

## Consultation on the advertising of electronic cigarettes

Committee of Advertising Practice (CAP) and  
Broadcast Committee of Advertising (BCAP)

Chartered Trading Standards Institute response

31<sup>st</sup> October 2016

## **About The Chartered Trading Standards Institute**

The Chartered Trading Standards Institute (CTSI) is a professional membership association founded in 1881. It represents trading standards officers and associated personnel working in the UK and also overseas – in the business and consumer sectors as well as in local and central government.

The Institute aims to promote and protect the success of a modern vibrant economy and to safeguard the health, safety and wellbeing of citizens by empowering consumers, encouraging honest business, and targeting rogue traders.

We provide information, evidence, and policy advice to support local and national stakeholders.

We have also, as part of our recently revised remit, taken over responsibility for business advice and education concerning trading standards and consumer protection legislation. To this end, we have developed the Business Companion website ( [www.businesscompanion.info](http://www.businesscompanion.info) ).

The CTSI Consumer Codes Approval Scheme was launched in 2013, superseding the OFT scheme ( [www.tradingstandards.uk/advice/ConsumerCodes.cfm](http://www.tradingstandards.uk/advice/ConsumerCodes.cfm) ).

CTSI is a member of the Consumer Protection Partnership, set up by central government to bring about better coordination, intelligence sharing and identification of future consumer issues within the consumer protection arena.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement.

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***A key concern for CTSI is that of resources. UK local authority trading standards services enforce over 250 pieces of legislation in a wide variety of areas. They have suffered an average reduction of 46% in their budgets since 2010 and staff numbers have fallen by 53% in the same period.***  
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This response has been composed by CTSI Lead Officer for **Lead Officer for Health – Jane MacGregor and Members of the National Tobacco Focus Group**. Should you have any queries or wish to discuss the response please do not hesitate to contact **LO Health** at [tobaccocontrol@tsi.org.uk](mailto:tobaccocontrol@tsi.org.uk).

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## Introduction

CTSI welcome the opportunity to respond to this consultation. Trading standards are responsible for compliance monitoring of the Tobacco and Related Products Regulations 2015 and are thus closely involved in the electronic cigarette market place. Whilst supportive of business, we recognise that this is a developing area and thus clear guidance is required to ensure that businesses comply with the new requirements.

## Executive Summary

- CTSI is broadly supportive of the approach taken by CAP and BCAP to the advertising of electronic cigarettes
- We note that it is intended to produce guidance to accompany several of the principle points; it is critical that this is reviewed regularly to keep pace with the changes in this market

## Response to Consultation Questions

In media subject to the regulations:

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.

**A Q1: Yes**

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.

**A Q2: Yes**

In media subject to the Regulations:

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.

4. Do you have any further views regarding the types of products for which advertising should or should not be prohibited?

**A Q3: Yes, however, CTSI has concerns about the ease with which it is possible for a consumer to distinguish between non-nicotine products and those that do contain nicotine and are therefore prohibited.**

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.

**A Q5: Yes, however CTSI would welcome some further clarification of what constitutes a magazine v a periodical and, also, whether a catalogue produced for a consumer is also deemed to be a magazine?**

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.

7. Are there any types of media that you consider to be information society services which are not referenced above?

8. Are there any types of online media listed above or otherwise which you think should not be categorised as an information society service?

**A Q6: CTSI agrees that the proposal is consistent with the law. We would urge that any guidance is regularly reviewed and updated in light of changes in media usage (trends). Is it possible to provide reference in the guidance note to the position of sites such as E Bay, Face Book?**

**A Q7 & Q8: CTSI has insufficient expert knowledge in this field to comment further.**

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

**A Q9: Yes**

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.

11. Are there any other claims / types of claims you consider are factual in nature should appear on this list?

**A Q10 & 11: Yes, CTSI agrees that the points listed are factual in nature. We would add that there are other factual matters that are required to be provided by virtue of consumer protection legislation for example name of manufacturer or importer, safety instructions, hazard labelling**

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.

13. Are there other types of generic claims that should be included in this list?

14. Do you have any other comments to inform CAP's consideration of whether a claim is factual or promotional?

**A Q 12: Yes**

**A Q13: CTSI suggest that generic claims such as "safer than", "less harmful than" may require special consideration. CTSI acknowledges the position of PHE in this regard however, without context such claims could be considered to be promotional.**

**A Q14: CTSI recommend that the guidance is reviewed regularly and updated in light of new research, legal decisions and changes in the market.**

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.

**A Q 15: CTSI has insufficient expert knowledge in this field to comment further.**

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.

**A Q16: Yes however a clear definition of what constitutes a leaflet would be helpful.**

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

**A Q17: The second sentence of the last paragraph of section 22 is unclear and we do not understand what is meant by it. In addition there is a typo in the third line which says "sections" plural when it should be 'section' singular. We suggest that there is potential confusion created by the inconsistent use of unauthorised and unlicensed. The MHRA license products they do not authorise them.**

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.

**A Q18: The quality of the guidance note will be critical, for example, the second bullet 'Online media and some other forms of electronic media' the meaning of 'some other forms of electronic media' is unclear – what these other forms of media are needs to be specified.**

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?

**A Q19: CTSI is unclear what is meant by "a direct response mechanic relating to a nicotine E cigarette" this may therefore require further explanation.**

20. Are there any criteria you consider should be added to the list?

**A Q20: Not that we are aware of at this point.**

In media subject to the Regulations:

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

**A Q21: In principle CTSI is supportive of the need for businesses to advertise, however in practice we believe that this will be difficult if not impossible to achieve.**

22. Do you agree with BCAP's proposal to allow e-cigarette retailers to advertise their services on TV and radio? If not, please explain why.

23. Do you agree with BCAP's proposed additional text for rule 10.1.11? If not, please explain why.

**A Q23: No, see above. CTSI is concerned that retailers will take advantage of use of other methods to indirectly promote their products through use of colour, imagery,**

**and name. All aspects that the tobacco industry has used over many years to promote / advertise their products.**

24. Do you have information or evidence which can inform CAP and BCAP's future consideration as to whether they might allow for substantiated health claims to be made for unlicensed e-cigarettes?

**A Q24: No**

25. Should BCAP remove rule 33.7 for the reasons given above? If not please explain why.

**A Q25: Yes**

26. Do you have any other comments or evidence for CAP and BCAP in relation to the ongoing suitability of their e-cigarette rules for the regulation of lawful advertisements?

**A Q26: Regular review of guidance issued in light of research, legal decisions and changes to the market.**

**Chartered Trading Standards Institute 31 October 2016**