

Fit for purpose?

**An analysis of the role of the
Portman Group in alcohol
industry self-regulation**

July 2018

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Executive summary

The Portman Group was established in 1989 and has been a key regulator of alcohol marketing since 1996. The group hosts an Independent Complaints Panel which adjudicates on complaints against the naming, packaging and promotion of alcoholic drinks according to a Code of Practice.

From 2006 to 2017, the Panel published a total of 99 decisions on alleged breaches of its Code of Practice. This report presents an analysis of those 99 decisions. It finds that, while a number of Panel decisions have been effective in removing products that breach the Code from the market:

- The Panel's decision-making has not been consistent over time.
- Its decisions have often appeared subjective, and not based on an explicit presentation of the rationale, or the evidence underpinning the deliberations.
- There is a lack of Panel oversight and scrutiny which means that, regardless of the independence or quality of individual members, the overall process is not held to public account.

We conclude that, in light of the scale and potential impact of alcohol marketing across society, its regulation would be better served by a fully independent body that is subject to much greater levels of public accountability and scrutiny. This would drive up the consistency of decision-making, more explicitly apply research evidence to the mechanisms of marketing influence, and operate more robust appeals processes.

The Codes of Practice of a fully independent regulator would be explicitly established not only to prevent and enforce breaches of good practice, but also to contribute to the reduction of alcohol-related harm.

It would also need the scope to consider the promotion of individual products in the context of the wider marketing mix. Currently, this responsibility is divided between the Advertising Standards Authority and the Portman Group.

The establishment of an independent regulator, operating on a statutory basis, would oblige the regulator to answer fully to the public and Parliament. It would protect the decision-making integrity of the panel, avoiding any perception that its decisions are conflicted by links to the alcohol industry or other interests.

This report presents what are intended to be constructive criticisms of current practice, which recognise that any complaints panel of this kind is engaged in complex and contentious work, which is unlikely to satisfy all stakeholders. However, its fundamental conclusion is that self-regulation is not appropriate to the alcohol market, not only because it weakens the capacity for proper scrutiny and oversight, but because the goals of tackling the detrimental social impacts of irresponsible alcohol marketing are by definition often in conflict with the goals of alcohol marketeers.

The UK Government should therefore, as part of its proposed Alcohol Strategy, establish a root-and-branch review of alcohol marketing regulation, covering the existing functions of the Portman Group, the Advertising Standards Authority and other relevant bodies. This review should establish clearly the basis on which the regulation of alcohol marketing should be carried out; how a regulatory body should address the unique challenges of a complex, multi-platform landscape; and how public scrutiny, impartiality and commitment to evidence can best be ensured.

Introduction

The Portman Group is a key regulator of alcohol industry marketing and promotion in the UK. Its 'Code of Practice', which aligns with the relevant codes developed by the Advertising Standards Authority (ASA), applies to the naming, packaging, marketing and promotional activity of UK alcohol products.

This report presents detailed analysis of 12 years of decisions made by the Portman Group's Independent Complaints Panel between January 2006 and December 2017, about which forms of alcohol promotion are acceptable and which are not, under the terms of the Group's Code of Practice. The report examines:

- The criteria in the Code against which the Panel's decisions have been made, and how those criteria have been interpreted by the Panel.
- How consistently the criteria have been applied, including the Panel's rationale for changing its views on products over time, and for differentiating between problematic products and those it considers acceptable.
- The types of evidence the Panel has used in its decision-making.
- The sanctions the Portman Group can apply to alcohol producers that the Panel judges to have breached the Code.
- To whom the Portman Group is accountable in its regulatory role.
- Possible alternatives to the current regulatory model.

The report does not seek to re-adjudicate any of the 99 individual decisions.

Rather, it investigates the process by which those decisions have been reached, in order to consider whether the process is fair, transparent and effective in achieving its stated aims.

Background

The Portman Group was established in 1989 as an industry-funded corporate social responsibility (CSR) body, following a series of meetings between representatives of some of Britain's biggest alcohol producers. It took its name from the location of those first meetings: the Guinness company offices on Portman Square, London. According to the Group's website, it is currently funded by eight member-companies,¹ whose sales collectively make up more than half of the UK alcohol market:

- Anheuser-Busch InBev (AB InBev)
- Bacardi Brown-Forman
- Carlsberg
- Diageo
- Heineken
- Jägermeister
- Molson Coors
- Pernod-Ricard

The Portman Group as a regulator

The Portman Group's regulatory role is more recent and dates from 1996. It is a role the Group took upon itself largely in response to the controversy about the sweet alcoholic drinks known as 'alcopops'.² In 1996, the Group published its first Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks, and established an Independent Complaints Panel to adjudicate on alleged breaches of the Code. The Code has been through a number of iterations since then. The fifth edition of it was published in 2015,³ and the Group is currently consulting on a sixth edition.⁴ According to the Portman Group, the Code "is widely credited with raising standards of marketing responsibility across the industry".⁵ It does not, however, apply to all aspects of alcohol marketing. It sets standards for the "naming, packaging, marketing and promotional activity undertaken by a drinks producer for an alcoholic drink which is marketed for sale and consumption in the UK", but only where that activity is not already overseen by the Advertising Standards Authority (ASA) or Ofcom.⁶ As such, it does not cover print, broadcast or online advertising; nor does it apply to promotions by retailers, unless they also involve producers.

In 2014, the Portman Group also took on the regulation of sponsorship by the alcohol industry of performers, sports teams, music events, and venues (although Ofcom retained responsibility for regulating television programme sponsorship). The terms of the Code of Practice on Alcohol Sponsorship largely mirror those of the Code on Naming, Packaging and Promotion.⁷ Taken together, the two Codes mean that the Portman Group regulates:

- The bottles, cans and boxes in which drinks are sold;
- Any display materials drinks manufacturers supply to shops;
- Alcohol industry sponsorship arrangements, apart from those for television programmes.

In the four years since the Code of Practice on Sponsorship has been in place, the Complaints Panel has published no judgements under it. This report, therefore, is focused solely on the implementation of the Code of Practice on Naming, Packaging and Promotion.

There are two main aspects to the operation of this Code:

- **Proactive:** The Portman Group operates an Advisory Service, which it encourages companies to consult confidentially prior to launching or re-launching a product, in order to reduce the risk of a breach of the Code. The Advisory Service is composed of Portman Group staff, and advises both drinks producers and the Independent Complaints Panel. The Group is clear, however, that the Advisory Service cannot give any kind of approval or endorsement on behalf of the Portman Group, and that discussing a product with the Advisory Service does not guarantee that complaints will not arise subsequently or that the Panel will not rule against that product in the future.⁸
- **Retroactive:** Anyone who believes that a product has breached the terms of the Code can submit a complaint to the Independent Complaints Panel. If the Panel judges that a breach has occurred, the producer will be asked to work with the Portman Group to amend that product or withdraw it from sale, usually within a period of three months. Alongside this, the Portman Group may ask retailers not to restock the product in its current form. This aspect of the Portman Group's work is retroactive in that it does not prevent any offending product from entering the market; rather, it ensures that it is eventually removed from sale and does not reappear. The publication of complaints decisions on the Group's website is also intended, presumably, to give an indication of what kinds of packaging and promotional materials are considered acceptable or otherwise.ⁱ

It is not clear whether the Portman Group has any targets for ruling on complaints

within a particular timescale. To illustrate the length of time the process can take, in October 2015 a complaint was made about a counter top unit (CTU) intended to increase sales of Baileys cream liqueur in the run-up to Christmas 2015. The Panel's decision on the CTU was published in early March 2016, two months after the promotional campaign had ended.⁹ In a similar manner, around the end of December 2017 the Panel was asked to consider whether Spar's 'Everyday Wine' range encouraged daily drinking. The Panel's decision was published mid-May 2018, more than four months after the original submission.¹⁰

By way of comparison, a similar pattern can be seen with the ASA. For example, in late February 2018 the ASA ruled that a Christmas-themed Aldi advert running from November to December 2017 was in breach of their code and that the campaign, which had ended two months previously, should "not be shown again".¹¹ The ASA has said that some cases "can take six months or more to complete".¹² Complaints to the Portman Group do not appear to take this long to process, although given that the Panel's published decisions do not state when the complaint was made (only when the decision itself was published), it is hard to be certain on this point.

The Portman Group's Code is sometimes described as a form of "voluntary" self-regulation. However, as the Group has stated, "this term needs to be clarified as it is potentially misleading. The Codes are voluntary insofar as the industry has volunteered to impose the restrictions on itself. Compliance with the Codes is mandatory; there is no opt-out for any drinks manufacturer".¹³ This means that whether or not producers are members of the Portman Group, and whether or not they have formally endorsed the Code, they may be subject to sanctions if they breach it.^{ii. iii} This applies to any overseas producers who import products into the UK as well.

ⁱ This is presumably the case for complaints decisions that are published in full. However, in 2014 the Portman Group introduced a new 35-day Fast Track for resolving complaints, under which the precise nature of the complaint and the changes made to address it are not made public and are kept confidential between the producer, the complainant and the Portman Group. Use of the Fast Track requires agreement between all three parties, and so far, only six complaints have taken this route:

<http://www.portmangroup.org.uk/complaints/fast-track-resolutions>

ⁱⁱ Details of the sanctions the Portman Group is able to apply are set out on page 23.

ⁱⁱⁱ This situation has led to some complaints by smaller brewers that they are being regulated according to a Code, and by means of mechanisms, that have been drawn up under the auspices of a few of the major players. On pages 20-23, we examine whether there is any basis to such criticisms.

Reviewing the Independent Complaint Panel's decisions 2006 to 2017

In order to better understand how the Portman Group operates as a regulator, we reviewed in detail all of the 99 decisions made by the Group's Independent Complaints Panel under the terms of the Code of Practice on Naming, Packaging and Promotion, during the 12 years from 1 January 2006 to 31 December 2017. We asked a series of questions about each decision:

- What criteria from the Code has the Panel used and how have they interpreted them?
- How consistently have the Code criteria been applied, including:
 - When the Panel has changed its views on particular products, what reasons has it given?
 - What reasons has the Panel given for differentiating between problematic products and those it considers acceptable, particularly when assessing apparently similar products?
- What types of evidence has the Panel used in its decision-making?

Our aim was not to determine the validity or otherwise of any individual decision; rather to fully understand the process by which decisions were reached, whether that process was fair to all parties, and whether it achieved its stated aims.

What criteria have the Panel used and how have they interpreted them?

Complaints will only be accepted by the Panel if they are made under one or more of the criteria listed in the Code, and the Panel's judgements can only be made on the same basis. The current edition of the Code has 11 criteria. These state that a drink is potentially problematic if:

- Its alcoholic nature is not communicated with "absolute clarity".^{iv}
- The drink, its packaging or any promotional material or activity associated with it, do any of the following:
 - Give high alcoholic strength or intoxicating effect "undue emphasis".
 - Suggest any association with:
 - Bravado, or violent, aggressive, dangerous or anti-social behaviour
 - Illicit drugs
 - Sexual activity or sexual success^v
 - Suggest that consuming the drink can lead to social success or popularity.
 - Encourage illegal, irresponsible or immoderate consumption.
 - Urge the consumer to drink rapidly or to "down" a product in one.
 - Have a "particular appeal" to under-18s.
 - Incorporate images of people who are, or appear to be, under 25 years of age, if those people are drinking alcohol or have another "significant role".
 - Suggest that the product has therapeutic qualities or can enhance mental or physical capabilities.¹⁴

The criteria in themselves appear to be largely uncontroversial within the alcohol industry. In none of the 99 complaints deliberations we looked at did a producer's response to the complaint seek to question the criteria against which their product was being judged. The most common defence by far was that their product did not breach the rules, rather than questioning the validity of those rules. The ways in which the criteria are understood and interpreted by the Panel are, however, more open to question. We will seek to illustrate this by examining how the Panel has interpreted the prohibition on drinks packaging:

- Having a particular appeal to people under the age of 18.
- Suggesting an association with sexual activity or sexual success.

^{iv}This criterion only means that a drink cannot appear to be non-alcoholic when it is, in fact, alcoholic. It does not cover questions of whether an alcoholic drink may be mistaken for being more or less alcoholic than it really is. When the Panel were asked in 2017 to consider whether the brand name Kopparberg Light suggested the drink was less alcoholic than other Kopparberg ciders (when, in fact, it had the same alcoholic strength) the Portman Group responded that "misleading claims are not covered by the Code and fall outside our remit".

^vThis is a stricter wording than earlier editions of the Code, which referred to "suggesting sexual success or prowess". According to the Portman Group's guidance on the fifth edition of the Code, this new criterion "categorically disallows any reference to types of sexual activity". Under the previous criterion, a beer called Shag Lager was approved by the Panel in 2001, in that whilst its name may suggest sex it did not suggest sexual success or prowess. Similarly, in 2012, the Panel ruled that the Dorothy Goodbody character was "mildly sexually provocative and...slightly saucy" but did not suggest sexual success.

Particular appeal to under-18s

Section 3.2(h) of the Code states that “a drink, its packaging and any promotional material or activity should not in any direct or indirect way...have a particular appeal to under-18s”.¹⁵ The Portman Group’s Advisory Service’s Guidance Notes on the Code state that when assessing whether a drink or its packaging has a particular appeal to those under the legal drinking age, “the test to apply is not one of quantity, i.e. appealing to more under-18s than over-18s, but the way in which it appeals, i.e. the packaging/promotion appeals to/resonates with under-18s in a way that it does not with over-18s”.¹⁶ This interpretation largely rules out taking action on marketing and packaging that appeals to a range of consumers including under-18s. For example:

- In 2011, the Panel judged that Stiffy’s Jaffa Cakes and Kola Kubez liqueurs were not in breach of Section 3.2(h) since they were using flavours that were “popular with both adults and under-18s”.¹⁷
- In 2017, they ruled that whilst Cactus Jack’s Schnapps in Black Jack and Fruit Salad flavours “might have some appeal to under-18s, they did not think that this was strong enough to constitute particular appeal”.¹⁸

In theory, under this interpretation, a drink could have strong appeal to a large number of children, but as long as it also appealed to adults it would be acceptable. The ASA, by comparison, makes no reference to whether or not an advert will also appeal to adults; focusing instead on “the selection of media, style of presentation, [and] content or context in which ads appear”.¹⁹ The Portman Group’s particular interpretation of “particular appeal” to under-18s is perhaps one of the reasons that, when the Panel has ruled against drinks under Section 3.2(h) of the Code, it has generally done so in relation to products whose appearance it judges to be potentially attractive to very young children, rather than the teenage demographic that straddles the boundary between childhood and adulthood.

The following examples are typical:

- In 2008, the Panel ruled on the Big Beastie premixed vodka drink that its “garish colours, coupled with the childish outline of a spider and its web, would cause the product to appeal particularly to under-18s”.²⁰
- In 2009, another premixed spirit drinks range, Baby Blue and Baby Pink, was judged unacceptable since these names “in combination with the bright blue and pink colours, gave the products a childish feel that would appeal particularly to under-18s, and particularly girls”.²¹
- In 2012, the Panel concluded that the cartoon image of the farmer Mr Laverstoke “looked like a child’s drawing, and whilst it would be unlikely to appeal to older children, it would be likely to have a particular appeal to younger children”.²²
- In 2016, a set of five miniature bottles of premixed drinks was banned partly because the “bubble writing style of font used on the packaging...was similar to [that used on] products that were particularly aimed at young girls, for example some ‘princess-themed’ products”.²³

One thing that seems absent from the Panel’s deliberations in relation to “particular appeal to under-18s” is a recognition that children often aspire to appear older than they are and may be drawn to products that suggest greater maturity to them. Marketing that is childish will not always appeal to children. As the owner of the Laverstoke brand stated in response to the Panel’s decision, “[I] contest [whether] teenagers would find the branding hip or trendy enough to purchase”.²⁴

Related to this, the Panel's deliberations seem to take no account of the ages at which children are actually accessing alcohol, nor their methods of doing so. The very young age group the Panel's deliberations focus on may have some knowledge or experience of alcohol, but are far less likely to be interested in alcohol or to be drinking it than older children,²⁵ and would be unlikely to be able to obtain it except via adults.²⁶ Alcohol consumption, or attempted purchase and consumption, becomes more common in the teenage years,^{27, 28} during which children are becoming progressively less likely to be attracted by the packaging styles the Panel deems to have "particular appeal" to children:

- Research by alcohol charities across the UK amongst young drinkers from 2012 to 2015 indicates that price and loyalty to major alcohol brands are the two major factors at play when under-18s select alcoholic drinks.²⁹
- Research published by Cancer Research UK in 2017 again found strong brand- and price-awareness.³⁰

As far as we are aware, the Panel has not, in any of its decisions, drawn on any research investigating which types of alcohol packaging (if any) have a particular appeal in real-world environments to children of various ages; nor any evidence on how packaging relates (if at all) to children's desire and attempts to obtain and consume alcohol.

Summary

The Portman's Group's position is that a drink may appeal to children if it "resonates with under-18s in a way that it does not with over-18s". However, this definition precludes taking action on drinks that appeal to the full range of consumers including under-18s. It forces the Panel to focus on drinks with a superficial appeal to young children, who are unlikely to be interested in alcohol, as distinct from adolescents.

The Portman Group or any other regulatory body operating in this area needs to demonstrate a clear understanding of the relationship between age, aspiration and the appeal of brand imagery. It needs to move beyond the assumption that underage drinkers are only attracted to childish imagery and consider how appeal to youth often requires the depiction of young adulthood.

Association with sexual activity or sexual success

Section 3.2(d) of the Code states that “a drink, its packaging and any promotional material or activity should not in any direct or indirect way...suggest any association with sexual activity or sexual success”. Sexual suggestion is commonplace in marketing and has been used to promote products as diverse as cars,³¹ clothes,^{32,33} wrist watches,³⁴ perfume³⁵ and razor blades.³⁶ Alcohol marketing is no exception to this, and this is hardly surprising given the strong links in Western culture between alcohol consumption, seeking sexual partners and subsequent pair bonding. However, sexual imagery rarely appears on major drinks companies’ drinks packaging, being largely a feature of other elements of the marketing mix (such as television advertising,³⁷ online content,³⁸ and promotional events³⁹) which are beyond the scope of the Portman Group’s Code. Possibly as a result, the Panel’s deliberations under Section 3.2(d) of the Code have fallen broadly into two categories:

- Consideration of fringe products featuring explicit sexual imagery. These products, generally imported into the UK in small quantities and not widely sold in mainstream shops, have included:
 - 2007: Rubbel Sexy Lager, a Belgian beer with labels featuring young women wearing swimming costumes which could be scratched off to reveal the naked women underneath.⁴⁰
 - 2012: Magnum Tonic Wine, a Jamaican drink with a label featuring an image of a naked couple apparently having sex. The packaging also made reference to Vigorton, a vitamin ingredient believed by some to enhance sexual stamina.⁴¹

- Products using bawdy, crude or juvenile sexual images or language. Examples include:
 - In 2009, the Panel ruled against Rampant TTs’ test tube shots, which were advertised with the slogan “make anything Rampant” alongside an image of “a young woman in a bikini with her fingers inside the bikini bottom”.⁴²
 - In 2011, the Panel ruled against Stiffy’s premixed drinks on the grounds that “stiffy” was a slang term for an erection.⁴³
 - In 2014, the Panel ruled against two beers named Big Cock and Knobhead.⁴⁴
 - In 2012, a representative of the Portman Group asked Alcohol Concern⁴⁵ to complain about the Slater’s brewery Top Totty⁴⁶ pump clip, featuring a young woman in a bunny girl costume, after the image caused well-publicised controversy when the beer was sold on draft in a House of Commons bar.⁴⁷

Our own analysis indicates that of the 10 occasions on which the Panel deliberated on possible breaches of Section 3.2(d) of the Code, all but one of the products adjudicated on used packaging of an obviously sexual and unsophisticated nature; and in eight of those cases the complaint was upheld. On the one occasion when a complaint was made to the Panel about a subtler use of sexual suggestion, the Panel rejected the idea that featuring the James Bond character on a product could suggest an association with sexual success, noting that “there were no other images on the packaging (such as a woman) which could give rise to this association”.⁴⁸

Summary

The Panel’s deliberations on suggestions of associations with sexual activities and/or sexual success have tended to focus on the crudest examples of sexual images or language. This is largely a result of it considering drinks packaging in isolation from the broader marketing mix that producers use to link their products to sexual success. A more nuanced, and evidence-based, model of how ‘sexual success’ is implied or indicated in marketing is required for this element of the Code to be effectively applied.

How consistently have the Code criteria been applied?

In this section, we will examine whether the application of the Code by the Panel has been consistent, thereby ensuring fair treatment for all parties, and providing a reliable guide for both producers and consumers about what is acceptable. As part of this, we will look at instances when the Panel has changed its views on particular products over time, and what reasons it has given to justify this; and at how the Panel has set about differentiating between apparently similar products with regards to their acceptability or otherwise under the Code.

Ideas about what is acceptable within any society will change over time, and regulation will often need to change to accommodate and acknowledge that. There is no particular virtue in a regulator continuing to restrict a product no longer considered problematic. Equally, when a shift is made towards a more permissive (or more restrictive) position, the reasons for the shift have to be clear and explicable. In order to explore this in more detail, we will now consider how the Panel has changed its view on three particular groups of products, all of which have come before it more than once, thereby providing the Panel with opportunities to reflect on its own previous judgements. The products in question are:

- 500ml cans of ‘super-strength’ lager and cider, which came before the Panel in 2008, 2015 and 2017.
- The range of Stiffy’s premixed drinks, subjects of complaints in 2004 and 2011.
- Various test tubes of premixed spirits, considered by the Panel in 2009 and 2010.

Super-strength lager and cider

In the first of these three groups of cases, 500ml cans of four extra-strong lager brands were the subject of complaints by the charity Thames Reach in 2008. The charity complained again in 2015 about three of the four, and in 2017 two local authorities brought complaints against two similar beers and a cider, again in 500ml cans. All of the drinks in question were what has become known as ‘super-strength’ drinks, on account of their relatively high alcohol content (compared with other beers and ciders) and their relative

cheapness. On all occasions (in 2008, 2015 and 2017), the basis of the complaint was that 500ml cans contained more than four units of alcohol – the recommended daily maximum for a man according to the 1995 UK Government guidance.⁴⁹ Since the cans could not be resealed, it was claimed that the contents were likely to be consumed by one person in a single session, thereby encouraging excessive consumption, in contravention of Section 3.2(f) of the Code. We will look at the Panel’s responses to the 2008, 2015 and 2017 complaints in turn.

In 2008, four separate but identical complaints by Thames Reach against Skol Super,⁵⁰ Tennent’s Super,⁵¹ Kestrel Super⁵² and Carlsberg Special Brew⁵³ were all rejected by the Panel on the following identical grounds to each other:

- “The phrasing of the UK Government’s advice raised questions over the rationality of treating four units of alcohol as a threshold of responsibility.”
- “It is difficult to make a reasonable and objective distinction on responsibility grounds between a can of strong lager and other types of drinks container holding in excess of four units.”
- “Using the Code to restrict container size in this way was inappropriate and liable to lead to inconsistencies.”⁵⁴

In 2015, the same charity complained again that 500ml cans of Kestrel Super,⁵⁵ Skol Super,⁵⁶ and Carlsberg Special Brew⁵⁷ were in breach of Section 3.2(f) of the Code. On this occasion, the complaints were upheld by the Panel, and retailers were asked to stop stocking all three of them in their current form. The main reasons the Panel gave for this change of position were that:

- It “considered that it [i.e. the Panel] should be responsive to changes in the prevailing climate in society”.
- There was a “strong cultural assumption that products packaged in a can were designed for consumption by one person in one sitting” and “an assumption the product quality would degrade quickly once the can was opened”.

- One of the Panel members had looked up 9% beer in a 500ml can on the NHS Change4life app (which used an algorithm based on the 1995 unit guidance) and received an amber warning that their health was at “increasing risk” as a result of consuming one of these cans.⁵⁸

All three of the producers affected argued at the time that a ruling against their products had implications for a wide range of alcoholic products sold in containers holding more than four units and which could not be resealed – such as, for example, many sparkling wines. The Panel responded that this issue was “not relevant to the complaint (and container) before them” and that “they should consider the issue only in relation to cans”.⁵⁹ In 2016, Alcohol Concern asked the Panel to consider three other beers sold in non-resealable bottles that contained more than four units of alcohol: Leffe Blonde (5 units), King Cobra (5.6 units), and Meantime IPA (5.6 units). The Panel Secretariat replied that “in the light of the publication on 8 January [2016] of the Department of Health consultation on the proposed new guidelines on alcohol consumption for the Chief Medical Officers the Panel has decided to put on hold any further complaints about this issue. Any new guidance, and the evidence underlying them, will be among a number of factors being considered by the Panel”.⁶⁰

Perhaps the most obvious feature of the UK Chief Medical Officers’ Low Risk Drinking Guidelines, when they were confirmed in August 2016, was the replacement of separate daily and weekly maximums for men and women with a single weekly maximum of 14 units for all drinkers, with a recommendation to “spread your drinking evenly over 3 or more days”.⁶¹ This presented an obvious difficulty for the Panel, in that, although arithmetic indicated that anyone drinking 4 units or more on four days a week would cross the 14 unit threshold, the previous daily maximum of 3 units for a woman and 4 for a

man had been removed. The implications of this change for the Panel’s decision-making were made clear in the Portman Group’s 2016 annual report: “In light of the changes, the...Panel has reconsidered how it defines immoderate consumption. Previously, the Panel had used the upper limit for men (4 units) as a threshold for immoderate consumption”.⁶² The report therefore stated that, with that yardstick removed, “it is for the Panel to make its own assessment as to what [the] parameters [of moderate drinking] are, and whether or not the packaging of a particular product encourages the exceeding of those parameters”.⁶³

This new approach of setting its own parameters was first tested in 2017, when a further three ‘super-strength’ drinks in 500ml cans – K Cider,⁶³ Crest Super,⁶⁴ and Oranjeboom 8.5%⁶⁵ – were the subject of complaints by Portsmouth and Medway Councils under Section 3.2(f) of the Code. The Panel’s decision was much closer to the one taken in 2008 than in 2015. In the case of all three drinks, the Panel said that it did believe that they “were likely to be viewed by consumers as an option for regular day-to-day consumption”, and that the sale of the product in non-resealable 500ml cans was “likely to lead to consumers drinking [4 units or more] of alcohol on a single drinking occasion”, but that, given the shift to weekly unit guidance, the Panel had “insufficient evidence to find a breach of Code paragraph 3.2(f)” without understanding much more about drinkers’ weekly drinking habits. All three drinks were therefore judged not to have breached point 3.2(f) of the Code.⁶⁶

Stiffy

A similar pattern of making and then overturning decisions can be seen in the Panel’s deliberations on Stiffy’s premixed drinks in 2004 and 2011. In 2004 the Panel noted that the brand name “Stiffy” was “commonly used slang for an erection”, but decided that the name did not suggest an

⁵⁸ This was the Panel’s position in 2015. In 2008, the Panel decided that “the phrasing of the government’s advice raised questions over the rationality of treating four units of alcohol as a threshold of responsibility”.

⁵⁹ The 2017 ruling creates an interesting anomaly. Following the Panel’s 2015 ruling, Retailer Alert Bulletins were issued asking Code signatories not to re-order Skol Super, Carlsberg Special Brew and Kestrel Super in their current form. As a result, Skol Super has remained on sale in 500ml cans but with its ABV reduced from 9% to 8%; and Carlsberg Special Brew dropped its alcoholic strength from 9% to 8% and reduced its can size to 440ml, in both cases with the aim of keeping the unit content at four or less. These are changes that the makers of K Cider, Crest Super, and Oranjeboom 8.5% will not now be obliged to make, and from the point of view of equity and consistency, it could be argued that Skol Super and Carlsberg Special Brew should be able return to the market at their original size and strength. Kestrel Super appears to have remained on sale in its original form despite the 2015 ruling, although apparently in fewer retail outlets.

association with sexual success.⁶⁶ In 2011, they ruled that “Stiffy” was “a common slang term for an erection” and that “the brand name therefore...suggested an association with sexual success”. The reason cited for this change of position was the need “to be responsive to changes in the prevailing climate in society and, in particular, to the more conservative attitudes that now exist towards alcohol promotion”.⁶⁷

It is interesting to note here that in 2004, the ASA ruled against a Stiffy’s Shots poster campaign on the grounds that the slogan “Have you had a stiffy tonight?” was clearly sexual.⁶⁸

Test-tubes

In 2009 and 2010, the Panel considered complaints that various types of test tube shots breached Sections 3.2(f) and (g) of Code by encouraging “immoderate consumption” and drinking “rapidly”. In 2009, the Panel looked at Mmwah! shots in test tubes and concluded that:

- “The test-tube container could not be set down on its base on a flat surface” (such as a table or bar top) in order to take a pause in drinking.”
- “The test-tube packaging format was effectively urging down-in-one consumption.”
- It promoted “a style of consumption that was unwise and which the Code was seeking to prevent.”
- “The product was clearly designed to encourage additional alcohol consumption among on-trade clientele.”
- “The whole idea of the product was to drive incremental consumption through an inappropriate drinking style.”⁶⁹

The decision on Mmwah! shots in 2009 was effectively overturned in 2010, when the

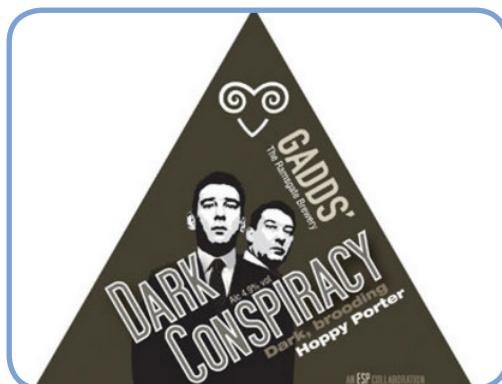
Panel ruled that the equivalent products Shootaz,⁷⁰ Shot in a Tube,⁷¹ and Quivers⁷² were “highly likely” to be consumed “down-in-one” but said that they “did not breach the spirit of Code in terms of urging ‘down-in-one’ consumption”. Previous concerns about “driving incremental consumption” were not raised again. This change of opinion is also notable in that the Guidance on the Code states that “down-in-one” drinking is “a functional style of drinking whereby alcohol is consumed for its effect rather than its taste” and that it “can easily lead to intoxication and is not readily associated with sensible and moderate consumption”.⁷³

Other examples

Other examples of apparent inconsistency in the Panel’s decision-making are set out below. The following examples highlight in particular the occasional tendency of the Panel to introduce new criteria not specified in the Code. These new criteria are generally quite minor but do seem to influence the Panel’s final decisions, as these five examples illustrate:

- In 2008, the Panel rejected a complaint that an image of the character Dorothy Goodbody breached Section 3.2(d) of the Code, in part “because the image was only a drawing rather than a real person” (presumably meaning it was not a photograph).⁷⁴ The same criterion was not applied to the drawing of a naked couple on Magnum Tonic Wine in 2012.⁷⁵
- In 2012, the Panel ruled against the cartoon image of a farmer on Laverstoke Park Farm beers.⁷⁶ In 2015, the Panel approved what they acknowledged was a “cartoon-like image of a farmer” on Willy’s Cider, on the grounds that it “far from dominated the front label”.⁷⁷ The Code itself sets no criteria for the size or position of any offending image.

- In 2016, the Panel rejected a complaint that Heineken's James Bond branding linked their beer with a violent character (in breach of Section 3.2(b) of the Code), in part because "James Bond is a fictional character".⁷⁸ The Panel specifically contrasted the Heineken branding with the Gadd's Brewery Dark Conspiracy beer brand featuring the Kray twins "who were real people", against which the Panel had ruled in 2012.⁷⁹ The Code itself makes no such distinction between real and fictional characters; and, indeed, the Guidance on the Code states in relation to Section 3.2(h) that "pictures of real or fictional people... could cause packaging or a promotion to breach this rule". The Panel also ruled that:
 - The image of James Bond used was less problematic because it was "very much stylised", although the same could well be said of the Gadd's image of Ronnie and Reggie Kray, a deliberately low-res rendition of David Bailey's 1965 portrait of the brothers.
 - "The pistol [held by James Bond on the packaging] is displayed in a stylised pose and is not being used to shoot or cause harm"; although in 2005,⁸⁰ the Panel ruled that "regardless of the cause for which they were used, guns were by nature dangerous and associated with violence".^{viii}



The Kray twins for Gadd's brewery



James Bond for Heineken

- In 2017, the Panel considered a complaint against the Mr Gladstone's Curious Emporium range of drinks, and ruled against them on the basis that "sweet-tasting drinks branded more as confectionery than as alcohol, could be seen as a soft introduction to alcohol by teenagers".⁸¹ This may well be a legitimate concern (and is one that has been expressed by many people about sweet premixed drinks),⁸² but it is one that goes well beyond the scope of the Code and potentially encompasses many other drinks.^{ix} It also clashes with much of what the Panel has said on other occasions:
 - In 2006, the Panel ruled that the flavours Kola Kube, Bubblegum and Cheeky Cherry did not mean that the Funky Monkey Vodka Shots range had a particular appeal to under-18s.⁸³
 - In 2011, the Panel ruled that two sweet-tasting, vodka-based drinks branded as Jaffa Cakes and Kola Kubez did not appeal to children.⁸⁴
 - In the same month as their judgement against Mr Gladstone's Curious Emporium, the Panel approved the continued sale of Cactus Jack's Schnapps with what it agreed were the "confectionery flavours" Black Jack and Fruit Salad.⁸⁵

^{viii} Following this ruling, the Guidance on the Code was amended to state that "the inclusion of weapon imagery is not necessarily...problematic", and clarifying that imagery "inextricably linked to violent behaviour" was likely to breach the Code.

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^{ix} It could, for example, be said to raise questions about WKD Iron Brew, Henry's Hard Cherry Cola, or Hooper's Alcoholic Dandelion and Burdock, all of which are alcoholic versions of popular sweet children's drinks and could "be seen as a soft introduction to alcohol by teenagers".

- In 2017, the Panel considered the image of a bear on Tiny Rebel Cwtch beer. They “discussed whether toy bears had a particular appeal to very young children” and “concluded that this point could not be ignored regardless of whether the product was deliberately aimed at children or not”.⁸⁶ The Panel has previously ruled that teddy bears are acceptable alcohol marketing devices when the product linked to them is “a romantic gift for adults”^{87,88} or “a gift for couples”.^{89, 90}

In addition, in their ruling on Cwtch, the Panel said that they had considered the producer’s assertion that the design of the can was aimed at adults on a nostalgia-based level but said that “the fact that these elements appealed to adults when they themselves were teenagers, meant that they could still appeal to teenagers today”.⁹¹ This appears to contradict the Code Guidance that a product is only problematic if it “appeals to/ resonates with under-18s in a way that it does not with over-18s”,⁹² and suggests that that the Panel has extended the scope of the Code to include drinks with a nostalgic appeal to adults and a resultant potential appeal to current youngsters. It is also worth noting that the Panel has previously clearly said that elements that appealed to previous generations of young people cannot be assumed to have current appeal to young people. It ruled in 2005 that a beer themed on the character of Zebedee from the Magic Roundabout was “retro in nature and would have a nostalgic appeal to an older generation...rather than a particular appeal to under 18s”.⁹³ It came to a similar conclusion regarding Gamma Ray beer in 2015.⁹⁴

Two other aspects of the Tiny Rebel ruling indicate additional inconsistencies:

- The Panel’s ruling that “the combination of the Tiny Rebel logo and the dishevelled bear placed so prominently on the packaging indirectly encouraged immoderate consumption” would appear to mean that not just bottles and cans of Cwtch, but almost all of the brewery’s bottles, cans, pump clips⁹⁵ and pub signs,⁹⁶ as well as associated merchandise,⁹⁷ were in breach of Section 3.2(f) of the Code. The Panel has not pursued this point in their ruling.
- Similarly, following the judgement, the Portman Group has accepted as a remedial measure that the bear logo can be moved to the back of the can (rather than being removed altogether),⁹⁸ although their own Guidance on the Code states that “there is no distinction between the front and back of a product” since “consumers...are likely to pick up a product and turn it round”.⁹⁹

Our key point in all this is that the Panel’s decisions cannot be taken as a clear guide to what is acceptable and what isn’t. As Tiny Rebel have said, a decision may “set a precedent, but the boundaries of that precedent aren’t clear”, with apparently “no clear difference between what is and isn’t allowed”.¹⁰⁰ Greater consistency, backed up by more robust explanations of decisions, would allow producers to better anticipate whether they will fall foul of the Panel, would have a better preventative effect in stopping inappropriate packaging being produced in the first place, and would help consumers have a better idea of which products they might reasonably expect to be removed from sale if they were to complain about them.

Summary

The Panel’s decision-making is not always consistent. It has applied the Code criteria in different ways over time, with little or no explicit justification. It has also, from time to time, introduced new criteria not specified in the Code, without clearly considering the full implications of its decisions. Greater consistency, supported by more robust explanations of decisions, would be better for consumers and fairer to producers.

What types of evidence has the Panel used in its decision-making?

Jenny Watson, Chair of the Independent Complaints Panel, provided a telling description of the Panel's decision-making process in 2015 when she stated that decisions were taken "making use of the wide range of experience and views around the table".¹⁰¹ One thing that is not mentioned here is real-world evidence drawn from outside the Panel's own experience and views. Indeed, the Portman Group states that the Panel "will determine its own procedures"¹⁰² and "will not be bound by any enactment or rule of law relating to the admissibility of evidence in legal proceedings". For example, when deciding what are "the parameters of moderate drinking", "it is for the Panel to make its own assessment as to what those parameters are, and whether or not the packaging of a particular product encourages (whether directly or indirectly) the exceeding of those parameters".¹⁰³ This approach had led one brewer to complain that the Panel seems to feel no need to "supply qualitative or quantitative evidence to support their rulings", relying instead on "ill-informed and unjustified views",¹⁰⁴ and another to claim that "the decisions are enormously subjective".¹⁰⁵

The Panel's deliberations on 500ml cans of 'super-strength' lager and cider in 2008, 2015 and 2017 (cited above) provide a good illustration of the kinds of evidence the Panel does, and does not, consider. As noted above, in 2008 the Panel declined to rule against such drinks because it believed this to be beyond its remit and potentially problematic. When it decided, in 2015, to act against such products it did so on the basis of "strongly held cultural assumptions which influenced the way consumers would respond to drinks in cans". This position was based on a YouGov survey of more than 2,000 adults, 80% of whom "believed that a 500ml 9% ABV can was designed for the contents to be consumed by one person in one sitting", adding that "the Panel shared this view".¹⁰⁶ Whilst such beliefs and views may be accurate, on their own, they do not constitute reliable evidence. The YouGov survey did not ask a sample of 'super-strength' consumers how they use these products, it asked a general sample of people how they thought such products were used. In that sense, it was not consumer research at all (in much the same way that the Panel does not appear to have ever asked under-18s which

products have a "particular appeal" to them). According to data supplied by Carlsberg to the Panel, only 0.1% of off-trade purchasers had consumed "super-strength" beer in the last seven days, compared with 64% who had consumed any form of alcohol.¹⁰⁷ Similarly, the British Beer and Pub Association's figures indicate that the market share held by extra-strong beers is so statistically insignificant as to be recorded as 0.0%.¹⁰⁸ Given these two figures, it is likely that only a tiny number of those 2,000 people questioned were regular consumers of 'super-strength' drinks, and so in a position to give an informed opinion about how such drinks were consumed.

The other test that the Panel applied to these drinks was whether the container could be resealed. This may be a relevant factor (and was cited by Thames Reach in their complaints in 2008¹⁰⁹ and 2015¹¹⁰) but no evidence was cited by the Panel to demonstrate the importance of this factor, i.e. whether drinkers do, in reality, consume the contents of such cans more rapidly because they cannot re-close them, or drink more harmfully because of this factor. They may do, but we don't know one way or the other. By way of comparison, easily resealable large bottles (up to 3 litres) of white cider are often consumed by dependent drinkers.¹¹¹ Clearly, in this case, the ease of resealing the container is not one of the factors driving some to empty the bottle.

Similarly, when deciding in 2010 that test tubes of premixed spirits were no longer problematic, the Panel appears to have overlooked evidence from the drinks industry itself about how these products (and similar ones) are used in real-world drinking environments. Research by a number of major drinks producers has identified that drinkers on a night out often reach a stage when they feel bloated by beer. This is a point at which they may be inclined to stop drinking; or at which they can be persuaded to switch to spirits or other low-volume drinks.¹¹² This is where test tube shots fit in the off-trade market. Indeed, in 2009 the Mmwah! website (apparently with the aim of encouraging publicans to stock the tubes) noted that "they are bought in addition to existing drinks, not as a replacement".¹¹³ As such, although the consumption of a single test tube is unlikely in itself to produce intoxication, it has a role in keeping customers drinking. Various

types of shots, including those in test tubes, are often promoted in bars by roving “shots girls” – a tactic which indicates the extent to which consumers are being encouraged to drink more, rather than being left to decide whether to order another drink. Indeed, one of the UK’s leading “shots girls” agencies say that they will “guarantee an uplift in incremental sales”.¹¹⁴

There are a number of other notable examples of the Panel apparently failing to consider what the industry is saying about its own products. In 2016, when looking at Heineken’s tie-in with the James Bond franchise, the Panel stated that it “could not find any reason why the...James Bond brand would lead consumers to believe that the product may suggest an association with sexual success/activity”.¹¹⁵ However, in 2015, Hans Erik Tuijt of Heineken stated that the sponsorship deal enabled the brewery to reach the men “who want to be Bond” and the women “who want to be with Bond”; and in the 2012 film Skyfall, Daniel Craig as James Bond is shown enjoying a post-coital Heineken in bed with Tonia Sotiropoulou.¹¹⁷

Also in 2016, the Panel was asked to consider the imagery used on the well-known Captain Morgan rum brand.¹¹⁸ The main question that was raised was whether the Captain Morgan character was a cartoon of a pirate and therefore likely to appeal to children, in contravention of Section 3.2(h) of the Code. The Panel ruled that they agreed with the brand-owner Diageo that Captain Morgan was “not a pirate”.¹¹⁹ This conclusion is remarkable in that the Captain Morgan brand website describes him as a “buccaneer”,¹²⁰ and presents the life-story of the character as being that of the historical pirate Henry Morgan of Llanrumney,¹²¹ who’s signature features on bottles of the drink.¹²² The site is largely written in the argot of Hollywood pirate movies and includes references to seeking “treasure”¹²³ and “gold doubloons”.¹²⁴ In addition, Diageo’s staff and partners around the world have for a number of years been seeking to associate Captain Morgan with piratical themes, as the following examples illustrate:



DIAGEO

Our Business | Our Brands | Responsibility | Investor | News

/ Resource Item

PRINT PAGE

PRESS RELEASE 17 Sep 2014

Ahoy Matey! Captain Morgan Encourages Adults to Enjoy a Captain & Colaaarr Cocktail in Celebration of Talk Like a Pirate Day

Captain Morgan (@CaptainMorgan) · Follow
The Captain's favourite TV show? Rum Dine With Me.
#piratetvshows #TalkLikeAPirateDay
9:21 AM - 19 Sep 2014
2 1

Captain Morgan (@CaptainMorgan) · 19 Sep 2014
To anyone running a tombolaaaar in Angolaaaar while drinking a CaptainAndColaaaar, on #TalkLikeAPirate day, I salute you. #PirateSpirit
5 2

Captain Morgan (@CaptainMorgan) · 2 Oct 2014
A Captain and Cola,
with friends and sunshine,
a perfect evening,
just don't forget lime.
#PiratePoetry
#NationalPoetryDay
7 6

Taylor (@taylorstrategy) · Follow
Taylor and #client @CaptainMorganUS want to prepare you for happy hourrr....
#TalkLikeAPirateDay

10:30 PM - 19 Sep 2016

The point here is not whether Captain Morgan is a pirate or not; rather that Diageo felt able to tell the Panel that Captain Morgan is not what much of their own marketing material suggests that he may well be – a pirate – and that the Panel took this at face value, apparently with little or no investigation. It is interesting to note in conclusion that in a 2017

trademark dispute in Canada, Diageo defined their Captain Morgan character in court documents as wearing a “pirate’s hat” and a “nautical or pirate uniform”; and maintained that another rum producer was seeking to “trade upon Diageo’s goodwill and confuse consumers” by the use on its labels of “a young pirate-like character”.¹²⁵

Summary

The Panel’s decisions often appear subjective, and are not explicitly developed in the light of the wide body of evidence available regarding purchasing and drinking behaviours. On occasions, it appears to have overlooked evidence from the drinks industry itself about how producers see their products and describe them. Much broader evidence-gathering, and a more extensive application of available research, is essential if decisions are to be recognised as fair, evidence-based and meaningful.

Statistical analysis of complaints to the Portman Group

During the period from the beginning of 2006 to the end of 2017, the Panel published a total of 99 decisions. In this section, we'll look at the statistics on who's been complaining about which types of products, and what decisions the Panel has been making, to consider whether any meaningful patterns can be discerned.

Reasons for complaints

Overall, complaints were made against 99 drinks and/or an associated promotion. In total, these 99 complaints included 160 alleged breaches of the Code, with many drinks being alleged to have breached more than one section of the Code. Of these 160 alleged breaches, the most common accusation was encouraging heavy or rapid drinking (Sections 3.2(f) and 3.2(g) of the Code). Taken together, there were 43 allegations of breaches of Sections 3.2(f) and/or 3.2(g) (making 27% of the 160). This was closely followed by appeal to under-18s (Section 3.2(h)), which was cited 41 times (26%). These two concerns were well ahead of all others, and the next most common, failure of products to be clearly labelled as alcoholic (Section 3.1), was cited just 18 times (11%).

Types of drinks attracting complaints

Looking at the types of drinks that were the subjects of complaints, of the 99 drinks complained about from 2006 to 2017, 21 (or just over one in five of all complaints) were what could be termed "craft" beers or ciders from independent breweries. Other categories of drinks attracting substantial numbers of complaints included:

- Premixed or ready-to-drink (RTD products), sometimes known as "alcopops":
17 complaints
- 'Super-strength' ciders and lagers:
15 complaints
- Spirits and liqueurs: 16 complaints
- Novel container types, such as test tube shots and flexible pouches:
12 complaints.

Two other drinks types – mainstream commercial lager brands, and wines – drew seven complaints each. A number of other categories were the subject of one complaint each during the 12 years: a standard strength cider brand, a fortified wine, a tonic wine, and a non-alcoholic snack marketed under a well-known beer brand.

How frequently a type of product is complained about appears to bear no relation to how much of it is sold, and is perhaps more closely related to its perceived potential harmfulness. For example:

- RTDs ("alcopops") make up less than 3% of the UK alcohol market, but attracted 17% of complaints.
- Extra-strong beers are so statistically insignificant as to be recorded as accounting for 0.0% of alcohol sales, but were the subject of 15% of complaints.
- Conversely, wines were the topic of just 7% of complaints, but make up 33% of alcohol sales.¹²⁶

It is hard to judge the proportion of the alcohol market taken up by "craft" beers and ciders (which account for 21% of complaints), since there is no universally accepted definition of them.

^x The difference between the two numbers (99 and 104) is the result of a small number of products being the topic of more than one complaint by different complainants at around the same time. The Panel considers similar complaints about a product together and delivers a single ruling on them.

Types of complainants

The Panel's 99 rulings between 2006 and 2017 were made in response to 104 representations by individual complainants.^x Our analysis indicates that of the 104 complainants:

- 35 were members of the public.
- 22 were non-governmental organisations (NGOs), most commonly Alcohol Concern or Alcohol Focus Scotland.
- 18 were drinks companies or alcoholic drinks trade bodies.
- 10 were a result of a Code Compliance Audit conducted by PIPC for the Portman Group in 2008.¹²⁷
- Nine were the Portman Group acting in lieu of a complainant.
- Nine were local authorities.
- One was a Member of Parliament.¹²⁸

As we can see, the largest group of complaints came from members of the public. This could be seen as encouraging, in that it suggests that ordinary consumers have some awareness of the complaints process and are engaging with it. The second largest group is from NGOs with an interest in alcohol harm reduction, which is, perhaps, unsurprising given that a number of charities working in this field undertake a 'watchdog' role in highlighting and reporting items they consider inappropriate. Next are the 18 complaints made by drinks producers and alcohol trade bodies. Taking these 18 together with the nine complaints made by the Portman Group itself means that 26% of complaints that have gone to the Panel have come from within the alcohol industry.

Can any pattern or bias be discerned from the statistics?

Given the high proportion of complaints both about small breweries and from within the alcohol industry, it is perhaps not surprising that, over the years, the Portman Group has been subject to a number of accusations that its regulatory activities disproportionately affect certain drinks and certain producers. In 2014, C&C Group left the Portman Group, saying that it was "dominated by large multi-national drink companies with an agenda at odds with the wider UK [drinks] industry".¹²⁹ The famously outspoken Brewdog, who have been found in breach of the Code more than once, claimed in 2009 that "the Portman Group is funded by the big boys to look after the interests of the big brewers".¹³⁰

Our analysis of complaints does indeed indicate that companies that are not members of the Portman Group are much more likely to be the subject of complaints than its members, and that those complaints are much more likely to be upheld. From 2006 to 2017, the Panel ruled 79 times on complaints against non-members and upheld complaints 43 times (54% of these complaints).^{x1} During the same period, there were 20 rulings on complaints about products produced by members of the Group. Of these, seven (35%) went against producers and in 13 cases (65%) the Panel rejected the complaints. However, the reasons for this pattern are more complex than accusations of simply "looking after the interests of the big brewers" would suggest.¹³¹ To a large extent, it is the result of the types of complaints that come in. There are almost four times as many complaints against non-members of the Portman Group as there are against members.

^{x1}This total includes complaints that were partially upheld, in that a drink was complained about under more than one section of the Code, and was found to be in breach of at least one part of the Code but not all those cited in the complaint. Our analysis indicates that complainants will throw their net fairly wide by citing as many sections of the Code as they believe may be relevant. Occasionally too, the Panel will test complaints against additional points of the Code not cited by the complainant.

Of the 35 complaints made from 2006 to 2017 by members of the public, only four (11%) were about members of the Portman Group. Although the Group did commission a wide-ranging audit of alcohol products on sale in the UK in 2008,¹³² mostly the Panel passes judgement on products as and when they are complained about – the pattern of complaints reflects the concerns of complainants.

It also seems clear that the Group's member-companies better understand whether potential products will transgress the Code before they go to market. The major drinks producers who make up the Group's membership have experienced branding and marketing teams and are protective of their reputations. They are less prone to crude or amateurish packaging of the type that can land some smaller companies in trouble, and in this respect, the Code and the Advisory Service could be said to be doing their job. It follows logically that those companies which are most engaged in the process are the least likely to breach the terms of the Code.

Summary

From 2006 to 2017, the Panel published a total of 99 decisions, in response to complaints by 104 people or organisations, about 160 alleged breaches of the Code. The most common complaint was of encouraging heavy or rapid drinking. The drinks most commonly complained about were "craft" beers or ciders, and the largest single source of complaints was members of the public.

Companies that are not members of the Portman Group are much more likely to be the subject of complaints than its members, and complaints against them are much more likely to be upheld. While this could be construed as bias towards member companies, it may also be because member organisations better understand whether potential products will transgress the Code before they go to market.

What sanctions can the Portman Group apply for with breaches of the Code?

Given that the Portman Group is not a statutory body, producers are under no legal obligation to respond to complaints made to the Panel. This does not mean, however, that producers can choose whether to be regulated by the Group. As the Portman Group has stated, compliance with its regulatory procedures is “voluntary insofar as the industry has volunteered to impose the restrictions on itself...Compliance with the codes is mandatory; there is no opt-out for any drinks manufacturer”.¹³³ In reality, ‘the industry’ in this context means the Group’s eight member-companies – they are the people who have volunteered to impose restrictions on the alcohol market, rather than any of the other approximately 2,800 alcohol producers in the UK, all of whom are subject to the Code.^{134, 135, 136}

A few of these smaller producers have declined to engage with the Portman Group.¹³⁷ Most, however, do seek to work within the Group’s processes. One reason for this may be that the Group has a very effective sanction against producers. By means of its Retailer Alert Bulletins, the Portman Group can ask retailers not to restock a product in its current form. Six of the UK’s seven largest supermarkets are signatories to the Code¹³⁸ and comply with these Bulletins, meaning that a product can be excluded from around 80% of the UK grocery market,¹³⁹ representing a potentially huge loss of sales opportunities. In 2014, one brewer claimed to have lost supply deals for their beers worth £230,000 after being named in a Retailer Alert Bulletin.¹⁴⁰

As another put it, somewhat more bluntly, in 2017, “We...have to do what they say because they have us over a barrel commercially”.¹⁴¹

If a retailer continues to stock a product which the Panel has found in breach of the Code, the Group may “notify the relevant licensing authority...the Government [and] trading standards officers”.¹⁴² Clearly, where a product has been judged by the Panel to be in breach of the law, it is entirely appropriate for local licensing bodies and/or trading standards teams to take action. What is not clear from the Group’s publications, however, is whether they expect local authorities to act in the case of sales of products that are not illegal but which have been judged to be in breach of the Code. The Group also states that it may “insofar as the media about a retailer’s failure to support the decision of the Panel,” suggesting the Group considers reputational damage to retailers to be a possible means of influence for them.¹⁴³

By way of comparison, the sanctions the ASA can make use of are of a similar nature. Like the Portman Group, the ASA regard bad publicity as a crucial tool, describing it as “one of our most persuasive sanctions”. They are also able to secure disqualification of advertisers from industry awards and can advise the media to withhold advertising space in much the same way as the Portman Group asks supermarkets to withhold shelf space.¹⁴⁴

Summary

The Portman Group’s power as regulator depends largely on the willingness of major grocery retailers not to stock products the Panel has found to be in breach of the Code. The Group also says it will notify local licensing authorities if such products remain on sale. It is not clear, however, whether they expect local authorities to act against products that are not illegal but which have been judged to be in breach of the Code.

To whom is the Portman Group accountable in its regulatory role?

The Portman Group decides what should be in the Code, advises the Independent Complaints Panel on how to apply it, and undertakes enforcement of the Panel's decisions. Given the this potentially very substantial influence over the UK alcohol market, it is important to ask in what ways, and to whom, the Group is accountable for exercising that influence. As noted above, the Group's membership is comprised of eight international alcohol producers, who collectively have sales making up more than half of the UK alcohol market.¹⁴⁵ Over the years, this has provoked complaints that the Group simply operates in the interests of these major players, who fund it.^{146, 147}

It should be noted, however, that members of the Independent Complaints Panel cannot be employed by the Portman Group or any of its member-companies. The Chair of the Panel is appointed in accordance with the Public Appointments Process,¹⁴⁸ and in turn appoints the other members, of whom there are currently eight, including people with backgrounds in education, youth work, healthcare and policing, as well as the drinks industry.¹⁴⁹ The Panel works on the basis of information prepared by Portman Group staff, but is "not...bound by the views expressed or advice given by the Portman Group's Advisory Service".¹⁵⁰

If the Panel judges that a complained-about product does not breach the Code, that decision is final and there is no further recourse for the complainant.

If the Panel believes, on the other hand, that a breach has occurred, the producer is given an opportunity to appeal. Once a final decision has been made, the Panel will only consider representations from the company if they include "fresh information which became available to it after the final decision and before any enforcement action".¹⁵¹ Again, at this stage, there is no process for input by the complainant.^{xii} The Group publishes an annual Alcohol Marketing Regulation Report,¹⁵² but it is under no obligation to submit this to any kind of external scrutiny nor to justify the Panel's decisions during the year to anyone.

Overall, of the three organisations that between them regulate alcohol marketing in the UK – the Portman Group, the ASA, and Ofcom – the Portman Group is the least accountable. It is answerable largely to itself. Under law, Ofcom is required to report on its work to the UK and Scottish Parliaments,¹⁵³ and may be called in for questioning by MPs or MSPs. Being non-statutory, the ASA is not subject to the same rigour, but, unlike the Portman Group, does have an Independent Reviewer who can be asked to intervene when serious questions are raised about a ruling or the process by which it was made.¹⁵⁴ The Portman Group, however, has no such reviewer and is under no obligation to explain itself or its work to any public or elected body.

Summary

The Portman Group has substantial power but very limited accountability. It draws up its own regulatory Code, advises the Panel that interprets that Code, and undertakes enforcement of the Panel's decisions. It has few arrangements for reviewing Panel decisions and is under no obligation to explain its activities to any public or elected body. Given the Group's substantial influence over the UK alcohol market, there is a clear case for thorough transparency and full public accountability. It is not clear that this can be achieved within a system of self-regulation.

^{xii} For example, after the Panel ruled in 2016 that the Captain Morgan character was "not a pirate", there was no means to present the contrary evidence that the brand's owners, Diageo, routinely seek to associate the character with piratical themes and have even taken legal action against another producer for seeking to "confuse consumers" by the use of a similar "pirate-like character".

Conclusion

In this report, we have highlighted a number of issues relating to the Portman Group's regulatory role, the operation of the Independent Complaints Panel, and the implementation of the Code of Practice on the Naming, Packaging and Promotion of Alcoholic Drinks.

The questions arising from our research can be broadly summarised under the following headings:

- **What is the Code intended to achieve and why?**
Is it intended to stop consumers being misled, to reduce harmful or dangerous drinking behaviours, or does it simply reflect a moral or aesthetic judgement that it is inappropriate for alcohol to be associated with certain themes?
- **How has the Panel interpreted the Code, and how has it justified its interpretations?**
The Panel has come to very different decisions about very similar products, and in doing this, has sometimes introduced additional decision-making criteria beyond the terms of the Code.
- **What types of evidence has the Panel used and what has it not considered?**
The evidence base described in the Panel's complaints decisions is generally narrow, and seldom appears to go beyond that which is provided to it by producers and the Portman Group's Advisory Service. Where additional evidence has been sought, it has generally been subjective in nature, e.g. commissioning opinion polling on how people believe certain drinks are consumed, rather than investigating actual habits of consumption.
- **How quickly does the Panel work?**
In most cases, promotional activities that are found to have breached the Code will already have been active in the public domain for some time, and a campaign may even have been completed, before the judgement has been made. It is fair to ask to what extent this reduces the effectiveness of the Panel's work.
- **What powers does the Portman Group have and how is it accountable for their use?**
These powers derive largely from the willingness of major retailers to co-operate by no longer selling products the Panel has ruled against. There is no adequate accountability for the use of these powers. There is little recourse for producers who are unhappy with a decision by the Panel, and none at all for complainants.

Taken together, these findings indicate that the current system is not working adequately.

Making the system work for producers and consumers

If things are not working at present, what can be done? The issues highlighted in this report are serious enough, in our view, to justify an independent review of the current arrangements for the regulation of the UK alcohol market. Such a review should look in particular at:

- Whether alcohol industry self-regulation, including that undertaken by the Portman Group, is effective, adequate and appropriate.
- Whether the various regulatory strands for alcohol need bringing together under a single regulator.

- Whether the current criteria, as set out in the Portman Group's Code and equivalent ASA documents, are fit for purpose and have clear objectives.
- Whether decision-making processes are sufficiently robust and evidence-based.

The preparation of the forthcoming new National Alcohol Strategy for England would seem to be an ideal opportunity for the UK Government to initiate such a review, in conjunction with the Welsh and Scottish Governments and the Northern Ireland Executive. To support such a review, we discuss below some of the key issues that need to be resolved.

Is alcohol industry self-regulation in the UK effective, adequate and appropriate?

Like any other industry that sells its products in the UK, the alcohol industry's marketing activities are subject to some statutory regulation, in that its products cannot, for example, be promoted in ways that are misleading or dishonest,¹⁵⁵ lewd or obscene,¹⁵⁶ or racially abusive.¹⁵⁷ However, when it comes to those aspects of marketing that are particular to alcohol as a product, and that relate to alcohol harm, the industry has been allowed to a large extent to regulate itself. This is understandably a situation that the industry is keen to maintain. The Portman Group has recently expressed its concern that placing alcohol industry regulation on an entirely statutory footing "would discourage creativity and damage UK businesses".¹⁵⁸ Barcardi have asserted that "well-constructed self-regulatory codes can be more effective and credible than government regulation and legislation", whilst AB InBev have said that they are working to "provide evidence to concerned supervisory bodies that self-regulation works effectively".¹⁵⁹ These comments indicate concerns within the industry that self-regulation must be shown to work if it is not to be replaced with more robust statutory regulation.

It is important to note here that to question the alcohol industry's competence or suitability to regulate itself is not to question its legitimacy as an industry. The production, distribution and sale of alcohol is a long-established, legal and socially accepted trade in the UK, and the consumption of the industry's products is an element in most people's leisure time. However, like any industry, drinks producers have a commercial imperative to increase sales of their products. So, whilst Diageo says that people drinking heavily is "not good...for our reputation", they also advise publicans on "the art of upselling" and how to "increase spirits sales in your pub".¹⁶⁰ AB InBev aims to "reduce harmful drinking globally";¹⁶¹ but, like several other brewers, they are also working hard to sell more beer in the relatively new African and Latin American markets.¹⁶² There is no reason one should expect things to be otherwise. As Adam Smith noted in 1776, "to widen the market" is the natural aim of any ambitious seller.¹⁶³ Those with most invested in that market-widening work are, however, probably the least suitable to set limits on it; not because they are unscrupulous, but simply because they will inevitably, from time to time, face a conflict of interest between effective regulation and maximum profitability.

Another weakness of current alcohol industry self-regulation in the UK is that it lacks clear mechanisms of accountability, and without such mechanisms there is no guarantee of impartial or effective regulation. The Nolan Principles of Public Life state that holders of public office must not only be “accountable to the public for their decisions and actions” but must also “submit themselves to the scrutiny necessary to ensure this”.¹⁶⁴ The Portman Group and its Complaints Panel are not currently subject to such public scrutiny.

One obvious way to achieve greater scrutiny, and therefore accountability, of all alcohol industry regulators would be to place the regulation of the alcohol industry in the UK on an entirely statutory footing, thereby making regulators answerable to elected representatives in the public forum of a

Parliamentary Committee. As a team of Dutch researchers looking at alcohol regulation across Europe noted in 2007, the UK’s current regulatory arrangements “allow for a certain degree of democratic oversight” but “this is much less direct than is generally the case in purely statutory systems”.¹⁶⁵ Statutory regulators, such as the example of Ofcom cited above, are required to report on their work to the relevant Secretary of State and can be called in for questioning by members of the UK Parliament and the devolved administrations. They may be asked to explain and justify their decisions and actions, and the evidence on which those decisions have been based may be demanded and questioned. Such transparency significantly reduces the room for the kinds of poorly-informed or inconsistent decision-making our report has highlighted.

Summary

The alcohol industry in the UK and globally is keen to continue to promote the self-regulation of marketing. However, like any industry, drinks producers have a commercial imperative to increase sales of their products; and even if profit is driven by ‘premiumisation’ in some quarters, it is clear that increased unit sales remains a key driver across the alcohol market. Self-regulation, therefore, presents insurmountable conflicts of interest between effective regulation and maximum profitability.

Currently the system lacks clear mechanisms of accountability, meaning there is no guarantee of impartial or effective regulation. Moving to a fully statutory arrangement would bring much more open and transparent regulation. Regulatory decisions would have to be explained and justified publicly and could be challenged on the basis of evidence.

Should UK alcohol industry regulation be brought together under a single regulator?

The Portman Group's regulatory remit includes the "naming, packaging, marketing and promotional activity undertaken by a drinks producer for an alcoholic drink which is marketed for sale and consumption in the UK", but only where that activity is not already overseen by the Advertising Standards Authority (ASA) or Ofcom.¹⁶⁶ Therefore, the Portman Group does not deal with print, broadcast or online advertising. The Group extended its remit in 2014 to include sponsorship by the alcohol industry of performers, sports teams, music events, and venues;¹⁶⁷ but Ofcom retains responsibility for sponsorship of television programmes.

An obvious criticism of this arrangement is that it does not reflect the reality of modern marketing. Alcohol companies do not see packaging, advertising and sponsorship as separate entities; but, at present, regulators do. When the Portman Group's Complaints Panel looks at the names and labels on drinks, it is considering in isolation elements that are, in reality, integral components of a complex marketing matrix. So, when the Panel considered in 2016 the sponsorship arrangement between Heineken and the James Bond franchise, they looked solely at the imagery placed on Heineken bottles and boxes.¹⁶⁸ But these containers were just two elements of an integrated marketing plan that included television commercials, access for fans to unseen film content, and even a selfie taken from space for those in the picture to share via social media.¹⁶⁹

All of this was reinforced by product placement in the films themselves, with James Bond trading in his usual vodka-Martini for a cold beer.¹⁷⁰ None of these other elements was expected to enter into the Panel's deliberations, given its narrow remit. In the same way, if a complaint had been made about any aspect of the campaign other than the bottles and boxes, it would have gone to the ASA (or possibly Ofcom, in the case of television sponsorship), where it would have been considered in isolation from any questions about drinks packaging. This division of the marketing mix meant that in 2004 the Portman Group's Panel, looking at drinks bottles, ruled that a range of drinks called Stiffy's Shots was not inappropriately sexual,¹⁷¹ whilst the ASA, looking at bus-stop posters for the same drink, ruled that it was.¹⁷²

This fragmented approach to regulating the different elements of alcohol marketing is neither necessary nor desirable. Other countries have other approaches. In Australia, for example, complaints about alcoholic products and their marketing can be made under the Alcoholic Beverages Advertising Code (ABAC), which encompasses "all marketing communications in Australia generated by or within the reasonable control of a marketer", including product names and packaging, brand advertising (including trade advertising), digital communications (including social media and user-generated content), alcohol brand extensions to non-alcoholic beverage products, point-of-sale materials, and retailers' advertising.¹⁷³

The situation in the United States of America is more complex, in that beers, wines and spirits have three separate self-regulatory bodies; but the same principle applies, in that the elements of the marketing mix are not artificially separated and are all the responsibility of the producer, as the following table illustrates:

Alcohol marketing regulators in the USA	Regulatory code remit
Beer Institute	"These guidelines apply to all beer-branded advertising and marketing materials created by or under the control of the brewer." ¹⁷⁴
Wine Institute	"All advertising in all forms – including, but not limited to internet, mobile and other digital marketing communications, product labels, packaging, direct mail, point-of-sale, outdoor, displays, sponsorships, promotions, radio, television, movies, video, print media and product placements – shall adhere to both the letter and the spirit of this Code." ¹⁷⁵
Distilled Spirit Council of the United States	"This Code applies to all activities undertaken to advertise and market distilled spirits, malt beverage[s] and wine brands. These activities include brand advertising, consumer communications, promotional events, packaging, labels, and distribution and sales materials." ¹⁷⁶

Similarly, South Africa's Advertising Code of Practice applies to all elements of the marketing mix, and extends into areas of marketing not covered by any UK regulator, such as in its prohibition on packaging which "encourages the impression that alcohol is a bulk commodity"¹⁷⁷ – an important issue in the UK, where bulk-purchase discounts for alcohol are a key sales tactic.¹⁷⁸ Such a comprehensive approach, that recognises the complex and interlinked ways in which alcohol is marketed and sold, deserves full consideration in the UK.

Summary

At present, the UK alcohol market is regulated in a way that does not reflect the reality of modern marketing. Packaging, advertising and sponsorship are regulated as separate entities, when they are, in reality, integral components of a complex marketing matrix. A number of other territories have taken steps to regulate all aspects of alcohol marketing together. An approach like this, that recognises the complex and interlinked ways in which alcohol is marketed and sold, should be considered for the UK.

Are the current codes fit for purpose?

Our analysis in much of this report has focused on issues arising from the ways in which the Portman Group's Code is interpreted and applied by the Complaints Panel. The Panel is, however, itself in an unavoidable position, in that it is being asked to work with a Code which has unclear aims. The stated overall purpose of the Code is "to ensure that alcohol is promoted in a socially responsible manner and only to those aged over-18".¹⁷⁹ With this aim in mind, the Code sets out a series of prohibitions on associating alcoholic drinks with:

- Things many of us would consider undesirable, such as violence, drunkenness, and under-age drinking.
- Things many of us would consider very much desirable, such as social or sexual success, or enhanced mental or physical capabilities.

What is not clear is how the Portman Group understands the link between alcohol packaging and any of these things; nor more broadly the link between alcohol packaging and any kind of alcohol harm. Is the Code based on a belief (or on evidence) that alcohol packaging and promotion tactics can lead people to use alcoholic products in ways the Portman Group is keen to prevent; or is it simply an attempt to exclude from the marketplace themes many people feel do not sit well with alcohol marketing? Is it an exercise in harm reduction, or simply in good taste? If we take as an example Section 3.2(h) of the Code, the prohibition of "a particular appeal to under-18s", we can ask the following questions:

- Is Section 3.2(h) intended to reduce the occasions on which people under the age of 18 notice alcohol as a result of childish packaging drawing their attention to it? If so, that would suggest a need for:
 - A much better understanding of what types of products and packaging draw children's attention at different ages. As noted above, the Panel's judgements on this topic appear to be based on adults' ideas of what children of various ages find attractive, rather than children's own views and experiences.
 - A much broader debate on how, when, where and how often children are exposed to alcoholic products and to alcohol marketing, and to what extent this is considered a problem.
- Is it intended to reduce the temptation for children to try alcohol, and reduce attempts by them to obtain or consume it? If so, its implementation needs to be grounded in a much better understanding of what attracts children of various ages to particular products, and which products they are seeking to obtain at what ages.
- Is it based on a genuine worry that childhood-themed alcoholic products will lead children to have a more alcoholic childhood, in the manner of similar concerns about the early sexualisation of children?¹⁸⁰
- Is it simply based on a moral or aesthetic judgement that is inappropriate for alcohol to be associated with childhood?

Similarly, in the case of Section 3.2(d), which prohibits “any association with sexual activity or sexual success”, we can ask:

- Is it intended to prevent alcohol producers from misleading consumers by inferring their products may bring sexual success? This would seem unlikely given that:
 - The Code states that “strong sexual images will breach the Code even if nothing directly suggests that the drink enhances the drinker’s sexual capabilities”.¹⁸¹
 - The Portman Group has stated that “misleading claims are not covered by the Code and fall outside our remit”.¹⁸²
- Is there a belief or concern that alcoholic products featuring sexual themes will encourage inappropriate drinking behaviour or sexual behaviour?
For example, in 2007 the Portman Group justified a ruling against Rubbel Sexy Lager (which featured naked young women on its bottles) on the grounds that “drinking excessively can affect people’s judgement and behaviour, leading to them engaging in sexual activity which they later regret”, apparently suggesting that sexually-themed drinks can lead to more drunken sex (and that reducing this kind of sexual activity is one of the Portman Group’s aims).¹⁸³
- Does it reflect a desire to avoid causing offence by placing sexual imagery or wording in public spaces, or to avoid degrading women by presenting them as sexual objects on alcohol packaging? If so, this could be explicitly stated in the Code,^{xiii} as it has been by the Advertising Standards Authority in its guidance to advertisers¹⁸⁴ and by regulators in some other territories.^{xiv, xv}
- Is there a concern that sexual images or wording on alcohol packaging (or on retail packaging more generally) are a risk to children, echoing the recommendation of the Bailey Review that sexualised images in print media should not be “in easy sight of children”?¹⁸⁵
- Or is it based on a moral or aesthetic judgement that it is inappropriate for alcohol to be associated with sex?

^{xiii} In 2018, the Portman Group consulted on amending its Code to include “causing offence on the grounds of...gender”.

^{xiv} The California-based Wine Institute state that “wine advertising shall not degrade, demean, or objectify the human form, image or status of women, men, or of any ethnic, minority, religious or other group or sexual orientation” and “shall not exploit the human form, or feature sexually provocative images”. Similarly, the Distilled Spirits Council of the United States say that “alcohol advertising and marketing materials should not degrade the image, form, or status of women, men, or of any ethnic, minority, sexually-oriented, religious, or other group”.

^{xv} The rebranding in 2018 by the Castle Rock Brewery of their Elsie Mo pump clip – from a 1940s pin-up in stockings, to confident female RAF pilot – suggests there may be an appetite in the UK for such a change. Similarly, the Wye Valley Brewery has recently dropped the Dorothy Goodbody character (and accompanying suggestive product description) from its bottles of stout.

Similar questions could be asked about many other sections of the Code, for example about the proposed inclusion of ‘vulnerable people’, and about the ASA’s broadcast¹⁸⁶ and non-broadcast¹⁸⁷ codes, which have been drawn up along very similar lines. Until such questions are properly addressed and clearly answered, it is hard to see how many of the various codes’ criteria can be effectively and consistently applied. In short, until we know what these codes are ultimately intended to achieve, we have little hope of achieving it.

One alternative that has been proposed to the complexity and ambiguity of the ASA and Portman Group codes is a form of regulation modelled on France’s Loi Évin.^{xvi} Passed in 1991, this set of public health laws states that alcohol marketing materials in France may only provide information relating to the alcoholic strength of a drink, its place of origin,^{xvii} its ingredients and means of production, as well as patterns of consumption.^{xviii} Images of drinkers, and lifestyle-related marketing more generally, are not permitted on packaging or in

advertisements.¹⁸⁸ The most important point to note about the Loi Évin is that it specifies what elements are permitted in marketing, not what is prohibited. Anything which is not explicitly permitted is prohibited. This makes the Loi Évin a much simpler system than the UK’s collection of multi-point codes that seek to cover a wide range of possible marketing tactics. It also places alcohol marketing under much tighter restrictions than the marketing of many other products. This is arguably justified in that alcohol is, as Tom Baber famously described it, “no ordinary commodity”,¹⁸⁹ and that therefore society has a right to set boundaries on the ways in which it is promoted. Others have claimed that over-regulation has already brought a po-faced puritanism to alcohol marketing, stifling the use of humour in particular.¹⁹⁰ The extent to which alcohol marketing can and should be more tightly regulated should be included in any review of the current arrangements for the regulation of the UK alcohol market; with the aim of balancing public health with the freedom for alcohol producers to pursue their legitimate trade.

^{xvi} Properly known as *Loi 91-32 du 10 janvier 1991 relative à la lutte contre le tabagisme et l'alcoolisme*.

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