

Independent Complaints Panel

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Independent Complaints Panel Code Consultation 2018 Response

This response to the Consultation is from the Independent Complaints Panel. It addresses specifically those issues where the Panel has found that the Code is unclear, unhelpful, or out of date. The Panel is conscious that it may need to make rulings under the new Code on any of the issues which it has raised here, and therefore has sought to raise these points in the most neutral way possible, to make the Portman Group and others aware of its concerns without tying its hands in the future with respect to individual complaints. For this reason the Panel has not commented on the drafting of the Code except where it considers the current drafting to be open to misinterpretation.

The Independent Complaints Panel has 8 members of the Panel who are appointed by the Chair of the Panel (currently Jenny Watson CBE). Members bring a mix of skills, currently including licensing knowledge, marketing expertise, health and regulatory skills, and input from work with young people. The Panel's decisions are published on the Portman Group website, and in an annual Code report. If a breach is found concerning the naming, packaging or point of sale advertising material of a drink, a Retailer Alert Bulletin (RAB) may be issued asking licensed retailers not to stock the product or display the point of sale material until remedial action has been taken. A RAB will also receive wider publicity through the trade press, and through distribution to trade associations, police and local authority licensing officers, and Code signatories.

The Panel treats the Code as principles based, which enables it to have greater flexibility in interpretation, and learning from our decisions is regularly included in updated versions of the Portman Group's Code Guidance. Although this principles based approach gives the Panel the broadest possible ability to interpret the Code, it is still vital that the Code is up to date. The Panel therefore welcomes this consultation and hopes that it will receive a wide range of responses from the broadest possible range of stakeholders.

Question 1: Do you agree that the Code should be amended to prevent alcohol being offered on the basis that it can change mood or behaviour?

1. The Panel is broadly supportive of this change since it will provide greater flexibility when hearing complaints.
2. On a separate but related point, in the past the Panel has heard complaints about products which contain caffeine. Current Portman Group guidance states that factual statements can be made about caffeine as an ingredient. It may be necessary to inform consumers that a product contains certain ingredients, like high caffeine

Independent Complaints Panel

content, but this must be done in a factual and non-emotive way. There is an additional provision in the Food Information Regulations (FIR) which requires additional labelling for high caffeine drinks.

3. However, if an ingredient which has an implied effect is given undue emphasis over and above the level deemed to be informative for consumers, the Panel may find such a product in breach of the Code, particularly if claims are made on packaging and in marketing materials. Since caffeine is commonly understood to be a stimulant the Panel has on occasion questioned whether the inclusion of “contains caffeine” on packaging might **in itself** suggest a potential change to mood or behaviour. If this Code rule is changed, the subsequent Guidance should be alive to this point.

Question 2: Do you agree with the proposed drafting of the Code rule?

N/A

Question 3: Do you agree that it is important to have a unit-based definition for immoderate consumption?

4. The issue of immoderate consumption is one of the most frequent causes of complaints to the ICP in the last few years and it is no surprise that the consultation document references the Panel and its decisions. Over the last twenty years the ICP has made decisions in relation to immoderate consumption, both in the on-trade (WKD Cauldron) and packaging (Tennent’s Super).
5. The Panel was surprised to see the change to the Chief Medical Officer’s guidelines, and the consequent loss of a daily unit guideline has significantly impacted upon Panel rulings, since it has removed a critical reference point. The most obvious example of this is a Panel ruling with regard to K Cider¹. Previously, the Panel had argued that putting in excess of four units in a non-resealable single serve can did indeed indirectly encourage immoderate consumption of alcohol, contrary to rule 3.2 (f). With the removal of the daily threshold, it was no longer able to continue so to do.
6. This decision was based on our understanding of how packaging interacts with the way individuals consume alcohol. Rather than simply rely on its own views that the current cultural assumption would be that a can of alcohol is consumed by a single person at a single sitting, the ICP previously asked YouGov to ask consumers how they would typically consume alcohol from certain types of product packaging². Consumers were of the view that a 500ml can containing a carbonated product was intended for consumption by one person in one sitting as it is not easily re-sealable. In the case of high strength products, that might involve the consumption of over four

¹ [K Cider Decision 12 January 2017](#)

² Research commissioned from YouGov by the Portman Group on behalf of the ICP, October 2014 and August 2016

Independent Complaints Panel

units of alcohol, which was the upper end of the daily number of units under previous CMO guidance.

7. The ICP is now in potentially difficult territory, and the industry is not helped by this lack of clarity. The CMO (England) has recommended moving away from daily unit consumption. In correspondence with the Chair of the ICP, the CMO has also expressed the view that, in the absence of fresh advice on higher risk drinking levels; “for a single serve can, designed to be consumed by one person in one sitting, a maximum of 4 units remains an appropriate threshold to help reduce alcohol related health harms. As a consequence I believe the Panel’s approach remains reasonable and pragmatic, in light of the evidence available³”. Elsewhere in government, the ONS still uses the daily guidelines as the basis for defining binge-drinking (more than 6 or 8 units in one sitting).
8. Given that official bodies are somewhat at odds, it would be helpful to the ICP if this consultation could establish greater consensus around a daily unit-based definition that might act as a threshold for immoderate consumption.
9. This is particularly important because, although the ICP will bear in mind changes in society and will consider new debates or issues related to the consumption of alcohol in its decision making, its decisions are also subject to judicial review⁴. It is therefore important that the Panel be able to evidence the reasons for its decisions, particularly when it is overturning a previous precedent.
10. Of course, health is only one area of consideration for immoderate consumption. The ICP definition of immoderate consumption takes a wider range of factors into account such as health & safety, the behaviour of the individual after consumption and the potential for consumption to lead to risky behaviour, in particular impaired judgement or performance.
11. Nevertheless greater consensus around an appropriate number of daily units which could be included in Code Guidance as a threshold to immoderate consumption would be helpful to the Panel in its deliberations. The ICP also believes that this would provide useful clarity for the industry.

Question 4: Do you agree there is enough evidence, as set out in section above, to support a daily threshold of 4 units?

12. The Panel is of the view that a daily unit threshold is helpful but would not want to comment on the specific threshold which might be set as a result of this consultation.

³ Correspondence between Chief Medical Officer (England) and Chair of Independent Complaints Panel, 26 September 2016

⁴ [Laverstoke Park Farm Ale and Lager October 2012](#)

Question 5: Do you agree that the Code should be amended to prevent any associations with illegal behaviour?

13. Although it is likely that the ICP would be able to interpret the Code widely enough to take “illegal behaviour” into account in a ruling, it may be helpful for the industry to have greater clarity on this point. This change to the Code appears sensible.

Question 6: Do you agree with the proposed drafting?

N/A

Question 7: Should the Code be amended to offer protection to vulnerable individuals?

14. One of the fundamental principles behind the Code is to protect vulnerable individuals. Until now, that has been given expression predominantly through a focus on those aged under 18, and for that reason the Code provides specific protection for this age group. The Panel gives considerable weight to whether products might, directly or indirectly, have “particular appeal” to under 18s and receives a high number of complaints which refer to this Code rule.
15. More recently however the Panel has reflected on whether there is a need to ensure greater protection for a wider group of vulnerable individuals under the Code. This is in part because we are aware that similar protections are extended to such groups through other regulatory regimes, and by different regulators, as the consultation document explains.
16. But it is also because we are thoughtful about products which might potentially be particularly attractive to those who are not able to make a balanced or informed decision about their drinking, including those who are alcohol dependent and thus perhaps vulnerable to exploitation.
17. Nothing in the Code can totally eliminate harm. But giving particular focus to under 18s in the Code seeks to **minimise** harm to this group. The ICP would strongly support a change to the Code to enable it to consider, if necessary and relevant to a complaint, whether it should afford a similar level of protection to other vulnerable individuals.

Question 8: If so, do you agree this should be an overarching principle of the Code, and as drafted?

N/A

Independent Complaints Panel

Question 9: Do you agree that the Code should be amended to protect individuals and/or groups from serious or widespread offence?

18. The current Panel has not found itself in a position where it was unable to uphold a product that it believed was problematic under the Code because this provision has been lacking.
19. However, the ICP is aware of strongly held views from a number of external stakeholders around this rule change, and also understands the possibility that, as other regulators change their rules, the Code finds itself out of step with expectations, and becomes confusing for the industry and complainants alike.
20. The Panel thinks it possible that it may receive many complaints under this rule, given that individuals have significantly different views of what might constitute “serious or widespread offence”, and it is likely to interpret the phrase in a reasonably literal way, with due regard to industry creativity.

Question 10: Do you agree with the proposed wording of the rule?

21. The current drafting could be interpreted to imply that any “offence” that might be caused in relation to race, religion, gender, sexual orientation, disability or age need not be “serious or widespread”. It would be helpful to the ICP if the drafting of this section of the Code could be as clear as possible if it is not to lead to frustration for both complainants and the ICP.

Question 11: Are there any other areas in which you think the Code might benefit from revision or ways in which you think it could be made to operate more effectively?

22. The Panel is aware that with the growth in digital marketing techniques together with virtual reality and augmented reality technologies, some alcohol producers are developing their own apps. This is a potentially complex area of regulation since some of these may not be subject to the Portman Code of Practice, falling within the remit of the ASA. Others, which are free to download, may not be covered by the ASA, and therefore are presumably covered by the Code. Although the ICP has not received a complaint about apps, given the pace at which this technology and means of promotion is developing, it would seem sensible for this issue to be considered during the Code review and a decision made as to whether it is, or is not, within the Panel’s remit, with appropriate Guidance produced to support an additional Rule if so.
23. The Panel has from time to time discussed the wording of Code Rule 3.2 (h) which states that packaging and any promotional marketing or activity should not “have a **particular** appeal” to under 18s (emphasis added) which implies that a product must have a more specific appeal to this age group, rather than being appealing to both adults and young people. The Panel is aware that the BCAP rule for television

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Independent Complaints Panel

alcohol advertising (Rule 19.15.1) has rather different wording: advertising should not “be likely **to appeal strongly** to people under 18, especially by reflecting or being associated with youth culture or showing adolescent or juvenile behaviour” (emphasis added). We think the Code would be strengthened with a change to Rule 3.2 (h), substituting “strong appeal” for “particular appeal”.

Submitted by Jenny Watson CBE

Chair, Independent Complaints Panel, Portman Group, on behalf of the Panel

4 June 2018

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