

ASA system submission to the Scottish Government consultation: Tightening rules on advertising and promoting vaping products (2022)

1. Background and Introduction

- 1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the ‘ASA system.’
- 1.2. The ASA is the UK’s independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18 with our remit further extended in 2011 to include companies’ advertising claims on their own websites and in social media spaces under their control.
- 1.3. We are responsible for ensuring that advertising is legal, decent, honest and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.
- 1.4. As the UK’s frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner’s Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.
- 1.5. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this ‘collective regulation’ helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.
- 1.6. We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees’ development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System’s processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.
- 1.7. The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don’t mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

- 1.8. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 850,000 pieces of advice and training in 2021.

2. Context of ASA response

- 2.1. The ASA system is providing this written submission in response to the Scottish Government's consultation on tightening rules on advertising and promoting vaping products (2022).
- 2.2. The consultation explores a wide range of issues and raises various questions that are not covered by or directly relevant to our regulation. We do not regulate e-cigarettes and vaping products or, for that matter, any other products. Rather we regulate the content, scheduling and targeting of ads and the claims made in them. We do not regulate sponsorship arrangements and our remit does not extend to the practices of sale, pricing or branding of vaping products (unless any of these aspects appear in an ad). We have no expert opinion to offer on proposals that would make the free distribution or nominal pricing of vaping products an offence; whether penalties or fines should be imposed for breaches of the proposed restrictions; or, whether it is necessary or desirable to restrict non-smokers from exposure to vaping products.
- 2.3. Our advertising rules are limited by and reflect the current legislative framework that permits vaping products to be legally sold to UK adults and, by extension, allows vaping products to be advertised in non-proscribed media.
- 2.4. It is in that context that we set out below the advertising rules for vaping products that are in place in the UK and, following that, seek to respond to the consultation question relevant to our work, specifically the question on banning the advertising of vaping products.

3. The Advertising Codes and the Tobacco and Related Products Regulations 2016

- 3.1. The ASA is the UK's regulator for advertising across media. This includes TV, radio, online, social media, cinema, newspapers and outdoor spaces. Our Codes contain rules which require ads not to mislead, harm, offend or be otherwise irresponsible.
- 3.2. The Codes also contain specific sections and rules which address certain sectors and types of advertising which, over time, required additional regulatory protections. The Tobacco and Related Products Regulations (TRPR), which implemented Directive 2014/40/EU (TPD), became law in the UK on 20 May 2016, and are reflected in Section 22 of the CAP Code.
- 3.3. Prohibitions on broadcast advertising with the aim or direct or indirect effect of promoting unlicensed, nicotine-containing e-cigarettes and e-liquids under the TPD were implemented into Section 10 of the BCAP Code under direction from the Government based on powers conferred by the Communications Act 2003. Broadcast advertising for non-nicotine containing e-cigarettes products or e-cigarettes which are licensed as medicines or medical devices are subject to rules under Section 33 of the BCAP Code.
- 3.4. Under the TRPR, nicotine-containing vaping products and their components (which will be referred to as 'e-cigarettes' for the sake of brevity) are prohibited from being advertised in certain media, unless they are licensed as medicines. Except for media targeted exclusively to the trade, marketing communications promoting e-cigarettes which are not licensed as medicines are not permitted in the following media:
- Newspapers, magazines and periodicals

- Online media and some other forms of electronic media
- 3.5. The law applies comprehensive restrictions online, such as paid-for online search listings and paid-for spaces online including social media. However, the provision of factual information by retailers on their own websites and social media accounts is not prohibited by the law because the consumer has specifically had to seek out that information by visiting the website or account. Information provided in this context must only be factual and not promotional in nature.
- 3.6. The law does not provide clarity on what constitutes factual versus promotional content and the ASA makes careful assessments of individual complaints based on the content and context of the material in question. CAP has published extensive [Advertising Guidance](#) which sets out how the prohibitions should work in practice.

4. The advertising rules and e-cigarettes

- 4.1. The ASA system takes extremely seriously its regulation of ads for products which present the potential for harm. In addition to rules that reflect legal prohibitions on e-cigarettes advertising, the Advertising Codes also contain rules which seek to mitigate potential harm arising from e-cigarette advertising, as well as other Code provisions that require ads not to mislead, harm or cause serious or widespread offence.
- 4.2. The Advertising Codes state that advertising for e-cigarettes:
- must be socially responsible
 - must not target or feature children, or include content which is likely to appeal particularly to children
 - must not confuse e-cigarettes with tobacco products
 - must not mislead about product ingredients or where they may be used
 - must not make medicinal claims and must take care with health claims
- 4.3. As with all age-restricted products, there are strict rules around the advertising of e-cigarettes, to protect children and young persons, both in terms of the content of ads and their placement. It's therefore important for advertisers to avoid anything likely to reflect or be associated with youth culture, any characters likely to be of particular appeal to under 18s, and anyone behaving in an adolescent or juvenile manner. Adverts mustn't feature anyone who is, or appears to be, under the age of 25 and must ensure ads are targeted responsibly.
- 4.4. Given that the advertising of tobacco products to the public is prohibited, e-cigarette ads mustn't promote any design, imagery or logo that might be associated with a tobacco brand.
- 4.5. Similarly, ads for e-cigarettes mustn't promote the use of a tobacco product or show the use of a tobacco product in a positive light and it must be clear that the product being advertised is an e-cigarette. E-cigarettes ads also must not encourage non-smokers or non-nicotine users to use e-cigarettes.
- 4.6. When advertising a product that contains nicotine, the ad must make this clear. This is likely to be required where a range of products is being advertised, if some of those products contain nicotine.
- 4.7. While the use of e-cigarettes in public spaces is not prohibited by law, policy on their use varies and as such, claims that e-cigarettes may be used anywhere are unlikely to be considered acceptable.

5. E-cigarette advertising and health claims / smoking cessation claims

- 5.1. Ads for e-cigarettes are prohibited from featuring medicinal claims, unless the product in question is authorised for those purposes by the Medicines and Healthcare Products Regulatory Agency (MHRA).
- 5.2. As stop-smoking claims are medicinal and require a relevant marketing authorisation from the MHRA, ads for e-cigarettes cannot claim that the product can act as a stop-smoking device unless it has been specifically authorised for that purpose by the MHRA. Marketers also need to take care to avoid claims which might imply that the product is suitable as a stop-smoking device, for example by making references to 'Stoptober'.
- 5.3. On 8 November 2018, CAP and BCAP [announced](#) the removal of the prohibition on health claims made for e-cigarettes in advertising, which meant that advertisers may make health claims if they hold robust, product specific, supporting evidence to substantiate the claims. The emerging consensus among public health experts appears to be that while e-cigarettes are less harmful than smoked tobacco they are not completely 'safe' and the evidence doesn't support any positive health benefits from vaping other than as an alternative to tobacco. Therefore, claims of absolute safety and positive health benefits of e-cigarettes are unlikely to be acceptable.
- 5.4. E-cigarettes may be presented as an alternative to tobacco but must not undermine the message that quitting tobacco use is the best option for health and shouldn't in any way encourage non-smokers or non-nicotine-users to use e-cigarettes.
- 5.5. Claims that an e-cigarette is less harmful than smoking tobacco are likely to be acceptable, provided that there is robust evidence that relates to the product, there's no implication that it can help cut down or quit tobacco use, and it's in a medium not prohibited by the Regulations.

6. Heated Tobacco

- 6.1. The ASA has in recent years received a number of complaints concerning the advertising of heated tobacco products. At present, heated tobacco products are regulated under the Regulations and classed as a novel tobacco product. The Regulations don't, however, contain specific restrictions on the advertising of heated tobacco products. The ASA understands the UK government's position on heated tobacco advertising is subject to restrictions under the Tobacco Advertising and Promotion Act 2002.
- 6.2. In the absence of government guidance (and therefore clarity on the legal requirements for heated tobacco advertising) the ASA currently refers complaints concerning heated tobacco advertising to DHSC, as the relevant statutory enforcement body in such cases, on the basis that the issues of those complaints relate to a legal provision for a regulated product.

7. Consultation question 2: Do you agree with the proposal to extend restrictions on advertising these products in the ways described?

- 7.1. The current restrictions in the Advertising Codes on e-cigarettes reflect the legal requirements of TRPR. They sit alongside rules written by CAP and BCAP, and endorsed through a process of public consultation, that recognise e-cigarettes are age-restricted products and require that they are advertised responsibly with a particular emphasis on protecting young people. Vaping products are also prohibited from making any medicinal

claims relating to smoking cessation unless the products are authorised by the MHRA as well as being prevented from promoting any positive health benefits of vaping.

- 7.2. The ASA system notes that at present, opinions from public health professionals differ on e-cigarettes, in relation to their risks and likely harm to health in the long term, as well as their value in smoking cessation within the wider tobacco reduction policies. In addition, there does not appear to be consensus on the impact of media prohibitions in relation to e-cigarettes advertising, with some opinions advocating for tighter restrictions whilst others call for further restrictions, as indicated in the recent [Post-Implementation Review of TRPR](#) published by the UK Government. The UK Government's Post-Implementation Review also concluded that on the basis of current evidence, TRPR has met its objectives but noted the potential for further regulatory changes in future should new robust evidence emerge that justifies such changes.
- 7.3. Noting the Scottish Government's aim in its proposals to further reduce youth up-take of vaping products, it should be noted the media placement restrictions imposed by TRPR, as reflected in the UK Advertising Codes, implicitly acknowledge that children and young people may see e-cigarettes advertising in non-proscribed media.
- 7.4. The UK Advertising Codes contain specific provisions which prohibit advertising of e-cigarette products from being targeted, through its content or placement, at children and young people, provided that those ads do not already breach the media placement restrictions as imposed by TRPR. Such marketing communications must be not placed in or around non-broadcast media that are obviously directed at those under the age of 18. They must also not be placed in other non-broadcast media where audiences under the age of 18 make up more than 25% of the audience (see CAP guidance on [Media placement restrictions](#)). The placement restriction was introduced by CAP in 2014 with the objective to appropriately limit children and young people's exposure to non-broadcast e-cigarettes advertising, whilst ensuring that advertisers' ability to reach a legitimate audience for their products was not disproportionately affected.
- 7.5. The Codes also offer an additional layer of protection through ad content restrictions where children and young people may be exposed to e-cigarettes advertising, as set out in Section 4 above. This ensures that such ads do not exploit the vulnerability of children and young people through the use of content that is likely to be of particular appeal to them.
- 7.6. CAP and BCAP strive to deliver advertising regulation that is transparent, proportionate, consistent, targeted only where regulation is necessary and written so that the rules are easily understood, easily implemented and easily enforced. They consider that an evidence-based approach is the best way of responding to those principles and that evidence is likely to provide the most sound basis for regulatory change. CAP and BCAP's approach is set out in their [Evidence-Based Policy-Making document](#).
- 7.7. As well as those principles, CAP and BCAP must also ensure that any potential restrictions introduced in the CAP and BCAP Codes must meet the requirements of Article 10(2) of the European Human Rights Convention and that advertisers' freedom of expression is not unjustifiably curtailed. Proposals to introduce new advertising standards in the UK Advertising Codes are required to go through a public consultation process, which would set out the legal and policy basis for such proposals; CAP and BCAP's decision to implement new standards may be subject to judicial review.

- 7.8.** The ASA system supports the Scottish Government's wider policy objectives in tobacco reduction and recognises that the Scottish Government has sovereign powers to introduce and implement legislation to impose further restrictions on advertising for e-cigarettes. It also recognises that devolved governments may introduce legislation on devolved matters, such as health, which may lead to varying policy directions between the UK Nations.
- 7.9.** However, the ASA system also notes that the UK Government, as indicated in the recent [report](#) published by the Office for the Internal Market, places importance on competition within the UK Internal Market and to ensure that goods and services provided within the UK Internal Marketing are not disadvantaged in one nation, in comparison to other UK Nations. Such services may include advertising and media services.
- 7.10.** The ASA system wishes, therefore, to seek clarification from the Scottish Government on the likely public health impact of the proposed additional media prohibitions on e-cigarettes advertising on mitigating and reducing take-up of vaping products amongst non-smokers and young people.
- 7.11.** The ASA system also seeks clarification from the Scottish Government on whether the impact and potential harms arising from e-cigarettes advertising necessitates a divergence in regulatory approach from the rest of the UK and whether such potential harms may be greater in Scotland. In addition, it would like to seek further elaboration from the Scottish Government on the likely economic impact on advertisers should the proposed e-cigarettes advertising placement restrictions be introduced.

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