
Regulation of advertising for less healthy food and drink

Implementation of new statutory restrictions

[Regulation of advertising for less healthy food and drink](#) - Welsh overview

STATEMENT:

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1. Overview

The purpose of this document – in brief

Between 21 February and 21 April 2023, Ofcom consulted on proposals for implementing new statutory restrictions on advertising and sponsorship for less healthy food and drink products. This statement summarises the consultation responses and sets out Ofcom’s conclusions.

The restrictions

The Health and Care Act 2022 amended the Communications Act 2003 (“the 2003 Act”) to introduce new restrictions on advertising and sponsorship for less healthy food and drink products, i.e. certain food and drink products that are high in fat, salt or sugar (“HFSS”). These new restrictions apply to advertising on Ofcom-regulated TV and on-demand programme services (“ODPS”) and also online.

In summary, **TV services and ODPS are prohibited from including advertising and sponsorship for less healthy food and drink products between 5.30am and 9.00pm; and paid-for advertisements for these products, where they are aimed at UK users, are prohibited from being placed online at any time.** The restrictions take effect from 1 October 2025.

Ofcom is the statutory regulator with responsibility for advertising on TV and ODPS, for which we have established co-regulatory relationships with the Advertising Standards Authority (“ASA”), the Broadcast Committee of Advertising Practice (“BCAP”) and the Broadcast Standards Board of Finance (“BASBOF”). Following amendments resulting from the Health and Care Act 2022, the 2003 Act also gives Ofcom responsibility for regulating online advertising for less healthy food and drink products, with the power to designate a co-regulator.

The consultation

The consultation set out Ofcom’s approach to implementing the new restrictions on advertising and sponsorship for less healthy food and drink products on TV, ODPS and online. It confirmed that the new restrictions on TV and ODPS are covered by the existing co-regulatory arrangements that apply to advertising in these media.

We consulted on: **a proposal to designate the ASA as a co-regulator for the new prohibition on advertising for less healthy food and drink products in paid-for online space; and proposed amendments to the BCAP Code and the Broadcasting Code to reflect the new restrictions that apply to advertising and sponsorship on TV.**

Ofcom’s conclusions

In summary, Ofcom has decided to: **designate the ASA as a co-regulator** for the online advertising prohibition; and **proceed with the amendments to the BCAP Code and the Broadcasting Code**, subject to minor changes. The rationale for these decisions is set out in the rest of this document.

The designation of the ASA will be published on our website. The final versions of the rules to be inserted into the relevant codes are set out in Annexes.

2. Introduction

2.1 In 2020, the UK Government set out its strategy for tackling obesity in the UK.¹ As part of this strategy, the Government brought forward legislation to impose restrictions on advertising for certain HFSS products, referred to as ‘less healthy’ food and drink products. These restrictions are set out in the 2003 Act² (as amended by the Health and Care Act, which received Royal Assent on 28 April 2022)³, and apply to advertising and sponsorship that appears on TV and ODPS, as well as advertising online.

2.2 In summary, the 2003 Act:

- prohibits TV services from including advertising and sponsorship for less healthy food and drink products between 5.30am and 9pm;
- prohibits ODPS from including advertising and sponsorship for less healthy food and drink products between 5.30am and 9pm; and
- prohibits paid-for advertisements for less healthy food and drink products that are aimed at UK users from being placed online at any time.

The restrictions take effect from 1 October 2025.⁴

2.3 Ofcom is the statutory regulator with responsibility for implementing and enforcing the restrictions. Ofcom has an existing co-regulatory relationship with the ASA in relation to broadcast and on-demand advertising and has the power under the new online advertising provisions to extend its relationship to cover the restrictions for less healthy food and drink products.

Existing regulation of HFSS advertising

2.4 From 2007 to 2009, as a result of growing concerns about child obesity, Ofcom introduced restrictions on advertising for HFSS products on TV. These restrictions prohibit the scheduling of TV advertising for all HFSS products during children’s airtime⁵ and around programmes with a disproportionately high child audience. The restrictions also cover the content of adverts. They are administered by BCAP and the ASA, as part of the co-regulatory arrangements for broadcast advertising.

¹ <https://www.gov.uk/government/publications/tackling-obesity-government-strategy>

² <https://www.legislation.gov.uk/ukpga/2022/31/contents/enacted>

³ <https://www.legislation.gov.uk/ukpga/2022/31/contents/enacted>

⁴ On 9 December 2022, the Government announced a delay to the implementation of the new restrictions (which at that stage were due to take effect from 1 January 2024), with the result that they will take effect from 1 October 2025. It confirmed that this is to allow the industry sufficient time to prepare for implementation: [Written statements - Written questions, answers and statements - UK Parliament](#). The delay was effected by Statutory Instruments amending the 2003 Act: [The Communications Act 2003 \(Restrictions on the Advertising of Less Healthy Food\) \(Effective Date\) \(Amendment\) Regulations 2022 \(legislation.gov.uk\)](#) and [The Communications Act 2003 \(Restrictions on the Advertising of Less Healthy Food\) \(Effective Date\) \(Amendment\) \(No. 2\) Regulations 2022 \(legislation.gov.uk\)](#).

⁵ ‘Children’s airtime’ means the periods within television schedules devoted to children’s programming, including all programming on dedicated children’s channels.

- 2.5 The existing regulation of HFSS advertising relies on a nutrient profiling model (“NPM”), originally developed as a tool for Ofcom by the Food Standards Agency, and now owned by the Department of Health and Social Care (“DHSC”).⁶ Based on the NPM, food and drink products are assigned a score and classified accordingly as HFSS or non-HFSS. The existing restrictions apply to advertising for products classified as HFSS according to this system.
- 2.6 Prior to the Health and Care Act 2022, there were no statutory restrictions on advertising for HFSS products on ODPS, or more widely online. However, under its self-regulatory system, the ASA enforces non-statutory rules on HFSS advertising that appears in non-broadcast media (including online).

New regulation of less healthy food and drink advertising

- 2.7 The new restrictions sit alongside the existing restrictions for HFSS advertising on TV (described above in paragraphs 2.4 to 2.6) and apply to a subset of HFSS food and drink products. The products captured by the new restrictions are called ‘less healthy’ in legislation and are defined as food and drink products which are classified as HFSS according to the NPM, and which fall within specified categories of food and drink products to be set out in regulations (“the Regulations”). The Government has published draft regulations which it consulted on between 9 December 2022 and 31 March 2023.⁷ It is currently considering the consultation responses.
- 2.8 The restrictions do not apply to advertising by or on behalf of small or medium enterprises involved in or associated with the manufacture or sale of food or drink (“food or drink SMEs”). Food or drink SMEs are defined in the 2003 Act by reference to the forthcoming Regulations.
- 2.9 There are further exemptions in relation to the online advertising restrictions (e.g. business-to-business advertising and advertisements which are not intended to be accessed principally by persons in the UK). These exemptions are set out in the 2003 Act by reference to the forthcoming Regulations.
- 2.10 As the ‘appropriate regulatory authority’ for the online advertising prohibition, Ofcom has a range of powers, including in relation to information-gathering and enforcement. Ofcom may designate any of the statutory functions to a co-regulator.
- 2.11 Further details of these new responsibilities and the proposed implementation of the new restrictions were set out in Ofcom’s consultation on the regulation of advertising for less healthy food and drink (see paragraphs 2.12 to 2.20 below). This information is also summarised, where relevant, in the following sections of this statement.

⁶ [Nutrient Profiling Model](#)

⁷ [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation - GOV.UK \(www.gov.uk\)](#)

Ofcom's consultation

- 2.12 Between 21 February and 21 April 2023, Ofcom consulted on proposals for the implementation of statutory restrictions on advertising for less healthy food and drink products.⁸ In the consultation document, Ofcom:
- confirmed that the existing co-regulatory arrangements for TV and ODPS extend to the new restrictions for advertising in these media, and said that we would amend the documents that support these arrangements accordingly;
 - confirmed that Ofcom and the ASA would amend the relevant ODPS rules to reflect the legislation, with no material changes or omissions;
 - consulted on proposed amendments to the BCAP Code and the Broadcasting Code to reflect the new restrictions that apply to advertising and sponsorship on TV; and
 - consulted on a proposal to designate the ASA as a co-regulator for the new prohibition on advertising for less healthy food and drink products in paid-for online space.
- 2.13 In addition, respondents to the consultation were invited to comment on: Ofcom's proposed approach to enforcement in relation to the online restrictions; and our assessment of the impact of our proposed approach to implementing the restrictions on TV, ODPS and online. All non-confidential responses have been published on our website.⁹
- 2.14 We received 25 responses in total, which we have carefully considered in finalising our approach. The responses were from a range of stakeholders including: charitable, campaigning and research organisations with an interest in public health; trade bodies representing food and drink manufacturers, retailers, advertisers and media organisations; individual food and drink manufacturers; a regulatory body; a broadcaster; an academic; and individual respondents.
- 2.15 The respondents were: the **Advertising Association**; **Bite Back 2030**; the **British Heart Foundation**; the **British Retail Consortium** ("BRC"); **Coca-Cola GB**; **Derby City Council Trading Standards**; the **Food and Drink Federation** ("FDF"); **Ferrero UK**; the **Internet Advertising Bureau UK** ("IAB"); the **Institute of Practitioners in Advertising** ("IPA"); the **Incorporated Society of British Advertisers** ("ISBA"); **ITV**; **Kellogg Marketing and Sales UK**; **Mars UK**; the **News Media Association** ("NMA"); the **Obesity Health Alliance** ("OHA"); **PepsiCo UK**; the **Scottish Grocers' Federation**; **Sustain**; **World Cancer Research Fund**; an **academic** from the Open University; two **individual respondents**; and another two **industry respondents**.

⁸ https://www.ofcom.org.uk/data/assets/pdf_file/0022/254191/Consultation-Regulation-of-advertising-of-less-healthy-food-and-drink.pdf

⁹ <https://www.ofcom.org.uk/consultations-and-statements/category-1/regulation-of-less-healthy-food-and-drink-advertising>

- 2.16 In addition, **BCAP** proposed minor changes to our proposed text for a rule and associated definitions to be inserted into the BCAP Code; and **Sky** submitted a query about the rule we proposed to insert into the Broadcasting Code.
- 2.17 Some responses were confidential, and references to these have been anonymised or redacted in this statement.
- 2.18 We received submissions on a range of issues in response to the questions raised in the consultation, which are set out, together with our conclusions, in the rest of this document. These included issues relating to:
- the underlying policy intent and potential impacts on public health and affected industries;
 - the proposed text for the rules and associated definitions to be inserted into the BCAP Code and the Broadcasting Code, including:
 - general comments on the clarity of key definitions;
 - references in the codes to the NPM;
 - exemptions from the restrictions;
 - the status of brand advertising;
 - the content and timing of guidance on the rules;
 - designating the ASA as a co-regulator;
 - suggestions for improving the ASA’s processes, in relation to:
 - proactive monitoring;
 - reporting obligations;
 - powers to impose sanctions;
 - an appeals process;
 - attention to costs; and
 - reviewing the effectiveness of the restrictions.
- 2.19 As stated, we have carefully considered all the consultation responses. This statement summarises the responses and sets out Ofcom’s conclusions.
- 2.20 We have decided to proceed with our proposal to designate the ASA as a co-regulator for the prohibition that applies to online advertising. In relation to TV advertising, we have made minor changes to the proposals we consulted on to ensure the rules and associated definitions to be inserted into the BCAP Code and the Broadcasting Code reflect appropriately the legislative requirements.

Structure of this document

- 2.21 The document is structured as follows:

- Section 3 provides an overview of the steps Ofcom is taking to implement the new restrictions that apply to advertising and sponsorship for less healthy food and drink products on TV and ODPS, under the existing co-regulatory arrangements for advertising in these media;
- Section 4 summarises the consultation responses and sets out Ofcom’s conclusions in relation to proposed amendments to the BCAP Code and the Broadcasting Code to reflect the new restrictions that apply to advertising and sponsorship on TV;
- Section 5 summarises the consultation responses and sets out Ofcom’s conclusions in relation to the proposal to designate the ASA as a co-regulator for the new prohibition on advertising for less healthy food and drink products in paid-for online space;
- Section 6 responds to comments on Ofcom’s proposed approach to enforcement in relation to online advertising; and
- Section 7 responds to comments on Ofcom’s assessment of the impact of our proposals.

2.22 Relevant extracts from the legislation and final versions of the rules are set out in Annexes.

3. Implementation of restrictions on TV and ODPS

- 3.1 Under the 2003 Act, Ofcom is the statutory regulator with responsibility for advertising and sponsorship on TV and ODPS. In relation to advertising in these media, Ofcom has well-established co-regulatory relationships with the ASA, BCAP and BASBOF. Sponsorship on TV and ODPS is regulated solely by Ofcom.
- 3.2 This section explains the steps Ofcom is taking to implement the new restrictions that apply to advertising and sponsorship for less healthy food and drink products on TV and ODPS under the existing co-regulatory arrangements. The steps covered in this section did not require consultation.

Implementation of restrictions on TV

New statutory requirements

- 3.3 Under Section 321A of the 2003 Act, Ofcom must set standards prohibiting Ofcom-licensed TV services from including advertisements for less healthy food and drink products (i.e. the subset of HFSS products captured by the new restrictions – see paragraph 2.7 above) between 5.30am and 9pm (“the TV watershed restriction”).
- 3.4 The 2003 Act states that for the purposes of section 321A, advertisements include advertisements under a sponsorship agreement, and anything else which, under a sponsorship agreement, is included in a TV service outside of programming. This would include, for example, sponsorship credits.
- 3.5 The restrictions take effect from 1 October 2025.

Co-regulatory arrangements for broadcast advertising

- 3.6 For broadcast (TV and radio) advertising, Ofcom has a long-standing co-regulatory relationship with the ASA, BCAP and BASBOF.¹⁰ Ofcom has contracted out certain of its functions to these bodies, via an authorisation by virtue of The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, made under the Deregulation and Contracting Out Act 2004 (“the Authorisation”). These co-regulatory arrangements are supported by a Memorandum of Understanding (“MoU”)¹¹ and a Deed for the Regulation of Broadcast Advertising.

¹⁰ BCAP is made up of members representing the broadcasting and advertising industries. It is responsible for writing and maintaining the BCAP Code. The BCAP Code applies to all advertisements (including teleshopping, content on self-promotion television channels, television text and interactive TV adverts) and programme sponsorship credits on radio and television services licensed by Ofcom.

¹¹ [Memorandum of Understanding](#)

- 3.7 In its consultation, Ofcom confirmed that enforcement of the new TV advertising restrictions will fall under these existing co-regulatory arrangements. While we considered that the Authorisation is sufficiently broad to capture the new restrictions, for clarity we said we would update the wording of this document to make specific reference to section 321A of the 2003 Act. A copy of the updated Authorisation was included as an annex to the consultation, for information.
- 3.8 The Authorisation has now been formally updated on Ofcom’s website.¹²

Amendments to the BCAP Code and the Broadcasting Code

- 3.9 Amendments to the BCAP Code and the Broadcasting Code to reflect the new restrictions that apply to advertising and sponsorship on TV were subject to consultation. The outcome of this consultation process is set out in Section 4.

Implementation of restrictions on ODPS

New statutory requirements

- 3.10 Part 4A of the 2003 Act sets out the legal framework for the regulation of ODPS. Section 368D sets out the duties of service providers under that framework. In particular, service providers must ensure that advertising included in their services complies with the advertising requirements in section 368F.
- 3.11 Section 368FA of the 2003 Act prohibits Ofcom-regulated ODPS from including advertisements and sponsorship announcements for identifiable less healthy food and drink products between 5.30am and 9.00pm (“the ODPS watershed restriction”).
- 3.12 Section 368C of the 2003 Act, which sets out the duties of the ‘appropriate regulatory authority’ under the ODPS framework, requires the regulator to produce guidance in relation to its functions under section 368FA, and to consult the Secretary of State before drawing up or revising this guidance.

Co-regulatory arrangements for on-demand advertising

- 3.13 Under the 2003 Act, Ofcom may designate another body, to the extent provided by the designation, to be the appropriate regulatory authority for the purposes of any of the ODPS provisions. If no body is designated, Ofcom is the appropriate regulatory authority.¹³ Additionally, where a body is designated for a purpose, Ofcom may act as the appropriate regulatory authority concurrently with or in place of that designated body.
- 3.14 Following a consultation process, in 2010 Ofcom designated the ASA to carry out certain functions in relation to advertising on ODPS. The ODPS designation has subsequently been renewed. Full details of the relevant functions are set out in the ODPS designation.

¹² https://www.ofcom.org.uk/data/assets/pdf_file/0036/263979/ASA-Broadcast-Authorisation.pdf

¹³ Communications Act 2003, s.368B(1)

- 3.15 Paragraph 13 of the ODPS designation states that Ofcom may review the co-regulatory arrangements at any time where, in our reasonable opinion, regulatory development, including any changes in relevant legislation, makes it appropriate to do so.
- 3.16 As set out in the consultation, we have reviewed the ODPS designation in the light of the new restrictions on ODPS advertising. We are satisfied that these restrictions are covered by the current arrangements. However, to ensure maximum transparency, we have amended the ODPS designation to make explicit reference to section 368FA of the 2003 Act, and the fact that the ASA will be responsible for producing guidance in relation to the designated functions under that section.¹⁴ A copy of the updated ODPS designation was included as an annex to the consultation, for information.
- 3.17 The ODPS designation has now been formally updated on Ofcom’s website.¹⁵

Amendments to the CAP Code ODPS Appendix and the ODPS Rules and Guidance

CAP Code ODPS Appendix

- 3.18 Ofcom has designated the ASA to take such steps as appear to the ASA best calculated to secure that the statutory requirements for ODPS advertising are complied with by ODPS providers. These requirements are reflected as rules in an appendix to the self-regulatory UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (“the CAP Code”), administered by the ASA (the “ODPS Appendix”).¹⁶
- 3.19 Under the terms of the ODPS designation, the ASA is required to ensure that the rules in the ODPS appendix are expressed as the relevant requirements of the 2003 Act, without material additions or omissions. As such, no consultation is required on the introduction of a new rule to reflect the ODPS watershed restriction.
- 3.20 Therefore, the ASA (in consultation with Ofcom) will update the annex to reflect the ODPS watershed restriction, with the rules to take effect from 1 October 2025.

ODPS Rules and Guidance

- 3.21 Ofcom retains responsibility for the regulation of sponsorship on ODPS and the relevant requirements are reflected in Ofcom’s ODPS Rules and Guidance.¹⁷
- 3.22 Unlike broadcast advertising and sponsorship, Ofcom does not have code-making powers in relation to such material on ODPS which must be compliant with the requirements set out in primary legislation. Accordingly, the new rule will reflect the legislation, with no material changes or omissions. We will update the section on sponsorship in the ODPS

¹⁴ Section 368C(6) of the 2003 Act (duties of the appropriate regulatory authority) requires the ‘appropriate regulatory authority’ to draw up guidance “setting out their intentions concerning the exercise of their functions” relating to section 368FA. (This was added pursuant to paragraph 5, Part 3 of Schedule 18 to the Health and Care Act 2022.)

¹⁵ https://www.ofcom.org.uk/__data/assets/pdf_file/0029/97346/ASA-ODPS-Designation.pdf

¹⁶ [ODPS appendix](#)

¹⁷ [ODPS Rules and Guidance](#)

Rules and Guidance to reflect the prohibition on sponsorship announcements for less healthy food and drink products between 5.30am and 9.00pm. In accordance with section 368FA(1) of the 2003 Act, the new rule will take effect from 1 October 2025.

- 3.23 As Ofcom has no discretion over setting the new rule and associated definitions, these were set out for informational purposes only in Ofcom's consultation.

4. Amendments to the BCAP Code and the Broadcasting Code

4.1 Ofcom consulted on proposed amendments to the BCAP Code and the Broadcasting Code to reflect the new restrictions that apply to advertising and sponsorship for less healthy food and drink products on TV. This section summarises the consultation responses and sets out Ofcom’s conclusions. Final versions of the new rules and associated definitions are set out at Annex 2.

Amendments to the BCAP Code

- 4.2 Under the co-regulatory arrangements for broadcast advertising, BCAP has responsibility for setting and maintaining rules in the BCAP Code that apply to TV advertising. Ofcom is also able to initiate code changes, but has undertaken to do so only in exceptional circumstances.¹⁸
- 4.3 Ofcom’s consultation explained why we considered it appropriate, on this occasion, for us to consult on the wording of a rule to be introduced into the BCAP Code to restrict advertising for less healthy food and drink products between 5.30am and 9pm. We invited respondents’ views on whether the text of the proposed rule and associated definitions, as set out below, appropriately reflected the legislative requirements (see Annex 1).

Proposed rule
TV advertising for identifiable less healthy food or drink products may not be shown between 5.30am and 9.00pm.

Proposed definitions
‘HFSS products’ are those food or drink products that are assessed as High in Fat, Salt or Sugar in accordance with the Department of Health and Social Care’s nutrient profiling model. Information on the nutrient profiling model is available on the Department of Health and Social Care’s website here .
A food or drink product is ‘less healthy’ if:
<ul style="list-style-type: none">• it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X]¹⁹; and• it is an HFSS product.

¹⁸ See paragraphs 6.1(b), 7.20 and 7.23 of the [Memorandum of Understanding](#).

¹⁹ The draft regulations have been subject to consultation: [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation](#). The BCAP Code will refer to the final Regulations (including the finalised form of their name).

A less healthy food and drink product is identifiable, in relation to advertisements, if persons in the UK (or any part of the UK) could reasonably be expected to be able to identify the advertisements as being for that product.

Rule X.X [the proposed rule] does not apply to ads for or on behalf of a food or drink SME within the meaning given by the Regulations.

Amendments to the Broadcasting Code

- 4.4 Rules for TV sponsorship are set out in Section Nine of the Broadcasting Code. Ofcom is responsible for setting and enforcing the rules in this code.
- 4.5 To comply with the legislation, Ofcom proposed amending the TV sponsorship rules to include the restriction on sponsorship by less healthy food and drink products between 5.30am and 9pm.
- 4.6 We asked for respondents' views on whether the text of the proposed rule and the associated definition, as set out below, appropriately reflected the legislative requirements (see Annex 1).

Proposed rule

9.17A: Programming (including a channel) may not be sponsored by an identifiable less healthy food or drink product between 5.30 am and 9.00 pm.

Note 1: Rule 9.17A does not apply to sponsorship by or on behalf of a of a food or drink SME, within the meaning given by the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X].²⁰

Note 2: A less healthy food or drink product is identifiable, in relation to sponsorship, if persons in the UK (or any part of the UK) could reasonably be expected to be able to identify the sponsorship as being for that product.

²⁰ The draft regulations have been subject to consultation: [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation](#). The Broadcasting Code will refer to the final Regulations (including the finalised form of their name).

Proposed definition

Meaning of less healthy food and drink

A food or drink product is 'less healthy' if:

- it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X];²¹ and
- it is an HFSS product, as defined by the [nutrient profiling scheme](#) which was devised by the UK's Food Standards Agency for use by Ofcom.

Consultation responses

Consultation Question 1:

Do you consider Ofcom's proposed rule and the proposed definitions to be inserted into the BCAP Code reflect appropriately the requirements of Section 321A of the Communications Act? If not, please explain why.

Consultation Question 2:

Do you consider Ofcom's proposed Rule 9.17A and the associated meaning, to be inserted into the Broadcasting Code, reflect appropriately the requirements of Section 321A of the Communications Act? If not, please explain why.

- 4.7 Most respondents who answered these questions were content that the proposed rules reflected appropriately the legislative requirements in relation to the TV watershed restriction. Some respondents raised issues with the wording of the proposed definitions associated with the rules, and suggested additions.

Comments on the proposed rules

What respondents said

- 4.8 The **Advertising Association, Bite Back 2030, British Heart Foundation, Coca-Cola GB, Derby City Council Trading Standards, Ferrero UK, FDF, IPA, ISBA, ITV, Mars UK, OHA, Sustain, World Cancer Research Fund** and an **academic** considered that the proposed rules, as consulted on, reflected appropriately the requirements of section 321A of the 2003 Act.
- 4.9 Some of these respondents, and others, raised issues with the proposed definitions associated with the rules, and made suggestions to improve clarity. In particular, **Kellogg Marketing and Sales UK** and two other **industry respondents** said they did not support the proposed text as consulted on due to these issues.

²¹ See footnote 19.

Ofcom's response

- 4.10 Ofcom notes the large number of respondents that supported the proposed rules to be inserted into the BCAP Code and the Broadcasting Code. We consider comments on the associated definitions in the sections below.

Clarity of key definitions

What respondents said

- 4.11 **Bite Back 2030** said that key definitions should be set out in legislation, rather than relying on case-by-case determinations by regulators.
- 4.12 An **industry respondent** considered that there were ambiguities in relation to the application of the proposed rules (for example, differences between the existing rules for HFSS products and the proposed rules for less healthy products), which it said could be resolved through legislation or in guidance.
- 4.13 **BRC** said that the products in scope of the new restrictions, and the meaning of an 'identifiable' product, would need to be further defined in guidance.

Ofcom's response

- 4.14 In relation to the calls for legislative change, this is a matter for Government and Parliament.
- 4.15 Guidance on the application of the rules applying to advertising of less healthy products on TV will be produced by BCAP (see paragraphs 4.44 to 4.51 below). We expect that this guidance will address how the new rules will operate alongside the existing rules applying to HFSS advertising on TV.
- 4.16 The 2003 Act states that 'a product is "identifiable", in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product'. We further expect that the BCAP guidance will address how 'identifiable' should be interpreted in this context, as well as the scope of the restrictions.

Nutrient profiling model

- 4.17 The restrictions apply to the advertisements for less healthy food and drink products. Section 321A of the 2003 Act defines a food and drink product as 'less healthy' if it:
- falls within a description specified in regulations made by the Secretary of State,
 - is "less healthy" in accordance with the relevant guidance.

The 'relevant guidance' is defined as 'the guidance entitled "Nutrient Profiling Technical Guidance" published by the Department of Health on 1 January 2011' ("the 2011 Technical Guidance").

4.18 Reflecting the above, Ofcom proposed including the following definitions in the BCAP Code:

‘A food or drink product is “less healthy” if:

- it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X]²²; and
- it is an HFSS product.’

“HFSS products” are those food or drink products that are assessed as High in Fat, Salt or Sugar in accordance with the Department of Health and Social Care’s nutrient profiling model. Information on the nutrient profiling model is available on the Department of Health and Social Care’s website [here](#).’

4.19 Ofcom’s proposed amendments to the Broadcasting Code included the same definition of a less healthy food or drink product, and the following slightly shorter version of the definition of an HFSS product: ‘as defined by the nutrient profiling scheme which was devised by the UK’s Food Standards Agency for use by Ofcom’.

What respondents said

4.20 An **individual** respondent disputed the model by which food and drink products are classified as ‘less healthy’ or ‘HFSS’. This individual believed that the model should exclude ‘natural foods’ (for example, meat, fish and dairy), and focus exclusively on processed foods. Another **individual** respondent emphasised that the restrictions should apply to a wide range of food and drink products, which the respondent was concerned had negative health impacts (for example, soft drinks, chocolate and coffee).

4.21 **Sustain** proposed that, where nutritional information for food and drink products is not available, DHSC’s ‘Composition of food integrated dataset’ could be used instead of the NPM.

4.22 The **Advertising Association, BRC, Coca-Cola GB, FDF, Ferrero UK, IPA, ISBA, ITV, Kellogg Marketing and Sales UK** and two **industry respondents** said that the definitions of ‘less healthy’ and ‘HFSS’ to be inserted in the codes should make clear that they rely on the version of the NPM developed in 2004/5 (“the 2004/5 NPM”). One respondent pointed out that the 2003 Act stipulates that the ‘relevant technical guidance’ is the 2011 Technical Guidance, which applies to the 2004/5 NPM.

4.23 The **Advertising Association** also requested clarity on whether the current (and any future) version of the NPM will only apply in relation to the new restrictions on advertising of less healthy products, or in relation to the existing restrictions on advertising of HFSS products as well. It added that guidance would need to be updated in the event a new version of the NPM was adopted.

²² See footnote 18.

- 4.24 **FDF, Kellogg Marketing and Sales UK** and an **industry respondent** asked Ofcom to urge the Government to publish the outcome of a review of the 2011 Technical Guidance, or otherwise ensure that this document is up-to-date.

Ofcom's response

- 4.25 In terms of the appropriateness of the model, the NPM was originally devised for by the Food Standards Agency for use by Ofcom, and is currently owned by DHSC. Ofcom defers to the specialist expertise of those responsible for developing, reviewing and revising the model. We note that 'less healthy' food and drink products are defined in the legislation in part by reference to a description to be specified in the Regulations. The Government's draft regulations, which it has consulted on, contain details of categories of food and drink that will be in scope of the new restrictions, including many of the kinds of foods that were a concern for the **individual** respondents.
- 4.26 Ofcom notes **Sustain's** suggestion regarding situations where nutritional information is not available. Under the 2003 Act, broadcasters are responsible for ensuring compliance with the TV watershed restriction, which includes determining whether an advertised product is in scope of that restriction. In this regard, Ofcom understands that the pre-clearance system for TV advertising, operated by Clearcast on behalf of broadcasters, requires that nutritional information, allowing the advertised product to be classified as 'HFSS' or 'non-HFSS' (and, by extension, 'less healthy'), be provided for food and drink adverts.
- 4.27 Ofcom acknowledges the responses of many food and drink manufacturers and trade bodies in relation to the 2004/5 NPM and the 2011 Technical Guidance. The proposed definitions of 'less healthy' and 'HFSS' food and drink products, as consulted on, included a reference and hyperlink to the 2011 Technical Guidance, which applies to the 2004/5 NPM. As a result of these comments, Ofcom will make more explicit in the codes that whether a product is 'HFSS' and/or 'less healthy' is determined by reference to the 2011 Technical Guidance, as this is specified in the relevant section of the 2003 Act. The legislation does not explicitly refer to the 2004/5 NPM, but in our view it is sufficiently clear from the reference to the 2011 Technical Guidance that the 2004/5 NPM applies.
- 4.28 In response to the **Advertising Association's** request for clarification on the status of the 2004/5 NPM with regard to the existing restrictions on HFSS products and the new restrictions on less healthy products, Ofcom can confirm that the 2004/5 NPM is the model currently in use for the existing restrictions; and, as stated above, the 2003 Act defines 'less healthy' food and drink products in part by reference to the 2011 Technical Guidance, which applies to the 2004/5 NPM.
- 4.29 For the avoidance of doubt, when Ofcom introduced the existing restrictions on HFSS products from 2007 to 2009 it decided to adopt the 2004/5 NPM devised by the Food Standards Agency. The new restrictions on less healthy products have been introduced via

legislation. This specifies that products subject to the restrictions are determined by using the technical guidance that applies to the 2004/5 NPM.²³

- 4.30 As stated above, the NPM is currently owned by DHSC, and questions about its maintenance are a matter for Government. In any future decision about the appropriate model to use in relation to the existing restrictions, Ofcom would be mindful of the desirability of ensuring consistency and coherence with other restrictions on food and drink advertising.

Exemptions

- 4.31 The 2003 Act exempts from the restrictions advertising by a ‘food or drink SME’. A ‘food or drink SME’ is defined in the legislation as ‘a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations’. The Government’s proposed regulations contain further information about the scope of this exemption. They also contain details of other exemptions, which apply to the online prohibition.
- 4.32 Ofcom consulted on including the following reference to the SME exemption in the BCAP Code: ‘Rule X.X [the proposed rule] does not apply to ads for or on behalf of a food or drink SME within the meaning given by the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X].’
- 4.33 In relation to the Broadcasting Code, Ofcom consulted on adding the following note to the proposed Rule 9.17A: ‘Rule 9.17A does not apply to sponsorship by or on behalf of a of a food or drink SME, within the meaning given by the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X].’

What respondents said

- 4.34 **ISBA** argued that the codes should further define ‘food or drink SME’, by including information about the scope of this exemption to be contained in the forthcoming Regulations.
- 4.35 **Coca-Cola GB, FDF, IPA** and **ISBA** said that the codes should explicitly refer to the other exemptions detailed in legislation and the forthcoming Regulations.

Ofcom’s response

- 4.36 In Ofcom’s view, the text as consulted on appropriately reflects the legislative requirements. As stated above, the 2003 Act stipulates that food and drink SMEs are exempt from the TV watershed restriction and that ‘food or drink SME’ is defined by reference to the forthcoming Regulations. Any other exemptions applying to the TV watershed restriction are to be set out in the Regulations. Ofcom considers that provisions set out in the primary legislation should be reflected on the face of the codes, while further

²³ Communications Act 2003, s.321A(4)

detail to be set out in the Regulations should be clearly signposted. This is the approach we adopted in the text as consulted on.

Brand advertising

What respondents said

- 4.37 **Coca-Cola GB, FDF, Ferrero UK, IPA, ISBA, Kellogg Marketing and Sales UK and PepsiCo UK** argued that the codes should make explicit that brand advertising is exempt.
- 4.38 **Sustain** said that brand advertising should be restricted.
- 4.39 On the assumption that the existing BCAP guidance on brand advertising in relation to the current HFSS advertising restrictions would also apply to less healthy products, **Kellogg Marketing and Sales UK** and another **industry respondent** said that the proposed rules contradicted the Government's intention for brand advertising to be exempt from the new restrictions. They were concerned that this would disincentivise reformulation of products. **Bite Back 2030, British Heart Foundation, Sustain** and another respondent also commented on the existing approach to brand advertising for HFSS products, claiming that it was not practical to approach this issue on a case-by-case basis, and that it should not be left to the regulator to determine. **Bite Back 2030, British Heart Foundation, Sustain** and another respondent questioned whether it was appropriate for an industry-funded self-regulator to make such judgements.

Ofcom's response

- 4.40 As stated above, Ofcom's approach to amending the BCAP Code and the Broadcasting Code is intended to ensure that the rules (and associated definitions) reflect appropriately the legislative requirements. The 2003 Act does not specify that brand advertising is exempt from the new restrictions.
- 4.41 As confirmed in the consultation, BCAP will produce guidance on the application of the TV watershed restriction. We expect that this guidance will address the meaning of an 'identifiable' product, including in relation to brand references. The guidance will be developed in consultation with industry and other interested stakeholders, as well as Ofcom and Government (see paragraphs 4.48 to 4.54 below).
- 4.42 Some respondents were mistaken in their assumption that the approach to brand advertising under the current HFSS restrictions will apply also to the new TV watershed restriction for less healthy products. The new guidance will be based on the restrictions set out in 2003 Act that apply to less healthy products, which include the qualification that a product must be 'identifiable', in the sense that 'persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product'.
- 4.43 Ofcom has considered the independence of the ASA as part of the process for establishing co-regulatory arrangements, including most recently in relation to the online prohibition

for advertising of less healthy food and drink products (see section 5). We are confident that, in its decision-making, the ASA is sufficiently independent of industry.

Guidance

4.44 In its consultation, Ofcom confirmed that BCAP will produce guidance on the TV watershed restriction. In addition, the ASA will produce the guidance required by the 2003 Act in relation to on-demand advertising. Finally, Ofcom's proposal to designate the ASA as co-regulator for the online prohibition, which we have decided to proceed with (see Section 5 below), included giving the ASA responsibility for producing guidance on the online prohibition.

What respondents said

4.45 **ISBA** and two **industry respondents** emphasised that, given the advance planning required for advertising campaigns, guidance needed to be delivered at least a year ahead of the restrictions taking effect from October 2025.

4.46 **FDF** and **Ferrero UK** also said that timely guidance was required on what was in scope of the restrictions (**Ferrero UK** specified that this guidance should be authored by Government and Ofcom).

4.47 The **Advertising Association** proposed that the meaning of 'identifiable' should be further defined in the codes, by including an explicit reference to the guidance on this point. **ITV** also said that the guidance should be referenced in the codes.

Ofcom's response

4.48 Ofcom recognises that industry should be given sufficient time to prepare for the new restrictions, which take effect from October 2025. We confirmed in our consultation that the existing co-regulatory arrangements for TV advertising extend to the new restrictions for advertising in these media, and said that BCAP would produce guidance on the TV watershed restriction. We also confirmed that the ASA would be responsible for producing guidance in relation to ODPS. This has enabled BCAP/ASA to move forward with preparatory work in relation to these aspects of the guidance. Following the publication of this statement, which confirms our designation of the ASA as a co-regulator for the online prohibition (see Section 5), the ASA can now proceed with developing guidance in relation to the online prohibition as well, to be delivered in a timely fashion.

4.49 We expect this guidance to cover, among other issues, the scope and application of the rules, and the meaning of 'identifiable'. Ofcom considers that the frontline regulator, responsible for day-to-day regulation in relation to the restrictions, is best placed to produce the guidance. BCAP also has experience of producing guidance on the existing HFSS restrictions.

4.50 Ofcom confirmed in our consultation that BCAP will be responsible for inserting the proposed new rule and associated definitions into the BCAP Code, and that it will consider any consequential amendments that may be needed, which will be subject to consultation,

as appropriate. Following Ofcom's consultation, BCAP proposed including a link to the guidance alongside the new rule to be inserted into the BCAP Code. Ofcom is content for the BCAP Code to include an explicit reference to the guidance (see paragraphs 4.56 to 4.58 below).

- 4.51 In relation to the new rule to be inserted into the Broadcasting Code, Ofcom is responsible for enforcement and will have regard to the guidance produced by BCAP.

Comments specific to the BCAP Code

What respondents said

- 4.52 **BCAP** suggested a number of minor changes to the proposed text to be inserted into the BCAP Code. These non-substantive amendments concerned the definitions associated with the rule, and included:

- placing double quotation marks around 'HFSS products' and 'less healthy' (rather than single quotation marks, as consulted on);
- not capitalising 'High in Fat, Salt or Sugar';
- adding a short-form reference to the Regulations;
- using the term 'advertisements' (rather than 'ads', as consulted on); and
- clarifying that 'SME' means 'small or medium enterprise'.

- 4.53 **BCAP** also proposed including a hyperlink to the guidance it will produce on the TV watershed restriction.

Ofcom's response

- 4.54 As the author of the BCAP Code, **BCAP** is well-placed to advise on such stylistic matters. Ofcom is content for the BCAP Code to reflect the non-substantive amendments proposed by **BCAP**, and to include a link to the guidance, as suggested.

Comments specific to the Broadcasting Code

What respondents said

- 4.55 **Sky** questioned whether the proposed rule prohibiting sponsorship by less healthy products to be inserted into the Broadcasting Code was necessary. Rule 9.17 of the Code already states that sponsorship 'must comply with both the content and scheduling rules that apply to television advertising'. As the BCAP Code will reflect the TV watershed restriction for advertising, **Sky** argued that the same rule would apply to sponsorship as well, without the need for a separate restriction in the Broadcasting Code. It was concerned that specifically reflecting the restriction on sponsorship by less healthy products in the Broadcasting Code could cause confusion, by undermining the perceived need for compliance with other scheduling requirements which are not reflected in this

way (for example, applying to alcohol and gambling products). Therefore, **Sky** requested that Ofcom clarify its approach in this regard.

Ofcom's response

4.56 Ofcom considers that a dedicated rule is justified in this case, because it will reflect the specific restriction on sponsorship by less healthy food or drink products that is set out in section 321A of the 2003 Act. Other rules contained in the BCAP Code which apply to sponsorship via Rule 9.17 of the Broadcasting Code (for example, applying to alcohol and gambling products) do not reflect specific legislative provisions in this way.

Ofcom's conclusions

4.57 In summary, Ofcom will make the following changes to the text as consulted on:

- including an explicit reference to the 2011 Technical Guidance, in relation to the definitions of 'less healthy' and 'HFSS' products, to be inserted into the BCAP Code and the Broadcasting Code;
- including a reference (and hyperlink) to the guidance accompanying the rule in the BCAP Code; and
- incorporating non-substantive stylistic amendments proposed by BCAP.

4.58 The final versions of the rules and associated definitions are set out at Annex 2.

4.59 Ofcom will direct BCAP to amend the BCAP Code accordingly. The new rule will be inserted into Section 32 of the BCAP, taking effect in accordance with section 321A(2) of the 2003 Act (as amended) from 1 October 2025. In addition, the associated definitions will also need to be inserted into Section 32 of the BCAP Code.²⁴

4.60 The BCAP Code includes existing rules on HFSS advertising on TV that cover content and scheduling.²⁵ The new rule setting out the TV watershed restriction will apply in addition to these existing rules. BCAP will be responsible for inserting the new rule and associated definitions into the BCAP Code. It will consider any consequential amendments that may be needed to ensure the interoperability of the new rule with the existing restrictions (e.g. to provide clarity on which product advertisements are subject to which restrictions). It will consult on such amendments separately, as appropriate. BCAP will also produce guidance to assist stakeholders in complying with the new rule.

²⁴ The definition of 'HFSS products' currently appears in Section 32 of the BCAP Code, in relation to the existing HFSS restrictions. We included it in the proposed definitions that were subject to consultation to provide context.

²⁵ Section 13 of the BCAP Code sets out requirements for the content of food and soft drink advertising and Section 32 of the BCAP Code sets out the rules on scheduling of broadcast advertising. In summary, the existing rules prohibit HFSS advertising from appearing around programmes that appeal to children and cover a wider range of HFSS products than those that will be included under the TV watershed restriction.

4.61 The new rule and the associated definition will be added to the sponsorship rules in Section Nine of the Broadcasting Code, taking effect in accordance with section 321A(2) (as amended) of the 2003 Act from 1 October 2025.

5. Designating a co-regulator for the online restrictions

5.1 Ofcom consulted on a proposal to designate the ASA as a co-regulator in relation to online advertising for less healthy food and drink products. The consultation also invited respondents to comment on Ofcom’s proposed approach to enforcement in this area. This section summarises the consultation responses and sets out Ofcom’s response and conclusions.

New statutory requirements

5.2 The Health and Care Act 2022 introduced a new statutory framework under Part 4C of the 2003 Act in relation to online advertising. Under this framework, paid-for advertisements for identifiable less healthy food and drink products are prohibited from being placed on the internet (“the online prohibition”). In accordance with section 368Z(14) (as amended) of the 2003 Act, the online prohibition takes effect from 1 October 2025.

5.3 The following are exempt from the online prohibition:

- a) advertisements placed by a food or drink SME;
- b) advertisements which are directed solely at persons who are engaged in or employed by a business which involves or is associated with the manufacture or sale of food or drink;
- c) advertisements included in Ofcom-regulated ODPS (to which the ODPS provisions apply – see Section 4);
- d) advertisements included in services connected to regulated radio services; and
- e) advertisements which are not intended to be accessed principally by persons in any part of the UK.

Further details of these exemptions will be set out in the forthcoming Regulations. Additional information about the exemptions listed above can be found in the Government consultation on the draft regulations.²⁶

5.4 The 2003 Act appoints Ofcom as the ‘appropriate regulatory authority’ for the online advertising restrictions, with a range of powers including in relation to information-gathering and enforcement.

Designation of the ASA

5.5 Under the 2003 Act, Ofcom may designate another body, to the extent provided by the designation, to be the appropriate regulatory authority for the purposes of the online

²⁶ [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation.](#)

advertising provisions. If no body is designated, Ofcom is the appropriate regulatory body for that purpose. Additionally, where a body is designated for a purpose, Ofcom may act as the appropriate regulatory authority concurrently with or in place of that designated body.

5.6 The 2021 Government response to its consultation on introducing restrictions on online advertising for HFSS products noted the ASA's existing role regulating online advertising under the self-regulatory system.²⁷ In addition, the ASA already acts as the frontline regulator for broadcast, on-demand and VSP advertising, in a co-regulatory relationship with Ofcom.

5.7 In view of the ASA's track record and experience under the existing self- and co-regulatory arrangements, Ofcom proposed in its consultation to designate the ASA as a co-regulator for specific functions in relation to the prohibition on online advertising for less healthy food and drink products.

Ofcom's assessment of the ASA against the criteria for designating a co-regulator

5.8 Section 5 of the consultation set out the rationale for this proposal, including Ofcom's assessment of the ASA against the relevant statutory criteria for designating a co-regulator and Ofcom's principles for analysing self- and co-regulation:

- Section 368Z19(9) of the 2003 Act requires Ofcom to satisfy itself that any body to which we propose to designate regulatory functions meets a series of statutory criteria.
- Ofcom's principles for analysing self- and co-regulation require us to set a clear framework under which we can consider if and when it may be appropriate to operate a co-regulatory system.²⁸

5.9 These criteria are summarised below:

²⁷ [Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response](#)

²⁸ These principles were last referred to in Ofcom's [Proposals for the regulation of advertising on video-sharing platforms - Consultation](#), May 2021.

Statutory Criteria
(s.368Z19(9))

Ofcom may not designate a body unless, as respects that designation, they are satisfied that the body:

- is a fit and proper body to be designated;
- has consented to being designated;
- has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority (taking into account any financial assistance that Ofcom intends to provide);
- is sufficiently independent of persons who carry on business that involves or is associated with the manufacture or sale of less healthy food or drink products; and
- will, in performing any function to which the designation relates, have regard in all cases—
 - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances. [See note]

Ofcom Principles for
Analysing Self- and
Co-regulation

An effective regulatory body must have

- independent governance and decision making;
- clear public accountability;
- clear regulatory objectives set out in a code;
- clear and transparent processes, which are followed;
- workable membership incentives (where relevant) and/or obligations for or on those it regulates;
- secure and sufficiently independent funding and budget control;
- accessibility to those seeking redress;
- genuine powers of investigation; and
- effective powers of enforcement and sanction.

Note: Ofcom considers the following matter mentioned in section 3(4) of the 2003 Act to be a relevant consideration in the context of designating the regulation of online advertising for less healthy food and drink products: ‘...(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation...’

- 5.10 On the basis of a careful assessment against the relevant criteria, Ofcom provisionally considered that the ASA would satisfy Ofcom’s criteria for designating it as a co-regulator for the online prohibition. We noted that our experience of working with the ASA in relation to broadcast, on-demand and more recently VSP advertising provided us with confidence that an effective partnership could be developed. We also noted the ASA’s role administering the self-regulatory system for online advertising, and considered that there was a benefit in having a single point of contact for consumers for advertising issues across all media.
- 5.11 The proposal set out in the consultation reflected the existing arrangements Ofcom has put in place for co-regulating ODPS and VSP advertising, where the ASA acts as the frontline regulator, with Ofcom providing a statutory backstop. It is based on a model which we know works well, and which will allow for the greatest possible consistency and continuity with the wider system for regulating broadcast and non-broadcast advertising, on a

statutory and self-regulatory basis. This will help to ensure that the overall regulatory framework for advertising is cohesive.

- 5.12 The consultation asked for respondents' views on the proposal, including any alternative approaches to regulating online advertising for less healthy food and drink products under the 2003 Act.

Consultation responses

Consultation Question 3:

- a) Do you agree with Ofcom's proposal to designate the ASA as a co-regulator for the online prohibition on advertising for less healthy food and drink products?
- b) If you do not agree with the proposal to designate the ASA as a co-regulator, please explain why. If appropriate, please include any alternative approaches to regulating online advertising for less healthy food and drink products under the Communications Act 2003, explaining why such an approach would better fulfil the statutory requirements.

- 5.13 Almost all respondents who answered this question supported Ofcom's proposal to designate the ASA as a co-regulator. No respondents proposed a different body that should be designated instead, or supported Ofcom retaining full responsibility for enforcing the online prohibition.
- 5.14 Some respondents emphasised that they were strongly in favour of the ASA taking on this role. Others supported the proposal but with reservations, or on a short-term basis, and proposed additional safeguards and improvements to the ASA's processes.

Comments on designating the ASA

What respondents said

- 5.15 The **Advertising Association, BRC, Coca-Cola GB, Derby City Council Trading Standards, Ferrero UK, FDF, IAB, IPA, ISBA, ITV, Kellogg Marketing and Sales UK, Mars UK, NMA, PepsiCo UK, World Cancer Research Fund** and an **academic** supported the proposal to designate the ASA as a co-regulator for the online prohibition. In particular, the **Advertising Association, ISBA** and **PepsiCo UK** said they strongly supported the proposal.
- 5.16 A number of respondents elaborated on the ASA's track record as an advertising regulator, emphasising its long history (**Advertising Association, FDF**), its reputation globally (**Advertising Association**), its industry knowledge and relationships (**IAB**), and its independent nature (**FDF, Kellogg Marketing and Sales UK**). **Coca-Cola GB** and **ISBA** also said that the ASA commanded the confidence of all parties to the regulatory system.
- 5.17 The **Advertising Association, Coca-Cola GB, Ferrero UK, FDF, IAB, IPA, ISBA, Kellogg Marketing and Sales UK, NMA** and another respondent considered that the ASA has the necessary expertise for this role, pointing to its experience co-regulating broadcast and on-demand advertising with Ofcom (as well as, more recently, VSP advertising), and

administering the self-regulatory system for non-broadcast advertising (including online advertising). Respondents also noted the ASA's experience applying the existing rules on HFSS advertising on TV and online.

- 5.18 **IAB, IPA, ISBA** and **NMA** stressed the importance of regulatory continuity, from the point of view of industry, advertisers and consumers. **IAB** considered that Ofcom's proposal to base the co-regulatory model on the existing co-regulation of ODPS and VSP advertising would help to ensure regulatory continuity.
- 5.19 Many respondents emphasised the advantages of maintaining a 'one-stop shop' for advertising complaints. The **Advertising Association, Coca-Cola GB, FDF, ISBA, NMA** and an **industry respondent** warned against regulatory fragmentation. They argued that not designating the ASA as a co-regulator for the online prohibition would create confusion and undermine the existing model of advertising regulation.
- 5.20 An **academic** who supported the proposal to designate the ASA as a co-regulator for the online prohibition reported anecdotally on focus groups with young people and their parents, where some participants had suggested that there should be a dedicated body to regulate the internet, including targeted advertisements for less healthy food and drink products.
- 5.21 An **individual** respondent acknowledged the ASA's track record in regulating advertising, but suggested that the process for determining whether or not a food or drink product is classified as 'less healthy' could involve the organisation Public Health Collaboration.
- 5.22 **Bite Back 2030, British Heart Foundation** and another respondent supported the proposal to designate the ASA as a co-regulator for the online prohibition 'in the short term' (**BRC** suggested that Ofcom should convene a forum of experts, to meet at least twice a year, to review compliance and processes, and update guidance as required). These respondents and others expressed reservations about the proposal, and suggested a range of additional safeguards and potential improvements to the ASA's processes (these comments are addressed below).

Ofcom's response

- 5.23 Ofcom notes the high level of support for this proposal, including comments that the ASA is well-placed to take on the role of co-regulator for the online prohibition, given its experience and expertise as an advertising regulator, including applying the existing restrictions on HFSS advertising. We also note that respondents agreed that there is benefit in maintaining a single point of contact for consumers for advertising issues across all media.
- 5.24 The designation of the ASA as a co-regulator will include details of a timetable for reviewing the designation. As the backstop regulator, Ofcom will carry out a review according to that timetable, publishing the outcome.
- 5.25 The additional safeguards and potential improvements to the ASA's processes proposed by respondents who expressed reservations about the proposal are considered in the sections below.

Proactive monitoring

What respondents said

- 5.26 Some respondents were concerned that the ASA system is too reactive, and overly reliant on complaints to highlight potential non-compliance. **Bite Back 2030, British Heart Foundation, World Cancer Research Fund** and another respondent suggested that the ASA should undertake regular proactive monitoring to address this issue.

Ofcom's response

- 5.27 Based on our assessment of the ASA against the relevant criteria for designating a co-regulator, and taking into account its experience regulating advertising (including online advertising), Ofcom is confident that the ASA has appropriate complaints-handling procedures in place, and operates appropriate enforcement measures.
- 5.28 In recent years, the ASA has increasingly undertaken monitoring (for example, using avatar technology) and other proactive measures, especially in relation to online advertising.²⁹ Ofcom considers that innovative approaches like these, designed to supplement the intelligence received from complaints, are helpful in meeting the specific challenges of regulating online advertising.

Reporting obligations

- 5.29 Ofcom's assessment of the ASA against the relevant criteria for designating a co-regulator considered that the ASA satisfied the criterion of clear public accountability, taking into account its current reporting on its regulation of broadcast, ODPS and VSP advertising (as well as advertising in other media, including online, on a self-regulatory basis). Its annual statement also includes an evaluation of its performance under key performance indicators ("KPIs"), such as the number of complaints received and resolved.
- 5.30 The proposal for designating the ASA as a co-regulator stipulated that the ASA will report, regularly and publicly, details of investigations and breaches of the online prohibition. It will also comply with KPIs for its complaints handling arrangements.

What respondents said

- 5.31 Some respondents called for the regulators to report publicly on complaints data and compliance records. **Bite Back 2030, British Heart Foundation, Sustain, World Cancer Research Fund** and another respondent said this reporting should include details of cases resolved by the ASA. They also called for Ofcom to have oversight of all complaints submitted to the ASA, and for the ASA to report all breaches to Ofcom and Government. **British Heart Foundation** and **World Cancer Research Fund** added that Ofcom should have a role in deciding which cases are referred to it by the ASA. **Bite Back 2030, British Heart Foundation, Sustain, World Cancer Research Fund** and another respondent further

²⁹ <https://www.asa.org.uk/news/innovate-to-regulate-policing-ads-online.html>

suggested that the ASA should report on emerging online platforms that might be exempt from the restrictions. In addition, respondents argued that Ofcom should report publicly on complaints, non-compliance and emerging issues, and that this reporting should be included in its Annual Report, laid before Parliament.

Ofcom's response

- 5.32 As noted above, the ASA currently publishes details of all its investigations, as well as an annual evaluation of its performance against defined KPIs. It will operate a similar reporting system in relation to the online prohibition. In addition, it will provide information to Ofcom as required under the terms of the designation (as it already does in relation to broadcast and on-demand advertising). Ofcom is satisfied that this will ensure sufficient transparency and accountability.
- 5.33 The online prohibition, as set out in the 2003 Act, prohibits a person from paying for advertisements for less healthy food and drink products to be placed online. This restriction is not platform-specific.

Powers to impose sanctions

- 5.34 In the consultation, Ofcom provisionally concluded that the ASA, under the proposal for co-regulating online advertising for less healthy food and drink products, satisfied the criteria of genuine powers of investigation and effective powers of enforcement and sanction. We noted its established approaches to compliance including prohibiting adverts and particular advertising techniques.³⁰
- 5.35 Under the co-regulatory arrangements, Ofcom will retain powers to conduct investigations and impose sanctions on non-compliant advertisers, as set out in the 2003 Act.

What respondents said

- 5.36 The **British Heart Foundation, Sustain, World Cancer Research Fund** and another respondent said that the ASA should have powers to impose financial sanctions on non-compliant advertisers, with limited scope to resolve cases informally, especially for repeat breaches.

Ofcom's response

- 5.37 Under the co-regulatory arrangements proposed in Ofcom's consultation, the ASA will have the ability to find an advertiser in breach of the relevant rule(s). An advertiser who has been found to contravene the online prohibition will be required to cooperate fully and promptly with the ASA in order to secure compliance.
- 5.38 As stated above, Ofcom is confident that the ASA operates appropriate enforcement measures. In any case, Ofcom will retain powers to carry out its own investigations, issue

³⁰ <https://www.asa.org.uk/codes-and-rulings/sanctions.html>

enforcement notifications, and impose financial penalties (taking into account the repeated nature of breaches, as appropriate).

Appeals process

5.39 Ofcom's assessment of the ASA's independence as a self-regulator included consideration of its governance structure and its funding arrangements. We also took into account the ASA's Independent Review process.

What respondents said

5.40 **BRC** said that the ASA's appeals process should be strengthened, in particular by permitting companies to argue their case in person.

Ofcom's response

5.41 Based on our assessment of the ASA against the relevant criteria for designating a co-regulator, Ofcom is satisfied that the ASA's processes for reviewing its decisions are sufficient.

5.42 The ASA has an Independent Review process where the ASA Council can be asked to reconsider a ruling, which is open to advertisers, complainants, broadcasters, ODPS services and VSP providers. The Independent Reviewer is not part of the ASA Executive or the ASA Council and, while they are entitled to observe Council discussions, they cannot partake in these discussions or discuss cases with the Council or Executive that have not been referred for review.

5.43 On the specific point raised by **BRC**, Ofcom does not consider it appropriate for us to mandate a particular format for hearings under the ASA's appeals process.

Attention to costs

5.44 The statutory designation criteria require that a designated body has access to sufficient financial resources. They also specifically provide for assessment of the potential co-regulator's access to financial resources to take into account financial assistance that may be provided to that body by Ofcom under section 368Z19(4) of the 2003 Act.

5.45 In the consultation, Ofcom considered the ASA's existing funding model, which is an arm's-length arrangement based primarily on a levy on advertising and direct marketing expenditure collected by the Advertising Standards Board of Finance ("ASBOF"). We provisionally concluded that the existing model may be sufficient to cover additional work associated with the functions we are proposing to designate to the ASA, given that it currently regulates online advertising on a self-regulatory basis. However, we also recognised that there may be costs associated with the new co-regulatory arrangements. Therefore, should it be agreed with ASBOF, Ofcom may provide additional funding as appropriate to enable the ASA to perform effectively any functions we propose to designate.

What respondents said

5.46 An **industry respondent** said that more detailed analysis of the ASA's likely costs in raising awareness about and enforcing the online prohibition was required. It considered that the incremental costs of administering a total ban in relation to less healthy products, as opposed to the more targeted restrictions that already apply to HFSS products, could be significant.

Ofcom's response

5.47 In our assessment of the ASA against the relevant criteria for designating a co-regulator, Ofcom took into account the ASA's funding system. We noted that it already covers the ASA's self-regulatory activity in relation to online advertising for HFSS products, potentially reducing incremental costs. We therefore considered that the existing funding model may be sufficient to cover additional work associated with the functions we proposed to designate to the ASA.

5.48 However, the Act also provides for Ofcom to provide financial assistance to a designated body, and the statutory designation criteria allow for us to take this into account when assessing that body's access to financial resources. On this basis, Ofcom is confident that the ASA has access to sufficient financial resources to fulfil the functions designated to it.

5.49 The ASA will report regularly on its performance, including its financial position. As part of our oversight of the co-regulatory regime, Ofcom will continue to monitor the costs associated with enforcing the statutory restrictions.

Ofcom's conclusions

5.50 Having carefully considered the consultation responses, Ofcom has decided to designate the ASA as a co-regulator for the online prohibition, on the basis consulted on.

5.51 Full details of the co-regulatory arrangements will be set out in the less healthy food and drink designation, which will be published on our website. In summary, the ASA will:

- ensure that the relevant requirements of the 2003 Act are reflected appropriately in a code for the purpose of securing that advertisers comply with the online prohibition;
- secure that advertisers comply with the online prohibition;
- handle complaints, including from the public and industry, about online advertising for less healthy food and drink products;
- where there appears to be a breach of the relevant requirements, record a breach against the advertiser with reference to the relevant rule(s), and require the advertiser to co-operate fully and promptly to secure compliance with that decision; and
- draw up and, from time to time, review and revise guidance setting out their intentions concerning the exercise of functions designated by Ofcom to the ASA in accordance with

section 368Z19 of the 2003 Act, and consult the Secretary of State before drawing up or revising this guidance.

- 5.52 Ofcom retains statutory backstop powers. Where there has been a failure by an advertiser to co-operate with the ASA and/or comply with its decisions, the ASA can refer the matter to Ofcom to consider whether to exercise our statutory powers. These include Ofcom's powers to investigate and take enforcement action against an advertiser for a breach of a relevant requirement, such as giving an enforcement notification or imposing a statutory sanction.³¹
- 5.53 In all cases, Ofcom is able to exercise its powers under Part 4C of the 2003 Act concurrently with or in place of the ASA. Ofcom retains formal information-gathering powers (as set out in section 368Z17 of the 2003 Act) and the power to take enforcement action (under sections 368Z15 and 368Z16 of the 2003 Act).

³¹ In accordance with s.368Z16 of the 2003 Act.

6. Enforcement of online restrictions

6.1 In Section 6 of the consultation, Ofcom set out our proposed approach to enforcing the new prohibition on advertising for less healthy food and drink products online, in circumstances in which intervention by Ofcom is considered appropriate (e.g. in the case of an ASA referral). The proposal was that Ofcom would follow its published Regulatory Enforcement Guidelines for investigations (the “Guidelines”).³² We invited respondents to comment on this approach.

What respondents said

6.2 **IPA** agreed with Ofcom’s expectation, set out in the consultation, that the ASA will be able to achieve broad sector compliance through its day-to-day regulatory work. In the event that intervention by Ofcom was necessary, **IPA** was content that Ofcom should follow its existing Guidelines, noting our intention to use our enforcement tools proportionately, having regard to our statutory duties, and only where we consider the evidence shows their use is justified.

6.3 The **Advertising Association** considered that the approach set out by Ofcom appeared sensible, proportionate, and aligned with existing best practice.

6.4 **IAB** said it was content with Ofcom’s approach to enforcing the online prohibition.

6.5 **World Cancer Research Fund** argued that a strict enforcement regime is required, including: regular proactive monitoring; financial penalties for repeated non-compliance; detailed definitions of what constitutes a ‘repeated’ or ‘severe’ breach; full transparency of the details of complaints and non-compliance; and a process for reporting all breaches to the Government.

6.6 **Bite Back 2030**, **Sustain** and another respondent argued that there should be a level playing field for consequences of non-compliance with the restrictions on TV and online.

Ofcom’s response

6.7 Ofcom notes the responses supporting our approach to enforcing the online prohibition.

6.8 Most of the points raised by **World Cancer Research Fund** in relation to enforcement have already been addressed in Section 5 above, which discusses proactive monitoring (see paragraphs 5.25 to 5.27), powers to impose sanctions (see paragraphs 5.32 to 5.36), and reporting obligations (see paragraphs 5.28 to 5.31). In response to the point about the definitions of what constitutes a ‘repeated’ or ‘severe’ breach, Ofcom will assess each case on its merits, applying the criteria in the Guidelines to determine the nature and extent of a breach.

³² https://www.ofcom.org.uk/_data/assets/pdf_file/0029/249095/enforcement-guidelines.pdf

- 6.9 In response to **Bite Back 2030, Sustain** and another respondent's call for a level playing field for consequences of non-compliance, the 2003 Act introduces different restrictions on advertising and sponsorship for less healthy food or drink products depending on the media in which that advertising appears. These restrictions are associated with different enforcement regimes. The role of the statutory regulator is to operate these regimes using the powers that apply in each case, as they are set out in legislation.
- 6.10 Nevertheless, Ofcom recognises the importance of a consistent approach. In our consultation, we confirmed that the existing co-regulatory arrangements for broadcast and on-demand advertising apply to the new restrictions on TV and ODPS. Our proposal to co-regulate in relation to the online prohibition was based on the existing co-regulatory arrangements. Designating the ASA as a co-regulator will ensure that a similar co-regulatory structure, and associated processes and procedures, is in place across different media. Ofcom acting as a statutory backstop in relation to the restrictions on TV, ODPS and online will further ensure a consistent approach. In all cases, we will use our enforcement tools proportionately, having regard to our statutory duties, and only where we consider the evidence shows their use is justified.
- 6.11 In conclusion, Ofcom will proceed with its plan to follow our published Guidelines in relation to enforcing the online prohibition.

7. Impact assessment

- 7.1 In Section 7 of the consultation, Ofcom set out our assessment of the impact of our proposed approach to implementing the new restrictions on advertising and sponsorship for these products on TV, ODPS and online. We invited respondents to comment on this impact assessment.

What respondents said

- 7.2 The **Advertising Association** and **IPA** agreed with Ofcom's proposed approach of co-regulating with the ASA, and did not object to our assessment of the impact of this approach.
- 7.3 Many respondents commented on the underlying policy internet and potential impacts on public health and affected industries, rather than the impact of the proposed approach to implementing the restrictions. In particular, the **Advertising Association** and **IPA** both disagreed with the impact assessment conducted by Government during the formulation of its policy and did not believe that the restrictions were justified.
- 7.4 **FDF**, **Ferrero UK** and **Kellogg Marketing and Sales UK** argued that the restrictions should have a time-limit (for example, within five years of implementation), at which point they should be repealed unless they can be shown to have been successful in reducing obesity.
- 7.5 The **British Heart Foundation** called for regular reviews of the impact of the restrictions. It was also concerned that key definitions should remain up-to-date.

Ofcom's response

- 7.6 Ofcom notes the comments in relation to our assessment of the impact of our approach to implementing the restrictions. In conclusion, the consultation responses have not given us cause to revise this impact assessment, which is included for reference at Annex 4.
- 7.7 The potential impacts of the restrictions themselves were addressed in the Government's impact assessment ahead of the introduction of statutory restrictions. It is not Ofcom's role to comment on this process.
- 7.8 The new restrictions on less healthy food or drink products, as set out in the 2003 Act, are not time-limited. Any changes to the legislation are a matter for Government and Parliament.
- 7.9 The designation of the ASA as a co-regulator will include details of a timetable for reviewing the designation. As the backstop regulator, Ofcom will carry out a review according to that timetable, publishing the outcome.

A1. Extracts from legislation

A1.1 Relevant extracts from the Communications Act 2003, as amended by the Health and Care Act 2022, are set out below.

Communications Act 2003, S. 321A, inserted by Health and Care Act 2022, Sch. 18 para. 1

321A Objectives for advertisements: less healthy food and drink

- (1) OFCOM must set standards by virtue of section 321(1)(b) prohibiting television programme services provided between 5.30 am and 9.00 pm from including advertisements for an identifiable less healthy food or drink product, except as provided for by subsection (3).
- (2) OFCOM must ensure that the prohibition provided for by the first standards set by virtue of subsection (1) takes effect from the beginning of 1 October 2025.
- (3) Standards set by virtue of subsection (1) must exempt from the prohibition imposed by them—
 - (a) advertisements included in television programme services as a result of arrangements made by or on behalf of a person who is, at the time when the arrangements are made, a food or drink SME;
 - (b) advertisements prescribed in any regulations made by the Secretary of State under this paragraph.
- (4) For the purposes of this section—
 - (a) “advertisements” includes advertisements under a sponsorship agreement and anything else which, under a sponsorship agreement, is included in a television programme service, other than in a television programme;
 - (b) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;
 - (c) a food or drink product is “less healthy” if—
 - (i) it falls within a description specified in regulations made by the Secretary of State, and
 - (ii) it is “less healthy” in accordance with the relevant guidance;
 - (d) “the relevant guidance” is the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;
 - (e) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations.
- (5) Regulations under subsection (4)(e) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).
- (6) The Secretary of State may, before the date specified in subsection (2), amend that subsection so as to substitute a later date for the date that is for the time being specified there.
- (7) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.

(8) Before making regulations under subsection (3)(b) or (7), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

Communications Act 2003, S. 368FA, inserted by Health and Care Act 2022, Sch. 18 para. 2

368FA Advertising: less healthy food and drink

(1) From the beginning of 1 October 2025, on-demand programme services must not, between 5.30 am and 9.00 pm, include advertisements for an identifiable less healthy food or drink product.

(2) The prohibition imposed by subsection (1) does not apply in relation to advertisements included in on-demand programme services as a result of arrangements made by or on behalf of a person who is, at the time when the arrangements are made, a food or drink SME.

(3) The Secretary of State may by regulations provide for further exemptions from the prohibition imposed by subsection (1).

(4) For the purposes of this section—

(a) “advertisements” includes advertisements and sponsorship announcements (within the meaning given by section 368G(17)) under a sponsorship agreement;

(b) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;

(c) a food or drink product is “less healthy” if—

(i) it falls within a description specified in regulations made by the Secretary of State, and

(ii) it is “less healthy” in accordance with the relevant guidance;

(d) “the relevant guidance” means the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;

(e) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations.

(5) Regulations under subsection (4)(e) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).

(6) The Secretary of State may, before the date specified in subsection (1), amend that subsection so as to substitute a later date for the date that is for the time being specified there.

(7) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.

(8) Before making regulations under subsection (3) or (7), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

Communications Act 2003, Pt. 4C, inserted by Health and Care Act 2022, Sch. 18 para. 3

Advertising of less healthy food and drink

368Z14 Prohibition of paid-for advertising of less healthy food and drink

- (1) From the beginning of 1 October 2025, a person must not pay for advertisements for an identifiable less healthy food or drink product to be placed on the internet.
- (2) Subsection (1) does not apply where the person paying is, at the time when the payment is made, a food or drink SME.
- (3) Subsection (1) does not apply—
- (a) in relation to advertisements which are directed solely at persons who are engaged in, or employed by, a business which involves or is associated with the manufacture or sale of food or drink,
 - (b) in relation to advertisements included in on-demand programme services (as to which, see section 368FA),
 - (c) in relation to advertisements included in services connected to regulated radio services, or
 - (d) in relation to advertisements which are not intended to be accessed principally by persons in any part of the United Kingdom.
- (4) The Secretary of State may by regulations provide for further exemptions from the prohibition imposed by subsection (1).
- (5) For the purposes of this section—
- (a) paying includes providing any consideration (monetary or non-monetary);
 - (b) “placed” includes continues to be placed;
 - (c) paying for advertisements to be placed on the internet includes paying under a sponsorship agreement as result of which advertisements are placed on the internet;
 - (d) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;
 - (e) a food or drink product is “less healthy” if—
 - (i) it falls within a description specified in regulations made by the Secretary of State, and
 - (ii) it is “less healthy” in accordance with the relevant guidance;
 - (f) “the relevant guidance” is the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;
 - (g) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations;
 - (h) “services connected to regulated radio services” has the meaning given by regulations made by the Secretary of State.

(6) Regulations under subsection (5)(g) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).

(7) The Secretary of State may, before the date specified in subsection (1)—

(a) amend that subsection so as to substitute a later date for the date that is for the time being specified there, and

(b) make corresponding amendments to the references to that date in subsections (11) and (12).

(8) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.

(9) Before making regulations under subsection (4) or (8), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(10) A statutory instrument containing regulations under subsection (8) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(11) A person is to be treated as having contravened subsection (1) if—

(a) at any time on or after 1 August 2021 but before 1 October 2025, the person made a payment for advertisements to be placed on the internet on or after 1 October 2025, and

(b) if the payment had been made on 1 October 2025, the person would have contravened subsection (1).

(12) Subsection (11) does not apply if the person—

(a) has put in place arrangements to ensure that they are entitled to require that the advertisements are not placed on the internet on or after 1 October 2025, and

(b) uses all reasonable endeavours to ensure that the advertisements are not so placed.

368Z15 Enforcement

(1) Where the appropriate regulatory authority determine that a person is contravening or has contravened section 368Z14 they may do one or both of the following—

(a) give the person an enforcement notification;

(b) impose a financial penalty on the person in accordance with section 368Z16.

(2) The appropriate regulatory authority must not make a determination as mentioned in subsection (1) unless—

(a) there are reasonable grounds for believing that a contravention of section 368Z14 is occurring or has occurred, and

(b) they have allowed the person an opportunity to make representations about that apparent contravention.

(3) An enforcement notification is a notification which—

(a) specifies the determination made as mentioned in subsection (1),

(b) imposes requirements on the person to take such steps for complying with section 368Z14 and for remedying the consequences of the contravention as may be specified in the notification,

(c) fixes a reasonable period for the taking of those steps, and

(d) sets out the reasons for the appropriate regulatory authority's decision to give the enforcement notification.

(4) The requirements specified in an enforcement notification may include requirements to do one or more of the following—

(a) instruct or request specified persons to remove specified advertisements from the internet;

(b) arrange for specified advertisements to be modified in specified ways.

(5) A person to whom an enforcement notification is given must comply with it.

(6) The duty under subsection (5) is enforceable in civil proceedings by the appropriate regulatory authority—

(a) for an injunction,

(b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or

(c) for any other appropriate remedy or relief.

(7) If a person to whom an enforcement notification has been given does not comply with it, the appropriate regulatory authority may impose a financial penalty on that person in accordance with section 368Z16.

368Z16 Financial penalties

(1) The amount of a penalty imposed on a person under section 368Z15 is to be such amount not exceeding the maximum penalty as the appropriate regulatory authority determine to be—

(a) appropriate, and

(b) proportionate to the contravention in respect of which it is imposed.

(2) The maximum penalty is—

(a) in a case in which the person carries on a relevant business, an amount not exceeding the greater of—

(i) 5% of the turnover of the person's relevant business for the relevant period, and

(ii) £250,000;

(b) in any other case, £250,000.

(3) For the purposes of this section—

(a) a person's "relevant business" is so much of any business carried on by the person as involves or is associated with the manufacture or sale of less healthy food or drink products;

(b) "relevant period", in relation to a person's relevant business, means—

(i) except in a case falling within sub-paragraph (ii) or (iii), the period of one year ending with the 31 March before the time at which the penalty is imposed;

(ii) in the case of a person who at the time at which the penalty is imposed has been carrying on that business for a period of less than a year, the period, ending with that time, during which the person has been carrying it on;

(iii) in the case of a person who at the time at which the penalty is imposed has ceased to carry on that business, the period of one year ending with the time when the person ceased to carry it on;

(c) the amount of the turnover of a person's relevant business for the relevant period is to be calculated by the appropriate regulatory authority in accordance with the following subparagraphs—

(i) the amount is to be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom;

(ii) the amount is limited to the amounts derived by the person from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover;

(iii) where the person's relevant business consists of two or more undertakings that each prepare accounts, the amount is to be calculated by adding together the turnover of each, save that no account is to be taken of any turnover resulting from the supply of goods or the provision of services between them.

(4) In determining the amount of a penalty under subsection (1) the appropriate regulatory authority must have regard to any statement published by OFCOM under section 392 (guidelines to be followed in determining amount of penalties).

(5) A financial penalty imposed under this section, if not paid within the period fixed by the appropriate regulatory authority, is to be recoverable by the appropriate regulatory authority as a debt due to them from the person obliged to pay it.

(6) Where a financial penalty is imposed under this section in respect of matters appearing to OFCOM to have a connection with Northern Ireland and no connection with the rest of the United Kingdom, the penalty must be paid into the Consolidated Fund of Northern Ireland.

(7) In any other case, a financial penalty imposed under this section is to be paid into the Consolidated Fund of the United Kingdom.

368Z17 Power to demand information

(1) The appropriate regulatory authority may give a person a notice demanding information that the authority require for the purpose of carrying out their functions under this Part.

(2) The notice may relate to any information that the person appears to have or be able to generate.

(3) A notice under this section must—

(a) describe the required information,

(b) fix a reasonable period within which the information is to be provided, and

(c) set out the appropriate regulatory authority's reasons for requiring it.

(4) A notice under this section may specify the manner in which the information is to be provided.

(5) The appropriate regulatory authority may not require the provision of information under this section unless they have given the person from whom it is required an opportunity of making representations to them about the matters appearing to them to provide grounds for making the request.

(6) Section 368Z15 applies in relation to a failure to comply with a demand for information imposed under this section as if that failure were a contravention of section 368Z14.

(7) In this section "information" includes copies of advertisements.

368Z18 Guidance

(1) The appropriate regulatory authority must draw up and, from time to time, review and revise, guidance setting out their intentions concerning the exercise of their functions under this Part.

(2) The appropriate regulatory authority must consult the Secretary of State before drawing up or revising the guidance.

(3) The appropriate regulatory authority must publish the guidance and any revised guidance in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

368Z19 The appropriate regulatory authority

(1) OFCOM may designate any body corporate to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision of this Part, subject to subsection (9).

(2) To the extent that no body is designated for a purpose, OFCOM is the appropriate regulatory authority for that purpose.

(3) Where a body is designated for a purpose, OFCOM may act as the appropriate regulatory authority for that purpose concurrently with or in place of that body.

(4) OFCOM may provide a designated body with assistance (including financial assistance) in connection with any of the functions of the body under this Part.

(5) A designation may in particular—

(a) provide for a body to be the appropriate regulatory authority in relation to advertisements of a specified description;

(b) provide that a function of the appropriate regulatory authority is exercisable by the designated body—

(i) to such extent as may be specified;

(ii) either generally or in such circumstances as may be specified;

(iii) either unconditionally or subject to such conditions as may be specified.

(6) The conditions that may be specified pursuant to subsection (5)(b)(iii) include a condition to the effect that a function may, generally or in specified circumstances, be exercised by the body only with the agreement of OFCOM.

(7) A designation has effect for such period as may be specified and may be revoked by OFCOM at any time.

(8) OFCOM must publish any designation in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it.

(9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

(a) is a fit and proper body to be designated,

(b) has consented to being designated,

(c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority (taking into account any financial assistance that OFCOM intends to provide under subsection (4)),

(d) is sufficiently independent of persons who carry on business that involves or is associated with the manufacture or sale of less healthy food or drink products, and

(e) will, in performing any function to which the designation relates, have regard in all cases—

- (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
- (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.

(10) Subject to any enactment or rule of law restricting the disclosure or use of information by OFCOM or by a designated body—

(a) a designated body may provide information to another designated body for use by that other body in connection with any of its functions as the appropriate regulatory authority;

(b) a designated body may provide information to OFCOM for use by OFCOM in connection with any of their functions under this Part;

(c) OFCOM may provide information to a designated body for use by that body in connection with any of its functions as the appropriate regulatory authority.

(11) In carrying out their functions as the appropriate regulatory authority, a designated body may carry out, commission or support (financially or otherwise) research.

(12) In this section—

- “designation” means a designation under this section and cognate expressions are to be construed accordingly;
- “specified” means specified in a designation.

368Z20 Power to amend this Part to extend prohibition

(1) The Secretary of State may by regulations amend this Part for the purpose of prohibiting persons from doing either or both of the following (so far as not already prohibited)—

(a) placing on the internet advertisements for an identifiable less healthy food or drink product;

(b) making arrangements for advertisements for an identifiable less healthy food or drink product to be placed on the internet.

(2) For the purposes of subsection (1)—

(a) “placing” includes leaving in place;

(b) “placed” includes continues to be placed.

(3) The provision which may be made by regulations under subsection (1) by virtue of section 402(3)(c) includes provision repealing, revoking or amending provision made by or under any of the following whenever passed or made—

(a) an Act;

(b) an Act of the Scottish Parliament;

(c) a Measure or Act of Senedd Cymru;

(d) Northern Ireland legislation.

(4) Before making regulations under subsection (1), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(5) A statutory instrument containing regulations under subsection (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

368Z21 Interpretation

In this Part—

- “appropriate regulatory authority” is to be construed in accordance with section 368Z19;
- “less healthy”, in relation to a food or drink product, has the meaning given by section 368Z14(5)(e).

A2. Final rules and associated definitions

A2.1 The final version of the rules consulted on are set out below:

BCAP Code

New rule
TV advertising for identifiable less healthy food or drink products may not be shown between 5.30am and 9.00pm. Guidance on the application of this rule is available here [link].

Associated definitions
<p>“HFSS products” are those food or drink products that are assessed as high in fat, salt or sugar in accordance with the Department of Health and Social Care’s Nutrient Profiling Technical Guidance issued in 2011. Information on the nutrient profiling model is available on the Department of Health and Social Care’s website here.</p> <p>A food or drink product is “less healthy” if:</p> <ul style="list-style-type: none">• it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X]³³ (“the Regulations”); and• it is an HFSS product. <p>A less healthy food or drink product is identifiable, in relation to advertisements, if persons in the UK (or any part of the UK) could reasonably be expected to be able to identify the advertisements as being for that product.</p> <p>Rule X.X [the proposed rule] does not apply to advertisements for or on behalf of a food or drink small or medium enterprise (“food or drink SME”), within the meaning given by the Regulations.</p>

Broadcasting Code

New rule
9.17A: Programming (including a channel) may not be sponsored by an identifiable less healthy food or drink product between 5.30 am and 9.00 pm.

³³ The proposed regulations have been subject to consultation: [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation](#). The BCAP Code will refer to the final Regulations (including the finalised form of their name).

Note 1: Rule 9.17A does not apply to sponsorship by or on behalf of a food or drink small or medium enterprise (“food or drink SME”), within the meaning given by the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X].³⁴

Note 2: A less healthy food or drink product is identifiable, in relation to sponsorship, if persons in the UK (or any part of the UK) could reasonably be expected to be able to identify the sponsorship as being for that product.

Associated definition

Meaning of less healthy food and drink

A food or drink product is ‘less healthy’ if:

- it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X];³⁵ and
- it is an HFSS product, as defined by the Department of Health and Social Care’s Nutrient Profiling Technical Guidance issued in 2011, which relates to the [nutrient profiling scheme](#) devised by the UK’s Food Standards Agency for use by Ofcom.

³⁴ See footnote 29.

³⁵ See footnote 29.

A3. Impact assessment

- A3.1 Ofcom’s assessment of the impact of our proposals, as set out in the consultation, is reproduced below.
- A3.2 The new restrictions on advertising and sponsorship for less healthy food and drink products on TV, ODPS and online are set out in law. As part of its consultation process in relation to these restrictions, the Government carried out an impact assessment, taking into account the likely costs to businesses, balanced against the potential health benefits of the policy. It concluded that the proposed restrictions, in their finalised form (i.e. as reflected in the 2003 Act), were justified on this basis.³⁶
- A3.3 We do not consider that Ofcom’s proposed approach to implementing these restrictions will have a significant additional impact on stakeholders. Ofcom believes that co-regulation is the most effective way of fulfilling our statutory responsibilities in relation to the restrictions on advertising for less healthy food and drink products, taking into account the established co-regulatory relationship between Ofcom and the ASA for broadcast and ODPS advertising (as well as VSP advertising).
- A3.4 Broadcasters and ODPS providers are already required to cooperate with the ASA (as well as, in the most serious cases, Ofcom) under the existing co-regulatory arrangements. Therefore, Ofcom considers that applying this model in relation to the new restrictions on TV and ODPS advertising for less healthy food and drink products will have a negligible impact on these stakeholders. In addition, the ASA is widely recognised as a ‘one-stop shop’ for advertising complaints, and as such this approach would ensure consistency for consumers.
- A3.5 Ofcom’s proposal to designate a co-regulator for online HFSS advertising may result in an additional administrative burden and other costs for advertisers, who are the regulated entity in relation to these restrictions. However, the ASA already regulates online advertising on a self-regulatory basis, and advertisers are therefore required to engage with it in relation to the existing rules on online HFSS advertising. Our proposal preserves and builds on this established relationship between the ASA and advertisers, and we therefore expect any additional costs to be marginal.
- A3.6 If the ASA is not designated as a co-regulator as proposed here, advertisers will still be required to engage with Ofcom in relation to the new prohibition on online advertising for less healthy food and drink products. If the ASA takes on this role, the designation will be designed to minimise any unnecessary duplication of regulatory activity between Ofcom and the ASA, setting out clearly defined roles for all parties.
- A3.7 In addition, Ofcom considers that there is a benefit for consumers in maintaining a single point of contact for advertising complaints.

³⁶ [Impact assessment \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67424/impact-assessment.pdf)

Equality impact assessment

- A3.8 We have given careful consideration to whether our proposed approach to implementing the statutory restrictions will have a particular impact on persons sharing protected characteristics (broadly including race, age, disability, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership and religion or belief in the UK and also dependents and political opinion in Northern Ireland), and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations. This assessment helps us comply with our duties under the Equality Act 2010 (“the EA 2010”) and the Northern Ireland Act 1998 (“the NIA 1998”)³⁷.
- A3.9 The Government’s consultations on introducing new restrictions on HFSS advertising included an equality assessment, which concluded that the effects of the policy on people with specified protected characteristics would be either neutral or positive.³⁸ Ofcom does not consider that our proposed approach to implementing the new restrictions would have any different effect under the EA 2010 or the NIA 1998.
- A3.10 Ofcom has also considered how the ASA takes account of the EA 2010 (and related legislation) within its own enforcement procedures and processes. Ofcom understands that the ASA complies with the requirements of the EA 2010 (including the Public Sector Equality Duty). We also understand that the ASA has regard to equality considerations and the right to freedom of expression in its day-to-day decision-making and its communication with relevant parties. In relation to Northern Ireland, the ASA recognises that discrimination and equality issues are dealt with differently under the NIA 1998. It also has regard to the specific requirements of this legislation (including, for example, additional protected characteristics), where applicable. On the basis of these assurances, Ofcom is satisfied that there are no additional equality implications arising from our proposed designation of the ASA as a co-regulator.

³⁷ Further detail is set out in section 149 of the Equality Act 2010 and section 75 of the 1998 Act.

³⁸ <https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and-sugar/outcome/equality-assessment-introducing-further-advertising-restrictions-on-tv-and-online-for-products-high-in-fat-salt-and-sugar>