



## BRIEFING PAPER

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# Advertising of e-cigarette products

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## Summary

E-cigarettes are increasingly popular in a number of countries including the UK. The most common prototype of “electronic nicotine delivery systems” (ENDS) is the electronic cigarette (known as an ‘e-cigarette’). An e-cigarette is a battery operated device that simulates a lit cigarette. E-cigarettes do not contain tobacco but operate by heating nicotine, flavourings and other chemicals into a vapour that is then inhaled (some e-cigarettes do not contain nicotine). Other prototypes take the form of everyday items such as pens, USB memory sticks, and larger cylindrical or rectangular devices

The rapid growth in the availability and purchase of e-cigarettes led to a significant increase in advertising for them. The market moved quickly; a December 2013 article in the British Medical Journal highlighted a growth in the UK spend on e-cigarette promotion from £1.7 million in 2010 to £13.1 million in 2012.

A World Health Organisation (WHO) report on *‘Electronic nicotine delivery systems’*, published in July 2014, states that the use of ENDS is booming.<sup>1</sup> It estimates that in 2014 there were 466 brands and that in 2013 US\$ 3 billion was spent on ENDS globally.<sup>2</sup> Sales are forecasted to increase by a factor of 17 by 2030.<sup>3</sup> The report states that whilst there is no data on ENDS use at the global level, data mainly from North America, the European Union (EU) and Republic of Korea indicate that ENDS use at least doubled among both adults and adolescents from 2008 to 2012.<sup>4</sup> In 2012, 7% of EU citizens aged 15 years and over had tried electronic cigarettes. However, only 1% of the total population used them regularly.<sup>5</sup>

On 20 May 2016, the [Tobacco and Related Products Regulations 2016](#) (“the Tobacco Regulations”) implemented the [Tobacco Products Directive](#) (2014/40/EU) into UK law. Amongst many other things, the Directive (Article 20) affects how e-cigarette products may be advertised. There are now significant prohibitions on advertisements for nicotine-containing e-cigarette products sold as consumer goods (i.e. they are not licensed with the MHRA (the Medicines and Healthcare Products Regulatory Agency) as a medicinal product).

All advertisements in the UK are regulated by the Advertising Standards Agency (ASA). The ASA published a consultation in September 2016 in which it sought views on how best to reflect the [Tobacco Regulations 2016](#) in the British Advertising Codes in an optimal way.<sup>6</sup> The consultation closed on 31 October 2016. New rules on the advertising

A joint CAP and BCAP consultation on new rules on the advertising of e-cigarette products

<sup>1</sup> World Health Organisation (WHO), [Electronic nicotine delivery systems](#), 21 July 2014, FCTC/COP/6/10, [online] (accessed 22 October 2014)

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> “[Consultation on the advertising of electronic cigarettes – CAP and BCAP’s proposals for changes to the codes and guidance in response to the Tobacco Products Directive taking effect in the UK](#)”, 29 September 2016

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of e-cigarette products have now been issued in both the non-broadcast and broadcast advertising codes.

This Commons briefing paper provides detailed information about the implementation and enforcement of the [Tobacco Regulations 2016](#) and the role of the ASA.

There has, of course, been widespread debate in the UK amongst policy makers, health professionals, charities and business about the role and safety of e-cigarettes. A wide range of views exist from the public health benefits of e-cigarettes to their potential to re-normalise smoking. The role of the tobacco industry in manufacturing and promoting e-cigarettes, while continuing to sell conventional tobacco cigarettes, has also been questioned. It is not the purpose of this note to provide an account of the arguments for and against the use of e-cigarettes.

# 1. The EU Tobacco Products Directive

## Summary

- On 20 May 2016, the [Tobacco and Related Products Regulations 2016](#) (“the Tobacco Regulations”) implemented the [Tobacco Products Directive](#) (2014/40/EU) into UK law.
- Amongst many other things, the Directive (Article 20) affects how e-cigarette products may be advertised.
- There are now significant prohibitions on advertisements for nicotine-containing e-cigarette products sold as consumer goods (i.e. they are not licensed with the MHRA as a medicinal product).

The EU [Tobacco Products Directive](#) (2014/40/EU), (“the EUTPD”) includes a framework for regulating e-cigarettes.<sup>7</sup> Manufacturers of e-cigarettes can either apply for a medical licence (i.e. marketing authorisation) or submit their product to be regulated as a consumer product. Although Member states had until **20 May 2016** to implement the Directive, transitional arrangements were allowed by the EUTPD. In the UK, this meant that e-cigarettes or refill containers which were not in compliance with the EUTPD could be released for sale on the UK market until 20 November 2016.

Under **Article 20** of the Directive, there are a number of significant prohibitions on advertisements for nicotine containing e-cigarettes which are sold as a consumer product within the EU (see **Box 1** below). Crucially, Article 20 does not cover nicotine-containing products (NCPs) that are authorised as medicines. In the UK, the [Medicines and Healthcare Products Regulatory Agency](#) (the MHRA) is responsible for regulating NCPs that are medicinal products, including e-cigarettes. NCPs that are presented for cutting down, quitting and reducing the harms of smoking might all be considered to be medicinal products.<sup>8</sup> Further information about the MHRA’s licensing requirements of NCPs can be found on the [Gov.UK website](#).<sup>9</sup>

Article 20 of the Tobacco Products Directive

At a UK-wide level, the implementation of the EUTPD (including the non-advertising aspects) was handled by the Department of Health in England (DoH). In relation to the advertising of e-cigarettes, the DoH stated that it would take only a minimal approach to the implementation and had no intention to either capture more products, or restrict advertising any further than was required by the Directive. The Scottish Government took a different position and announced

<sup>7</sup> [OJ, 29.04.2014, L127/1](#)

<sup>8</sup> New producers must submit information about their products to the MHRA through a European Common Entry Gate (EU-CEG) notification panel: [List of submitted products - 31 May 2017](#)

<sup>9</sup> Medicines and Healthcare Products Regulatory Agency (MHRA), “[Licensing Procedure for Electronic Cigarettes and other Nicotine-Containing Products \(NCPs\) as Medicines](#)”, February 2017 (online) (accessed 5 June 2017)

powers to implement further restrictions on the advertising of e-cigarettes than those which would apply in the rest of the UK.

### **Box 1: Article 20 of the Tobacco Products Directive (2014/40/EU)**

In a nutshell, Article 20 of the EUTPR lays down the following rules for e-cigarettes sold as consumer products within the EU:

- **Safety and quality requirements for e-cigarettes**  
The Directive sets a maximum nicotine concentration and volume for cartridges, tanks and nicotine liquid containers. E-cigarettes should be child-resistant and tamper evident and have a mechanism that allows refilling without spillage to protect consumers. E-cigarette ingredients must be of high purity and e-cigarettes should deliver the same amount of nicotine when puffed at the same strength and duration. Manufacturers and importers must notify all products they place on the EU market through a standardised electronic format.
- **Packaging and labelling rules for e-cigarettes**  
Health warnings for e-cigarettes advising consumers that they contain nicotine and should not be used by non-smokers are mandatory. Packaging must also include a list of ingredients contained in the product, information on the product's nicotine content, and a leaflet with instructions for use and information on adverse effects, risk groups, addictiveness and toxicity. Promotional elements are not allowed on e-cigarette packaging, and cross-border advertising and promotion of e-cigarettes is prohibited.
- **Monitoring and reporting of developments related to e-cigarettes**  
The Directive lays down monitoring and reporting requirements for manufacturers and importers, EU countries and the Commission.
- **Implementing Legislation**  
In order to facilitate the implementation of Article 20 of the Directive, the European Commission adopted two implementing Acts and a Commission report related to e-cigarettes:  
[Commission Implementing Decision \(EU\) 2015/2183](#) of 24 November 2015 establishing a common format for the notification of electronic cigarettes and refill containers.  
[Commission Implementing Decision \(EU\) 2016/586](#) of 14 April 2016 on technical standards for the refill mechanism of electronic cigarettes.  
[Commission Report COM\(2016\) 269 final](#) - Report from the Commission to the European Parliament and the Council on the potential risks to public health associated with the use of refillable electronic cigarettes.



## 2. The UK legislative picture

The EUTPD has been implemented across the UK by the [Tobacco and Related Products Regulations 2016](#) ("the Tobacco Regulations"), which came into force on **20 May 2016**.<sup>10</sup> [Part 6](#) of the regulations sets out the requirements for e-cigarettes and refill containers.

It should be noted that although the Tobacco Regulations 2016 apply throughout the UK, devolved nations may choose to apply greater restrictions. Currently only Scotland is exploring this option: the [Health \(Tobacco, Nicotine etc. and Care\) \(Scotland\) Act](#) became law in Scotland in May 2016. It provides powers for Scottish Ministers to prohibit and restrict the advertising of vapour products (both those which contain nicotine and those which do not) through secondary legislation which is not yet in place. According to the [Advertising Standards Authority](#) (ASA) (the UK's advertising regulator), the Scottish Government intends to consult in due course as to what additional prohibitions they may wish to apply through further legislation.

Position in Scotland

It is fair to say that the current legislative picture is complex because of:

- the e-cigarette products which are (and are not) affected,
- the varying likely impact of the law on advertisements in different types of media, and
- because of the differing approach being taken by the Scottish Government to the rest of the UK

To understand the regulatory position, the following key facts should be noted:

- The legal prohibitions apply only to advertisements for e-cigarettes and e-liquids which contain nicotine and which are not licensed as medicines (i.e. they are sold as consumer goods). So advertisements for MHRA licensed products and those without nicotine are not caught. They can lawfully appear in any medium so long as they do not cross-promote prohibited products in media subject to the law and are compliant with [CAP](#) and [BCAP](#) advertising content rules (see below).
- Similarly, the advertising prohibitions apply only to certain media channels. Prohibited channels include: television, radio, print, online and other electronic media. Permitted channels include: direct mail, cinema, outdoor media and leaflets.
- As the [ASA](#) points out, this distinction between prohibited and permitted media types comes as a result of the limits on the European Parliament's jurisdiction when it comes to prohibiting advertising and not from an underlying policy rationale regarding the relative impact of different media.
- Despite the broad ban on advertising online, the law allows factual claims about products made on marketers' own website but prohibits promotional claims. For the [ASA](#), this will provide

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<sup>10</sup> SI 2016/507

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significant regulatory challenges in how to draw the line between these types of claim.

- Finally, the prohibitions do not extend to advertisements for e-cigarette retailers so long as they do not promote an actual product which cannot lawfully be advertised.



### 3. Role of the ASA in enforcing the Tobacco Regulations 2016

In the UK, the [ASA](#) is an independent body that regulates advertising in **all** media by enforcing the [British Advertising Codes](#); there are separate codes for non-broadcast and broadcast advertisements.

The British Advertising Codes are designed to ensure that all advertising is: "*legal, decent, honest and truthful*", does not mislead, harm or offend and is prepared with "*a due sense of social and professional responsibility*". In addition, the Codes include more prescriptive rules for sensitive products (such as tobacco or medicines).

According to the ASA, the rules contained in the Codes are intended to be "*transparent, accountable, proportionate and consistent*", targeted only where regulation is needed and written so that the rules are easily understood, easily implemented and easily enforced.

The British Advertising Codes are written and maintained by two industry bodies:

- The Committee of Advertising Practice (known as CAP) is responsible for the non-broadcast advertising code (known as the [CAP Code](#)<sup>11</sup>). All advertisements for print, outdoor posters, cinema, online, SMS, and direct mail etc. are covered by the CAP Code.
- The Broadcast Committee of Advertising Practice (known as BCAP) is responsible for the broadcast advertising code (known as the [BCAP Code](#)) under agreement with the Office of Communications (Ofcom).<sup>12</sup> Ofcom has a statutory responsibility under the [Communications Act 2003](#)<sup>13</sup> to maintain standards in television and radio advertisements, since 2004 it has entrusted the BCAP with this regulation.<sup>14</sup>
- The BCAP Code regulates all advertisements on: television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). Broadcasters are required by the terms of their Ofcom licence and, for S4C, by statute, to observe the standards set out in the BCAP Code.

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<sup>11</sup> The [ASA website](#) provides further information about the CAP

<sup>12</sup> The [ASA website](#) provides further information about the BCAP

<sup>13</sup> The [Communications Act 2003](#) sets out provisions for the regulations of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The Act requires [Ofcom](#) to set, review and revise a code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#).

<sup>14</sup> Ofcom contracted out its advertising standards codes function to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and with the agreement of Ofcom. Provisions imposed on Ofcom by the Act are therefore relevant to BCAP.

The CAP and BCAP launched a joint [consultation](#) in September 2016 on new rules and guidance on the advertising of e-cigarette products. In this consultation, both Committees sought views on how best to reflect the [Tobacco Regulations 2016](#) in their own Codes and guidance in an optimal way.<sup>15</sup> The consultation closed on 31 October 2016. Both the CAP and the BCAP have now issued new rules to their respective Codes (see below).

A joint CAP and BCAP consultation on new rules on the advertising of e-cigarette products

### 3.1 CAP Code: new rules on e-cigarette products

On 1 February 2017, the CAP introduced new **rule 22** into its Code prohibiting the advertising of unlicensed, nicotine-containing e-cigarettes in certain media. These prohibitions reflect the legislative bans contained in the [Tobacco Regulations 2016](#). According to the ASA, the new rule approximates but does not exceed the law. An outline of Rule 22 is provided in **Box 2** below. A copy of the regulatory statement and supporting materials can also be found [online](#).<sup>16</sup>

New Rule 22 of the CAP Code

Other than in rule 22.12 (which relates only to unlicensed, nicotine-containing products) for the purposes of this section of the Code, “e-cigarette” is taken to mean a product that is intended for inhalation of vapour via a mouth piece, or any component of that product including but not limited to, cartridges, tanks and e-liquids. Therefore **rules 22.1 to 22.11** apply to marketing communications for, and which refer to, e-cigarettes and related products (including but not limited to e-shisha and e-hookah products), whether or not they contain nicotine

Under rule **22.12**, marketers can no longer place advertisements for nicotine-containing e-cigarettes (or their component products), which are not licensed as medicines in print media or online. Print media would include:

- newspapers;
- magazines
- periodicals

In respect of the prohibition on online ads, in its guidance the CAP has indicated that ads placed in the following media channels are, or are likely to be, prohibited (but the list should not be considered exhaustive):

- commercial email, commercial text messaging and other electronic messaging service;
- marketers’ activities online (e.g. on their website and on social media – except for permissible activities (see below));

<sup>15</sup> [“Consultation on the advertising of electronic cigarettes – CAP and BCAP’s proposals for changes to the codes and guidance in response to the Tobacco Products Directive taking effect in the UK”](#), 29 September 2016

<sup>16</sup> [“E-cigarette advertising consultation and regulatory statement, 2016 \(CAP and BCAP\)”](#), 1 February 2017 [online] (accessed 5 June 2017)

- online (“display”) advertisements in paid-for space (including banner or pop-up advertisements and online video advertisements);
- paid-for search listings; preferential listings on price comparison sites; viral advertisements;
- paid social media placements, advertisement features and contextually targeted branded content;
- in-game advertisements (including augmented reality and virtual reality environments);
- commercial classified advertisements;
- advertisements which are pushed electronically to devices;
- advertisements distributed through web widgets
- promotional marketing online;
- affiliate links; and
- in-app advertising

The law applies comprehensive restrictions online. However, the provision of factual information by retailers on their own websites is not prohibited by law. According to the ASA, this is because the consumer has specifically had to seek out that information by visiting the website. That said information provided in this context must only be factual and not promotional in nature. Ultimately, the ASA will need to make careful assessments of individual complaints based on the content and context of the material in question.

Although the advertising of unlicensed, nicotine-containing e-cigarettes is not prohibited by law or by the CAP Code in the following media, ads must still comply with all relevant CAP rules about content and placement:

- Outdoor advertising, including digital outdoor advertising
- Posters on public transport (not leaving the UK)
- Cinema
- Direct hard copy mail
- Leaflets
- Private, bespoke correspondence between a marketer and a consumer

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- Media which is targeted exclusively to the trade

Although marketers can continue to advertise non-nicotine products under Rule 22, they must not cross-promote nicotine-containing products in media subject to the Rule 22.12. (For example, a non-nicotine based product must not indirectly promote a nicotine based products sold under the same name).

Finally, it is important to note that for products licensed as medicines, the rules in section 12 of the CAP Code (“Medicines, medical devices, health-related products and beauty products) apply in addition to any other relevant CAP rules.

ASA guidance on “[Electronic cigarette advertising prohibitions \(non-broadcast and broadcast\)](#)”, dated February 2017, is available online.

New rule 22.12 in the CAP Code prohibits the direct or indirect advertising of nicotine-containing e-cigarettes that are not licenced as medicines.

### Box 2: Rule 22 of the CAP Code

**22.1** Marketing communications for e-cigarettes must be socially responsible.

**22.2** Marketing communications must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand.

**22.3** Marketing communications 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.

**22.4** Marketing communications must make clear that the product is an e-cigarette and not a tobacco product.

**22.5** Marketing communications must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

**22.6** Marketers must not use health professionals to endorse electronic cigarettes.

**22.7** Marketing communications must state clearly if the product contains nicotine. They may include factual information about other product ingredients.

**22.8** Marketing communications must not encourage non-smokers or non-nicotine-users to use e-cigarettes.

**22.9** Marketing communications 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.

**22.10** 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.

**22.11** 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.

**22.12** Except for media targeted exclusively to the trade, marketing communications with the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not licenced as medicines are not permitted in the following media:

- Newspapers, magazines and periodicals
- Online media and some other forms of electronic media
- Factual claims about products are permitted on marketers’ own websites and, in certain circumstances, in other non-paid-for space online under the marketer’s control

## 3.2 BCAP Code: new rules on e-cigarette products

[Ofcom](#) has amended rules in the [BCAP Code](#) and related guidance to reflect changes in the law on e-cigarette product placement and sponsorship introduced by the [Tobacco Regulations 2016](#).

Specifically, the Tobacco Regulations 2016 amend section 319 (Ofcom Standards Code) of, and Schedule 11A (Restrictions on product placement) to, the [Communications Act 2003](#). The amendments to the Broadcasting Code remove an existing prohibition in Rule 9 on the product placement in television programming of "electronic or smokeless cigarettes" and insert a new prohibition on the product placement of "electronic cigarettes" and "refill containers", both of which are defined.

The Tobacco Regulations 2016 also amend Part 4A of the [Communications Act 2003](#), which regulates on-demand programmes services, and provide that on-demand programmes and services cannot be sponsored for the purpose of promoting e-cigarettes or refill canisters, and that there can be no product placement of such items. Broadcasting advertisements for e-cigarettes and refill containers, and sponsorships that promote such products, have also been banned.

**Box 3** below provides an outline of new **Rule 33** of the BCAP Code enforced by the ASA.

ASA guidance on "[Electronic cigarette advertising prohibitions \(non-broadcast and broadcast\)](#)," dated February 2017, is available online.

### Box 3: Rule 33 of the BCAP Code

**33.1** Advertisements for e-cigarettes must be socially responsible.

**33.2** Advertisements must contain nothing which promotes any design, imagery or logo style that might reasonably be associated in the audience's mind with a tobacco brand.

**33.3** 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.

**33.4** Advertisements must make clear that the product is an e-cigarette and not a tobacco product.

**33.5.** Advertisements must not contain health or medicinal claims unless the product is authorised for those purposes by the MHRA. E-cigarettes may be presented as an alternative to tobacco but marketers must do nothing to undermine the message that quitting tobacco use is the best option for health.

**33.6** Advertisements must not use health professionals to endorse electronic cigarettes.

**33.7** Advertisements must state clearly if the product contains nicotine. They may include factual information about other product ingredients.

**33.8** Advertisements must not encourage non-smokers or non-nicotine-users to use e-cigarettes.

**33.9** Advertisements must not be likely to appeal particularly to people under 18, especially by reflecting or being associated with youth culture.

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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.

**33.10** 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.

**33.11** Radio Central Copy Clearance – Radio broadcasters must ensure advertisements for e-cigarettes are centrally cleared.

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