



## **ACS Submission: Consultation on the advertising of electronic cigarettes**

ACS (the Association of Convenience Stores) welcomes the opportunity to respond to Committee of Advertising Practices consultation on the advertising of e-cigarettes. ACS is a trade association, representing the 50,095 convenience stores trading at the heart of the communities across the UK, which employ 390,000 people (see annex A for more details). Members include the Co-Op, One Stop, Costcutter Supermarkets, Spar UK and thousands of independent retailers.

Convenience retailers sell a range of grocery products and provide a number of services to their local communities, including Post Offices, free to use ATMs, bill payments services, and parcel collection. Collectively, tobacco and e-cigarettes make up, on average, 15.4% of sales in the convenience sector. E-cigarettes are still a new and growing product category in the convenience sector, and ACS has previously welcomed regulations, such as the introduction of a minimum age of sale, to ensure the correct management of the category.

The introduction of the EU Tobacco Products Directive will mean a number of operational changes for convenience retailers who sell tobacco and e-cigarettes. As well as ensuring they comply with the e-cigarette advertising restrictions, retailers will also have to ensure that they only sell e-cigarettes with a health warning, e-cigarettes with no more than 20mg/ml of nicotine (unless licensed as medicines), and e-cigarette refills with no more than 10ml. To aid retailers with the transition to the new regulations, ACS produced “Standardised Packaging and Tobacco Product Directive” best practice guidance, which can be found [here](#) for reference.

Convenience store retailers will predominately advertise e-cigarettes at point-of-sale in-store which is not restricted by the regulations. While we understand that point-of-sale advertising is not within the remit of the CAP code, the consultation document sets out a list of what non-broadcast media channels which are unaffected by the new regulations. We would welcome clarification in the accompanying guidance or within the CAP code that point-of-sale e-cigarette advertising is not prohibited by law to ensure there is no miscommunication to retailers regarding the changes to legislation. We would also welcome clarification where an advert is not prohibited but it is within the remit of the CAP/BCAP codes, it still has to comply with the code.

The ACS Local Shop Report 2016 suggests that 24% of convenience retailers have a store website, with 22% using Facebook, and 18% using Twitter to advertise their store and the products they sell<sup>1</sup>. As well as e-cigarette manufacturers and e-cigarette retailers who solely sell e-cigarettes, convenience store retailers will also be affected by the changes to the e-cigarette advertising legislation and the changes being made to the CAP code. ACS is willing to work with CAP and BCAP on the drafting of their guidance on the changes in e-cigarette advertising regulations, and on how it can be best communicated to retailers to ensure compliance.

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<sup>1</sup> ACS Local Shop Report 2016

Please see below for ACS' response to the relevant consultation questions:

- 1. Do you agree that CAP's proposal to prohibit advertisements which have the direct or indirect effect of promoting nicotine-containing e-cigarettes and their components which are not authorised as a medicine / medical device is consistent with the law? If not, please explain why.**

We agree that CAP's definition of e-cigarettes and the advertising prohibitions are consistent with the law.

- 2. Do you agree that the prohibition should apply to advertisements for non-nicotine and refillable products which can be refilled with nicotine containing e-liquid? If not, please explain why.**

Prohibiting advertisements for non-nicotine and refillable products would provide simplicity to the regulations, however, we do not believe that non-nicotine products should be prohibited if they indirectly promote e-cigarettes containing nicotine, for example, using the name of the brand to describe the product. We believe not displaying the brand name of the product online could cause consumer and retailer confusion.

- 3. Do you agree that advertisements for products in the list above would be lawful under TPRR and that CAP therefore does not need to prohibit them? If not please explain why.**

We agree that the list is consistent with the law.

- 5. CAP's proposal is to prohibit marketing communications for nicotine-containing e-cigarettes, which are not authorised as medicines, in newspapers, magazines and periodicals which are not targeted exclusively to a trade audience. Do you agree that this is consistent with the law? If not, please explain why.**

We agree that the list of prohibited marketing communications for nicotine containing e-cigarettes is consistent with the law. We would welcome clarification in CAP's accompanying guidance whether it would be the retailer stocking the magazines which includes an e-cigarette advertisement or the publication, or both, that would be making the offence.

- 6. CAP's proposal is to prohibit advertisements in information society services and to reflect this in the CAP Code as a prohibition on "advertisements in online media and some other forms of electronic media". This would be accompanied by a reference to a new guidance note which explains the legal framework and lists specific media types that are likely to be prohibited, as above. Do you agree that this proposal is consistent with the law? If not, please explain why**

We agree that CAP's proposal to prohibit advertisements in information society services is consistent with the law.

- 9. Do you agree that the law allows for factual claims on marketers' own websites? If not, please explain why.**

We agree that permitting factual claims on marketers' own websites is consistent with the law. We welcome the clarity that the Committee of Advertising Practices' guidance will provide around the definition of factual claims and promotional statements.

The ACS Local Shop Report suggests that 24% of convenience store retailers have websites for their store<sup>2</sup>. While the consultation document sets out that it would be permitted for marketers' websites to display factual information about e-cigarettes, we would call for clarity for the restrictions for retailers' websites. For example, to our understanding it would be permitted for a retailer to list factual information about an e-cigarette product on a designated page about e-cigarette products, but it would not be permitted to display e-cigarette information on the retailer's website home page as the consumer may not be actively seeking e-cigarette information by visiting a retailer's website?

**10. Do you agree that in principle the above types of claim are, all other things being equal, factual in nature and should therefore be permitted? If not, please explain why.**

We agree that the list of types of claim are factual in nature and therefore permitted. The line between promotional and factual is challenging, and therefore, we welcome the list that CAP has drafted. However, as outlined in the consultation document, the Advertising Standards Authority (ASA) Council's decision to determine if an advert is factual or promotional is not bound by the CAP guidance. As such, types of claim listed by CAP will be determined on a case by case basis. Where a claim is listed as permitted in CAP, could in fact be prohibited by ASA.

**12. Do you agree that the above types of claims are likely to be promotional in nature and should be prohibited? If not please explain why.**

We agree that the claims set out by CAP are likely to be promotional in nature and would be prohibited under the Tobacco Products Directive. However, as outlined in the consultation document, the Advertising Standards Authority Council's decision to determine if an advert is factual or promotional is not bound by the CAP guidance. As such, types of claim listed by CAP will be determined on a case by case basis. Where a claim is listed as permitted in CAP, could in fact be prohibited by ASA.

**15. Do you agree that social media pages might, in principle, be capable of meeting the criteria set out for websites in the section A.5.1. above? If not, please explain why. Please provide any examples and evidence you might have in support of your response.**

In principle, social media pages for e-cigarette manufacturers may be capable of meeting the criteria as set out in section A.5.1. However, we do not believe the social media pages of e-cigarette marketers' who sell other products (not related to e-cigarettes) such as convenience retailers' would meet the criteria. Websites and social media pages hosted by e-cigarette manufacturers and retailers who solely sell e-cigarettes will typically be used by consumers to find out more information about e-cigarette products, while convenience retailers' websites and social media pages will not, as they sell other products.

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<sup>2</sup> ACS Local Shop Report 2016

Moreover, the use of hashtags on social media, means that a consumer may discover a status update/post by an e-cigarette marketer when they were not actively seeking information about e-cigarettes.

**16. Do you agree that the media channels set out above are not prohibited by law from carrying advertisements for unlicensed, nicotine-containing e-cigarettes? If not, please explain why.**

While we understand that point-of-sale advertising is not within the remit of the CAP code, the consultation document sets out a list of what non-broadcast media channels which are unaffected by the new regulations. We would welcome clarification in the accompanying guidance or within the CAP code that point-of-sale e-cigarette advertising is not prohibited by law to ensure there is no miscommunication to retailers regarding the changes to legislation.

**17. Do you support the revised wording in Section 22? If not please explain why and how you think it should be amended.**

The revised wording in Section 22 is consistent with the legislation.

**18. Do you support the proposed wording of the, newly created, rule 22.12? If not please explain why and how you think it should be amended.**

The revised wording in Section 22.12 is consistent with the legislation.

**19. Do the criteria above provide a workable framework for identifying marketing communications that are likely to indirectly promote unlicensed, nicotine containing e-cigarettes that are not authorised as medicines?**

We agree that most of the criteria listed would provide a workable framework for identifying marketing communications that are likely to indirectly promote nicotine containing e-cigarettes, however, we do not agree that the brand name or range name should be restricted when advertising non-nicotine e-cigarette products.

A number of e-cigarette manufacturers produce both nicotine containing e-cigarettes and non-nicotine containing cigarettes. As outlined in the consultation document, non-nicotine containing cigarettes would not be permitted to include their brand name if it is associated with nicotine products. To our understanding, this would mean that any non-nicotine e-cigarettes which are produced by a manufacturer who produces nicotine containing e-cigarettes would not be permitted to display the brand name online. We believe this could provide confusion for both retailers and consumers, for example, how would a consumer be able to distinguish between brands when purchasing an e-cigarette product online? As such we believe that non-nicotine products should be permitted to have their brand name displayed online as long as it is not promotional in nature (such as names which include product claims).

**21. Should CAP allow advertisements for e-cigarette retailers so long as those advertisements do not refer to products which cannot be advertised?**

Yes, CAP should allow advertisements for e-cigarette retailers as long as they do not refer to products which cannot be advertised. E-cigarette retailers are not only retailers which solely sell e-cigarettes, but are also convenience stores. Convenience retailers should be allowed

to promote their store, and the wide range of products they offer, as long as they do not advertise an e-cigarette product which is prohibited.

**For more information on this submission, please contact Julie Byers, ACS Public Affairs Executive at [Julie.Byers@acs.org.uk](mailto:Julie.Byers@acs.org.uk) or call 01252 515001.**