the approach taken to alcohol.

11.1 E-cigarettes which do not contain nicotine

Question 23: To what extent, if any, do you consider that new rules should apply to e-cigarettes that do not contain nicotine? Please provide any relevant evidence in support of your response.

These rules should apply to all vapour products. The function of advertising is primarily to develop brands rather than specific products. It is possible that a

vendor would have brands that cover non-nicotine vapour products.

Question 24: Do you consider that any additional rules should be considered specifically in relation to the advertising of e-cigarettes that do not contain nicotine? Please provide any relevant evidence in support of your response.

No. It is important to emphasise the low risks associated with these products; the limited potential for abuse and addiction in new users; the potentially substantial health gains that may arise; the importance of commercial freedoms in securing health gains. The greatest risk comes from self-defeating elements in public health who want advertising for these products banned or severely limited to sterile medicalised public information communications. I hope the Committee will resist calls from these counter-productively risk averse organisations and recognise the vital role that advertising could play in tackling one of the most serious public health challenges of the 21st Century.

11.2 E-cigarettes which are licensed as medicines

Question 25: To what extent, if any, do you consider that the above rules for e-cigarettes should apply to those which are licensed as medicines?

These rules should *not* apply to e-cigarettes licensed as medicines as there is a separate regulatory regime for advertising medicines. However, in determining how the statutory and voluntary controls for advertising medicines are applied in practice, the MHRA and PAGB should be mindful of this guidance and avoid creating great asymmetries in the controls applied to e-cigarettes licensed as medicines and those sold as consumer lifestyle products.

11.3 Definition of an e-cigarette

That definition is as follows:

“Electronic cigarette’ means a product, or any component thereof, including cartridges and the device without cartridge, that can be used for consumption of [nicotine-containing] vapour via a mouth piece. Electronic cigarettes can be disposable, refillable by means of a refill container or rechargeable with single use cartridges.”

Question 26: Do you agree with the proposed definition of e-cigarette? If not

please explain why.

Yes. This is a minor variation and improvement on the definition used in the EU Tobacco Products Directive. The definition should be extended to all vapour devices, not just those using nicotine. The rules also need to apply to liquids sold separately from any device. This could be achieved either by changing the rules throughout to refer to both e-cigarettes and e-liquids, or the addition of the following to the definition above: *the rules applicable to e-cigarettes will also apply to refill containers and nicotine containing liquids or solids sold separately.*

11.4 Further comments

Question 27: Are there any other rules which you believe CAP and BCAP should consider implementing in relation to the advertising of e-cigarettes? Please provide as much detail as possible and any evidence you consider supports the relevant restrictions.

Yes. Communications made by health and medical charities working in this field should be understood as marketing communications and partly fund-raising activities peripheral to their core research operations. I would like to see a code of practice for charities that make public statements in this field - much of which is 'anti-advertising' and would not meet the standards to be set for e-cigarette advertisers. There are many misleading statements, but little recourse for individuals or businesses harmed or misled by such statements.

Question 28: Are there any other comments you wish to make in relation to the advertising of e-cigarettes and BCAP's consideration of this issue?

Please see opening contextual remarks at the beginning of the response.