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# Regulation of advertising of less healthy food and drink

Implementation of new statutory restrictions

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

**CONSULTATION:**

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# 1. Overview

## **The purpose of this document – in brief**

This document sets out Ofcom’s proposed approach to implementing new restrictions on advertising for less healthy food and drink products, which have been introduced through the Health and Care Act 2022.

On 28 April 2022, the Health and Care Act received Royal Assent. Amongst other things, it 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. Under the 2003 Act (as amended), both sets of restrictions take effect from 1 October 2025.

Under the 2003 Act, 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.

## **Ofcom’s approach to implementing the restrictions**

This document sets 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 also confirms that the new restrictions on TV and ODPS are covered by the existing co-regulatory arrangements that apply to advertising in these media.

## **Consultation on proposed amendments to the BCAP Code and the Broadcasting Code, and on the proposal to designate the ASA as a co-regulator for the online restrictions**

In addition, Ofcom is consulting on proposed amendments to the UK Code of Broadcasting Advertising (“the BCAP Code”) and the Broadcasting Code, to reflect the new restrictions on TV advertising and sponsorship for less healthy food and drink products. In relation to TV advertising, Ofcom’s intention following the outcome of this consultation is to direct BCAP to implement the necessary amendments to the BCAP Code. Ofcom is also consulting on a proposal to designate the ASA as a co-regulator for the new prohibition on online advertising for less healthy food and drink products.

We are seeking stakeholders’ views on the consultation questions, which are listed in Annex 1. The closing date for responses is 21 April 2023.

## 2. Background

- 2.1 In 2020, the UK Government set out its strategy for tackling obesity in the UK.<sup>1</sup> As part of this strategy, the Government brought forward legislation to impose restrictions on advertising for certain HFSS products, called 'less healthy' food and drink products. These restrictions are set out in the 2003 Act (as amended by the Health and Care Act, which received Royal Assent on 28 April 2022)<sup>2</sup>, and apply to advertising and sponsorship that appears on TV and ODPS, as well as advertising online.
- 2.2 The Health and Care Act received Royal Assent in April 2022. In summary, it amended the 2003 Act to:
- prohibit TV services from including advertising and sponsorship for less healthy food and drink products between 5.30am and 9pm;
  - prohibit ODPS from including advertising and sponsorship for less healthy food and drink products between 5.30am and 9pm; and
  - prohibit 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.<sup>3</sup>

- 2.3 Ofcom is the statutory regulator with responsibility for advertising and sponsorship on TV and ODPS. The 2003 Act gives Ofcom additional responsibility for the new restrictions on online advertising for less healthy food and drink products. Ofcom is also given the power to designate some or all of its relevant functions in this area to a co-regulator where Ofcom considers it appropriate to do so.

- 2.4 In this document, Ofcom is:
- confirming that the existing co-regulatory arrangements for TV and ODPS extend to the new restrictions for advertising in these media, and that it is making the necessary amendments to the documents that support these arrangements;
  - consulting 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

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

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

<sup>3</sup> On 9 December 2022, the Government announced a delay to the implementation of the new HFSS advertising restrictions, which means they will now 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 \(legislation.gov.uk\)](#).

- consulting on a proposal to designate the ASA as a co-regulator for the online advertising prohibition.

## Existing regulation of HFSS advertising

- 2.5 In 2007, as a result of growing concerns about child obesity, Ofcom introduced restrictions on advertising for HFSS products on TV. These restrictions, which were implemented fully by 2009, prohibit the scheduling of TV advertising for all HFSS products during children’s airtime and around programmes with a disproportionately high child audience. The restrictions also cover the content of adverts. They are administered by the ASA, as part of the co-regulatory arrangements for broadcast advertising.
- 2.6 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.<sup>4</sup> 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 those products classified as HFSS according to this system.
- 2.7 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 HFSS advertising

- 2.8 The new restrictions on the advertising of less healthy food and drink products sit alongside the existing restrictions for HFSS advertising on TV (described above in paragraphs 2.5 to 2.7) and apply to a subset of HFSS food and drink products. The products captured by the new restrictions are those 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 is currently consulting on.<sup>5</sup>
- 2.9 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 SME”). Food or drink SMEs are defined in the 2003 Act by reference to the Regulations.
- 2.10 There are further exemptions in relation to the online prohibition (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 Regulations.

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<sup>4</sup> [Nutrient Profiling Model](#)

<sup>5</sup> [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation - GOV.UK \(www.gov.uk\)](#)

- 2.11 As the ‘appropriate regulatory authority’ for the online advertising restrictions, Ofcom has a range of powers, including in relation to information-gathering and enforcement. Under the regime, Ofcom may designate any of the statutory functions of the appropriate regulatory authority to a co-regulator.
- 2.12 Further details of these new responsibilities and how Ofcom proposes to implement the new restrictions are set out in the following sections of this document.

## **Structure of this document**

- 2.13 The document is structured as follows:
- Section 3 sets out the steps Ofcom is taking to implement the new restrictions that apply to TV advertising and sponsorship, and consults on proposed amendments to the BCAP Code and the Broadcasting Code;
  - Section 4 sets out the steps Ofcom is taking to implement the new restrictions that apply to ODPS advertising and sponsorship;
  - Section 5 consults on Ofcom’s proposal to designate the ASA as a co-regulator to enforce the online advertising prohibition, including our assessment of the ASA against the relevant criteria for designating a co-regulator;
  - Section 6 sets out Ofcom’s approach to enforcement of the online advertising prohibition; and
  - Section 7 contains Ofcom’s assessment of the impact of our proposals.
- 2.14 Consultation questions are listed in Annex 1.

## 3. Implementation of new restrictions: Television

### New statutory requirements

- 3.1 Under Section 321A of the 2003 Act (as inserted by the Health and Care Act 2022), 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 2.8 above) between 5.30am and 9pm (“the TV watershed restriction”).
- 3.2 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.

### Co-regulation of broadcast advertising

- 3.3 For broadcast (TV and radio) advertising, Ofcom has a long-standing co-regulatory relationship with the ASA, BCAP and BASBOF.<sup>6</sup> 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”).
- 3.4 The Authorisation states that the functions contracted out by Ofcom are (subject to certain exemptions set out in the Authorisation):
- Ofcom’s functions in respect of the setting, reviewing and revising of standards codes for broadcast advertising (BCAP); and
  - Ofcom’s functions in respect of the handling and resolving of complaints about the observance of broadcast advertising standards codes (ASA).
- 3.5 These co-regulatory arrangements are supported by a Memorandum of Understanding (“MoU”)<sup>7</sup> and a Deed for the Regulation of Broadcast Advertising.
- 3.6 Enforcement of the new TV advertising restrictions will fall under these existing co-regulatory arrangements. In Ofcom’s view, the Authorisation is sufficiently broad to capture the new restrictions. However, for clarity we have updated the wording of this

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<sup>6</sup> 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.

<sup>7</sup> [Memorandum of Understanding](#)

document to make specific reference to section 321A of the 2003 Act. A copy of the updated Authorisation, showing the changes, is included at Annex 3 for information.

## Amending the BCAP Code

- 3.7 Under the co-regulatory arrangements, 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.<sup>8</sup>
- 3.8 Generally, this means that BCAP is responsible for developing advertising regulation policy and consulting on proposals for regulatory change before amending the BCAP Code (subject to Ofcom's approval). However, in this case changes to the BCAP Code are needed to reflect specific statutory restrictions, which have been consulted on by Government, with legislation passed by Parliament.
- 3.9 In this specific context, we consider it is appropriate for Ofcom to consult on the wording of a rule to be introduced into the BCAP Code. Following public consultation and parliamentary scrutiny, Government policy is now clearly laid out in legislation. Ofcom has statutory responsibility for ensuring that the rule appropriately reflects the legislative requirements. Ofcom consulting on the proposed BCAP Code rule through this consultation process will provide stakeholders (including BCAP, broadcasters and advertisers) with the maximum amount of time to prepare for the new restrictions coming into force.
- 3.10 We welcome respondents' views on whether the text of the proposed rule, as set out below, reflects appropriately the legislative requirements (see Annex 2). This rule would be inserted into Section 32 of the BCAP, taking effect in accordance with section 321A(2) (as amended) of the 2003 Act from 1 October 2025.

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

- 3.11 In addition to the proposed rule above, the following definitions would also need to be inserted into Section 32 of the BCAP Code.<sup>9</sup>

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 <a href="#">here</a> .
A food or drink product is 'less healthy' if:

<sup>8</sup> See paragraphs 6.1(b), 7.20 and 7.23 of the [Memorandum of Understanding](#).

<sup>9</sup> The definition of 'HFSS products' currently appears in Section 32 of the BCAP Code, in relation to the existing HFSS restrictions. We have included it in the proposed definitions below to provide context.

- it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X]<sup>10</sup>; and
- it is an HFSS product.

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.

- 3.12 Subject to the outcome of this consultation, Ofcom will direct BCAP to amend the BCAP Code accordingly.

**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.

- 3.13 As set out in the Background section, the BCAP Code includes existing rules on HFSS advertising that cover content and scheduling.<sup>11</sup> The final rule setting out the TV watershed restriction will apply in addition to the existing HFSS TV advertising rules.
- 3.14 BCAP will be responsible for inserting the proposed 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 and 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.

## Amending the Broadcasting Code

- 3.15 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.
- 3.16 To comply with the legislation, Ofcom is proposing to amend the TV sponsorship rules to include the restriction on sponsorship by less healthy food and drink products between 5.30am and 9pm.

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<sup>10</sup> The Regulations are currently 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 finalised Regulations (including the finalised form of their name).

<sup>11</sup> 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.

- 3.17 We welcome respondents' views on whether the text of the proposed rule, as set out below, reflects appropriately the legislative requirements (see Annex 2). This rule would 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.

Proposed rule
<p>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.</p> <p>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].<sup>12</sup></p> <p>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.</p>

- 3.18 In addition to the above rule, Ofcom proposes to include the following definition in the text box that precedes the sponsorship rules in Section Nine of the Broadcasting Code:

Proposed definition
<p><b>Meaning of less healthy food and drink</b></p> <p>A food or drink product is 'less healthy' if:</p> <ul style="list-style-type: none"><li>• it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X];<sup>13</sup> and</li><li>• it is an HFSS product, as defined by the <a href="#">nutrient profiling scheme</a> which was devised by the UK's Food Standards Agency for use by Ofcom.</li></ul>

**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.

- 3.19 Consultation questions are also listed in Annex 1.

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<sup>12</sup> The Regulations are currently 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 finalised Regulations (including the finalised form of their name).

<sup>13</sup> See footnote 12.

## 4. Implementation of new restrictions: On-Demand Programme Services

### New statutory requirements

- 4.1 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.
- 4.2 The Health and Care Act 2022 added a new provision to the 2003 Act (section 368FA) prohibiting 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”).
- 4.3 Section 368C of the 2003 Act, which sets out the duties of the ‘appropriate regulatory authority’ under the ODPS framework, has also been amended to require 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-regulation of ODPS advertising

- 4.4 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.<sup>14</sup> 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.
- 4.5 Following a consultation process, in 2010 Ofcom designated the ASA to carry out certain functions in relation to advertising on ODPS, including (but not limited to):
  - publishing rules for ODPS advertising that reflect the relevant requirements of the 2003 Act for the purpose of securing that ODPS providers comply with those requirements;
  - determining, following a complaint or otherwise, whether an ODPS provider has contravened any of the rules and requiring the ODPS provider to co-operate fully and promptly to secure compliance with the ASA’s decision; and
  - referring any particular case to Ofcom to determine whether there has been a contravention of any of the relevant requirements of the 2003 Act.

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<sup>14</sup> Communications Act 2003, s.368B(1)

- 4.6 Full details of the relevant functions are set out in the ODPS designation.<sup>15</sup> The original ODPS designation was for a period of 10 years. It was renewed in 2020 for a further four years, in order to align with the timetable for reviewing the co-regulatory arrangements for broadcast advertising in 2024.
- 4.7 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.
- 4.8 We have reviewed the ODPS designation in the light of the new restrictions on ODPS advertising. We are satisfied that section 368FA of the 2003 Act is covered by the current arrangements. However, to ensure maximum transparency, we have amended the ODPS designation so 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.<sup>16</sup> A copy of the updated ODPS designation, showing the changes, is included at Annex 3 for information.

## Amending the CAP Code ODPS appendix

- 4.9 The ODPS designation gives the ASA powers to publish rules for the purpose of securing that ODPS providers comply with the relevant requirements of the 2003 Act. The relevant statutory requirements for ODPS advertising 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”).<sup>17</sup> This will need to be updated by the ASA to reflect the new ODPS watershed restriction, taking effect in accordance with section 368FA(1) (as amended) of the 2003 Act from 1 October 2025.
- 4.10 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 on the introduction of the new rules will be required. Instead, Ofcom will review and approve a revised version of the ODPS appendix prepared by the ASA.

## Amending the ODPS Rules and Guidance

- 4.11 Ofcom retains responsibility for the regulation of sponsorship on ODPS, as well as other statutory requirements covering non-advertising content on these services. The requirements that apply to sponsorship on ODPS are reflected in Ofcom’s ODPS Rules and Guidance.<sup>18</sup>

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<sup>15</sup> [ODPS Designation](#)

<sup>16</sup> 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.)

<sup>17</sup> [ODPS appendix](#)

<sup>18</sup> [ODPS Rules and Guidance](#)

4.12 Unlike broadcast advertising and sponsorship, Ofcom does not have code-making powers in relation to such material on ODPS. As the new rule will reflect the legislation, with no material changes or omissions, Ofcom is not required to consult on the proposed wording. We will update the section on sponsorship in the ODPS 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) (as amended) of the 2003 Act, the new rule will take effect from 1 October 2025.

4.13 For information, the new rule and associated definitions are set out below.

Rule
2.52: An ODPS may not include sponsorship announcements for an identifiable less healthy food or drink product between 5.30am and 9.00pm.

Definitions
<p><b>Notes</b></p> <p>A food or drink product is ‘less healthy’ if:</p> <ul style="list-style-type: none"><li>• it falls within a food and drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X];<sup>19</sup> and</li><li>• it is a food or drink product that is high in fat, salt or sugar (“HFSS”), as defined by the <a href="#">nutrient profiling scheme</a> which was devised by the UK’s Food Standards Agency for use by Ofcom.</li></ul> <p>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.</p> <p>Paragraph 2.52 (above) does not apply to sponsorship announcements by or behalf of a food or drink SME, within the meaning given by the Regulations.</p>

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<sup>19</sup> The Regulations are currently subject to consultation: [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation](#). The ODPS Rules & Guidance will refer to the finalised Regulations (including the finalised form of their name).

## 5. Implementation of new restrictions: Online

### New statutory requirements

- 5.1 The Health and Care Act 2022 introduced a new statutory framework under Part C 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.
- 5.2 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 Regulations. Additional information about the exemptions listed above can be found in the Government consultation on the Regulations.<sup>20</sup>

- 5.3 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.

### Proposed Designation of the ASA

- 5.4 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 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.
- 5.5 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.<sup>21</sup> In addition, the ASA already acts as the frontline

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<sup>20</sup> [Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: secondary legislation.](#)

<sup>21</sup> [Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response](#)

regulator for broadcast, on-demand and VSP advertising, in a co-regulatory relationship with Ofcom.

- 5.6 In view of the ASA's track record and experience under the existing self- and co-regulatory arrangements, Ofcom is proposing 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. The rationale for this proposal, including our assessment of the ASA against the relevant statutory criteria for designating a co-regulator and Ofcom's principles for analysing self- and co-regulation, is set out in full in this section. Consultation questions on this proposal are included below and in Annex 1.

## Background

### The ASA

- 5.7 Established in 1962, the ASA is the UK's independent non-statutory advertising regulator. The ASA regulates advertising content across all media, investigating complaints and enforcing the advertising codes which apply to broadcast and non-broadcast advertising.
- 5.8 The advertising codes are written by the Committees of Advertising Practice: the Committee of Advertising Practice ("CAP") and BCAP. The Committees consist of members representing advertisers, agencies and media owners.
- 5.9 In general, the ASA is funded by the advertising industry through a voluntary levy on the cost of advertising space, collected on the ASA's behalf by the Advertising Standards Board of Finance ("ASBOF") and BASBOF.
- 5.10 The system under which the ASA operates is primarily a self-regulatory one. However, as explained in Sections 3 and 4, the ASA also undertakes a range of statutory functions on behalf of Ofcom, which we have contracted out or designated it to perform.
- 5.11 As explained in Section 3, under the co-regulatory arrangements for broadcast advertising, the ASA has day-to-day responsibility for administering the existing rules in the BCAP Code that cover the content and scheduling of TV advertising for HFSS products. In addition, the ASA currently regulates advertising for HFSS products in non-broadcast media (including online) under the self-regulatory system, enforcing the existing rules in the CAP Code. As set out below, Ofcom acts a statutory backstop in relation to broadcast advertising, but we have no role in the self-regulatory system.

### Co-regulation: Ofcom and the ASA

- 5.12 Ofcom has statutory responsibility for ensuring relevant standards are met in relation to the content of advertising on TV, radio, ODPS and video-sharing platforms ("VSPs"). These standards and Ofcom's responsibilities are set out in the 2003 Act.<sup>22</sup>

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<sup>22</sup> Communications Act 2003, s.319, Part 4A and Part 4B

## Regulation of advertising of less healthy food and drink

- 5.13 The 2003 Act encourages Ofcom, in performing its duties, to promote and facilitate the development of effective forms of self-regulation, where appropriate.<sup>23</sup> In specific circumstances, Ofcom is able to contract out or designate certain of its functions, including in relation to advertising.
- 5.14 As set out in Sections 3 and 4 of this document, Ofcom has established co-regulatory arrangements with the ASA in relation to broadcast and ODPS advertising. We have also designated the ASA to fulfil certain regulatory functions in relation to VSP advertising. Further information on these arrangements is set out below, as background to our proposal to designate the ASA as a co-regulator for the restrictions on online advertising for less healthy food and drink products.

### Broadcast advertising

- 5.15 The 2003 Act requires Ofcom to set standards for broadcast (TV and radio) advertising. The standards objectives set out in the 2003 Act include (but are not limited to): prevention of the inclusion in TV and radio services of advertising which may be misleading, harmful or offensive; and compliance with the international obligations of the UK with respect to advertising included in such services.<sup>24</sup>
- 5.16 In 2004, Ofcom contracted out certain of its functions in relation to broadcast advertising to BCAP and the ASA, via an Authorisation.<sup>25</sup> These functions are summarised in paragraph 3.4 of this document.
- 5.17 Ofcom remains ultimately responsible for broadcast advertising content standards. As the backstop regulator, Ofcom:
- retains the power to impose statutory sanctions on broadcasters;
  - supervises the ASA's performance against a variety of key indicators;
  - approves any proposed changes to the BCAP Code; and
  - retains the right to intervene (in exceptional circumstances) to set BCAP Code requirements.
- 5.18 The initial co-regulatory agreement was for a period of 10 years. In light of the success of the arrangement, the Authorisation was renewed in 2014 for a further 10-year period.

### Advertising on ODPS

- 5.19 Part 4A of the 2003 Act sets standards that ODPS providers are required to comply with, including in relation to advertising on their services. As noted in paragraph 4.4, under the 2003 Act Ofcom is the appropriate regulatory body for enforcing ODPS content standards

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<sup>23</sup> Communications Act 2003, s.3(4)(c)

<sup>24</sup> Communications Act 2003, s.319

<sup>25</sup> [Authorisation](#)

but can designate another body to be the appropriate regulatory authority for the purposes of any of the ODPS provisions.

- 5.20 Following consultation, in 2010 Ofcom designated the ASA to regulate advertising on ODPS. Under the terms of the designation agreement, the ASA is responsible for the day-to-day regulation of ODPS advertising, including (but not limited to):
- publishing rules for the purpose of securing that ODPS providers comply with the relevant requirements of the 2003 Act; and
  - securing that ODPS providers comply with these rules.
- 5.21 The rules applying to ODPS advertising, which directly reflect the provisions in Part 4A of the 2003 Act, are contained in a dedicated ODPS appendix to the CAP Code. They are enforced by the ASA, under the terms of the ODPS designation.
- 5.22 The ODPS designation was renewed for another four years in 2020 to align this process with the timeline for reviewing the arrangements applying to broadcast advertising in 2024.

### Advertising on VSPs

- 5.23 Part 4B of the 2003 Act contains specific requirements to protect users against potential harms related to advertising on video-sharing platforms (“VSPs”), and specific measures relevant to these harms.<sup>26</sup>
- 5.24 The 2003 Act places duties on the ‘appropriate regulatory authority’ to take steps to ensure that VSP providers comply with the requirements. As with the ODPS provisions, the 2003 Act gives Ofcom the power to designate another body, to the extent provided by the designation, to be the appropriate regulatory authority for the purposes of any provision of Part 4B of the 2003 Act. If no body is designated, Ofcom is the appropriate regulatory body for that purpose. Additionally, where a body is designated to fulfil certain purposes, Ofcom may act concurrently with or in place of that designated body.
- 5.25 Following a consultation process, in 2021 Ofcom designated the ASA to fulfil specific functions in relation to regulating certain VSP advertising.<sup>27</sup> As with the ODPS designation, the ASA is responsible for day-to-day regulation, including (but not limited to):
- publishing rules for the purpose of securing that VSP providers comply with the relevant requirements of the 2003 Act; and
  - securing that VSP providers comply with these rules.
- 5.26 The relevant statutory requirements are reflected as rules in a dedicated appendix to the CAP Code (the “VSP appendix”).<sup>28</sup>

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<sup>26</sup> Communications Act 2003, s.368Z, s.368Z1 and Schedule 15A

<sup>27</sup> Specifically, advertising that is marketed, sold or arranged by the VSP provider (i.e. VSP-controlled advertising).

<sup>28</sup> [VSP appendix](#)

5.27 The VSP designation is due to be reviewed in 2024, at the same time as the co-regulatory arrangements for broadcast and ODPS advertising.

## Proposal to designate the ASA

5.28 The co-regulatory arrangements summarised in paragraphs 5.12 to 5.27 are underpinned by the principle that it is beneficial for consumers to have a single point of contact for advertising issues across all media, and that a co-regulatory approach to advertising regulation is generally well-suited to managing the convergence of issues between advertising in different media.

5.29 As explained above, Ofcom may designate any body corporate, to the extent provided by the designation, to be the appropriate regulatory authority for the purposes of any provision of Part 4C of the 2003 Act.<sup>29</sup> 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 concurrently with or in place of that designated body. These provisions mirror those that apply under the ODPS and VSP regimes in Parts 4A and 4B of the 2003 Act respectively.

5.30 Ofcom's experience of co-regulation with the ASA has been a productive one. We have an established co-regulatory system, which has worked very effectively to date. It is designed to minimise complexity, and to ensure that statutory regulation and the self-regulatory system complement each other. The ASA is widely recognised as a 'one-stop shop' for advertising complaints across all media.

5.31 As noted above, through the co-regulation of broadcast advertising and the self-regulatory system for advertising in other media, the ASA also has specific experience of applying the existing rules on HFSS advertising.

5.32 Taking these considerations into account, Ofcom is proposing to designate the ASA as a co-regulator for the prohibition on online advertising for less healthy food and drink products.

5.33 Under this proposal, the ASA would be designated with specified functions related to this prohibition. Subject to the outcome of this consultation process, the full details of these co-regulatory arrangements will be set out in a designation. In summary, we propose that 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;

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<sup>29</sup> Communications Act 2003, s.368Z19

- 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.
- 5.34 Under these proposals Ofcom would retain 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 could refer the matter to Ofcom to consider whether to exercise our statutory powers. This would 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.<sup>30</sup>
- 5.35 In all cases, Ofcom would be able to exercise its powers under Part 4C of the 2003 Act concurrently with or in place of the ASA. Ofcom would retain 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.
- 5.36 If, following the outcome of this consultation, Ofcom designates the ASA, full details of the co-regulatory arrangements will be set out in a designation. Ofcom’s intention would be to publish this designation as soon as it is agreed, potentially alongside the regulatory statement following this consultation.
- 5.37 The proposal set out above closely reflects the existing arrangements Ofcom has put in place for co-regulating ODPS and VSP advertising. It is based on a model which we know works well, and which would 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 would help to ensure that the overall regulatory framework for advertising is cohesive.

### **Criteria for designating the regulation of online advertising for less healthy food and drink products**

- 5.38 Ofcom’s assessment of the ASA as a potential co-regulator for the online prohibition on advertising for less healthy food and drink products is based on two main sources, as set out below (“the designation criteria”).
- 5.39 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 criteria (as set out in the table below).

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<sup>30</sup> In accordance with s.368Z16 of the 2003 Act.

5.40 Ofcom’s principles for analysing self- and co-regulation (also summarised in the table below) 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.<sup>31</sup>

5.41 Paragraphs 5.43 to 5.57 below set out Ofcom’s assessment of the appropriateness of designating functions to the ASA in relation to the online prohibition against the designation criteria.

**5.42 Criteria for designating the regulation of online advertising for less healthy food and drink products**

**Statutory Criteria**  
**(s.368Z(19)(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...’*

<sup>31</sup> These principles were last referred to in Ofcom’s [Proposals for the regulation of advertising on video-sharing platforms - Consultation](#), May 2021.

## Ofcom's assessment against the designation criteria

### Statutory criteria

- 5.43 The statutory criteria for designating a co-regulator in relation to the online prohibition on advertising for less healthy food and drink products in Part 4C of the 2003 Act largely mirror those set out in Part 4A in relation to ODPS regulation and those in Part 4B in relation to VSP regulation.
- 5.44 These are the criteria we applied when we originally considered whether to designate the ASA to perform regulatory functions on behalf of Ofcom in relation to ODPS and VSP advertising, in 2009 and 2021 respectively. The same criteria were applied when we considered whether to renew the ODPS designation in 2020.
- 5.45 We consider that the current established co-regulatory models are suitable templates for the regulation of online advertising for less healthy food and drink products. The ASA has reported to Ofcom annually on its regulation of broadcast, ODPS and VSP advertising. Neither Ofcom nor the ASA has, so far, identified any serious issues which have warranted further action from Ofcom.
- 5.46 In view of these factors, we provisionally consider that the ASA meets the statutory designation criteria (see paragraph 5.42 above). In particular, we are satisfied that:
- a) the ASA's experience of co-regulating broadcast and ODPS (and more recently, VSP) advertising demonstrates that it is a fit and proper body to be designated;
  - b) the ASA has indicated that it would consent to being designated as a co-regulator;
  - c) the ASA would have access to adequate financial resources to effectively perform the functions we propose to designate (taking into account any financial assistance Ofcom may provide – see paragraphs 5.48 to 5.50 below);
  - d) the ASA's governance structure is sufficiently independent of persons who carry on business that involves or is associated with the manufacture or sale of less healthy food and drink products (see paragraphs 5.51 to 5.54 below); and
  - e) the ASA's experience of co-regulating broadcasting and ODPS advertising (as well as, more recently, VSP advertising) demonstrates that it would have regard to appropriate regulatory principles.
- 5.47 In Ofcom's view, the ASA's experience of regulating online advertising under the self-regulatory system further demonstrates that it is fit and proper to be designated. Since 2018, the ASA has focused on strengthening its regulation of online advertising. It has developed stakeholder relationships and regulatory tools to address issues associated with online advertising.
- 5.48 The statutory designation criteria require that a designated body has access to sufficient financial resources. The ASA's current regulation of online advertising (including rules on HFSS advertising) under the self-regulatory system is funded primarily by a levy on

advertising and direct marketing expenditure collected by ASBOF (as set out above in paragraph 5.11). This levy funding enables the ASA's regulatory activities including complaints-handling and investigations, as well as supporting its pre-publication advice service to advertisers, agencies and the media. The ASA also receives some income from seminars and advice services it offers. Under the existing co-regulatory arrangements between Ofcom and the ASA, the ASA reports regularly on its performance, including its financial position.

- 5.49 The statutory designation criteria 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.
- 5.50 As the ASA already regulates online HFSS advertising under this system, Ofcom considers that the existing funding model may be sufficient to cover additional work associated with the functions we are proposing to designate to the ASA. However, Ofcom recognises 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.
- 5.51 In assessing the ASA's independence as a self-regulator, Ofcom has considered its governance structure. The ASA is a limited company, independent of the Government and the advertising sector. The Chair of the ASA, who leads the ASA Council (the ASA's adjudicating body) is appointed by ASBOF and is also unconnected with the advertising sector. All ASA Council members sit as individuals and are recruited through an open recruitment process, for a maximum of two three-year terms. A clear majority of members are independent of industry and the remaining members have a recent or current knowledge of the industry.
- 5.52 Further to this, 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.
- 5.53 We have also had regard to the ASA's funding structure in assessing the ASA's independence as a self-regulator. As set out above, the ASA is funded through an arms-length arrangement based on charging a levy on the cost of advertising space, to ensure that it is sufficiently independent of industry and Government. As the levy is collected by ASBOF, the ASA is unaware of who is paying the levy or how much they are paying. Ofcom considers that this funding model helps to ensure that the ASA remains sufficiently independent.
- 5.54 We therefore consider that the ASA's governance and funding structure demonstrates that it would be sufficiently independent of relevant advertisers for the purposes of the proposed designation.

## Principles for analysing self-regulation and co-regulation

5.55 Ofcom's criteria for the promotion of effective co- and self-regulation, and for deciding whether to establish co-regulatory models, were first published in 2004, and subsequently revised in 2008 and 2012 (see paragraph 5.42 above). We have conducted an assessment of our proposals against these criteria:

- *Independent governance and decision making.* The ASA is independent of both Government and industry and has a transparent governance structure. As mentioned above, the ASA Council is appointed by the ASA Chair and has a clear majority of members who are independent of industry. The Council will consider the recommendations of the ASA but is free to come to its own conclusion.
- *Clear public accountability.* The ASA currently publishes details of all its investigations into broadcast, ODPS and VSP advertising (as well as advertising in other media, on a self-regulatory basis). It also publishes an annual statement that includes an evaluation of its performance under key performance indicators ("KPIs"), such as the number of complaints received and resolved. Under our proposal:
  - The ASA would report, on a regular basis, details of investigations and breaches of the online prohibition. This information would be publicly available.
  - The ASA would comply with KPIs for its complaints handling arrangements, which would be set out in the designation of the ASA as the co-regulator for online advertising for less healthy food and drink products.
  - The designation would also include details of the timetable for reviewing the designation. Ofcom would then carry out a review according to that timetable. The outcome of any review would also be published.
- *Clear regulatory objectives set out in a code.* Under this proposal, the ASA would ensure that the relevant statutory requirements are reflected appropriately in a code.
- *Clear and transparent processes, which are followed.* The ASA's current processes for investigating and adjudicating on complaints about online advertising are described in its Non-Broadcast Complaint Handling Procedures<sup>32</sup> and available on its website. The ASA's website also contains information for consumers on how to complain. Under this proposal, these processes would also apply to the ASA's regulation of online advertising for less healthy food and drink products.
- *Workable membership incentives (where relevant) and/or other obligations for or on those it regulates.* The ASA/CAP system has a high level of buy-in from the advertising industry, as well as involvement from online platforms.

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<sup>32</sup> <https://www.asa.org.uk/static/171eb506-b4ef-4fec-bdcec62dc49e0be2/489511a8-3786-4611-8552d660d99cece9/Non-Broadcast-Complaint-Handling-Procedures.pdf>

- *Secure and sufficiently independent funding and budget control.* As set out above in relation to the statutory designation criteria, the ASA's funding system is structured so as to ensure its independence, and already covers its self-regulatory activity in relation to online advertising for HFSS products, potentially reducing incremental costs. Under Part 4C of the 2003 Act, Ofcom may also provide financial assistance to a designated body and the statutory designation criteria allow for Ofcom to take this into account when assessing that body's access to financial resources.
- *Accessibility to those seeking redress.* The ASA's public profile as the established regulator for advertising across all media makes it a suitable body to take on co-regulation of online advertising for less healthy food and drink products. It provides information to consumers on how the regulatory system works via its website. We consider that the ASA's Non-Broadcast Complaint Handling Procedures are appropriate to cover complaints about online HFSS advertising in the event the ASA is designated as the co-regulator in this area. As noted above, the ASA retains an Independent Reviewer<sup>33</sup>, who reviews decisions made by the ASA, and considers appeals about the conduct of ASA investigations.
- *Genuine powers of investigation.* If Ofcom were to designate the ASA as the appropriate regulatory authority for the online prohibition, the ASA would have the ability to find an advertiser in breach of the relevant rule(s).
- *Effective powers of enforcement and sanction.* If Ofcom were to designate the ASA, the ASA would have the ability to require an advertiser that has been found to contravene any of the rules to co-operate fully and promptly with the ASA in order to secure compliance. The ASA has established approaches to compliance including prohibiting adverts and particular advertising techniques.<sup>34</sup> Based on the ASA's experience of regulating advertising (including online advertising), Ofcom is confident that it operates appropriate enforcement measures. In any event, Ofcom would retain the power to carry out its own investigation as well as the power to issue enforcement notifications or impose financial penalties on advertisers who failed to comply with the relevant restrictions.

5.56 For all these reasons, Ofcom provisionally considers that the ASA would satisfy Ofcom's criteria for designating it to be the co-regulator for online prohibition on advertising for less healthy food and drink products.

5.57 We welcome stakeholders' views on this proposal. Subject to the outcome of this consultation, Ofcom will confirm the details of any co-regulatory arrangements with the ASA. Consultation questions are set out below and listed in Annex 1.

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<sup>33</sup> <https://www.asa.org.uk/codes-and-rulings/independent-reviews.html>

<sup>34</sup> <https://www.asa.org.uk/codes-and-rulings/sanctions.html>

**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.

## 6. Enforcement of online restrictions

### Statutory Powers

- 6.1 Based on our experience of existing advertising co-regulatory arrangements, we would expect the ASA, should it be designated as a co-regulator, to be able to achieve broad sector compliance through its day-to-day regulatory work. However, if there appear to be circumstances where compliance may not be achieved, Ofcom has the power to intervene.
- 6.2 As referenced in Section 5 of this document, the 2003 Act gives Ofcom, as the appropriate regulatory authority, powers to take action against online advertisers that breach the statutory restrictions. These powers include formal information gathering powers, issuing an enforcement notification requiring the advertiser to take specified actions, and/or imposing a financial penalty.<sup>35</sup>
- 6.3 When considering if it is appropriate for Ofcom to use these powers to intervene, we plan to follow our published Regulatory Enforcement Guidelines for investigations (the “Guidelines”).<sup>36</sup> These Guidelines set out how Ofcom approaches enforcement of regulatory requirements and consumer protection legislation. They apply to all our enforcement processes, except where otherwise stated (e.g. they do not apply for TV, radio and ODPS) or where we have good reason to depart from them, and are designed to be flexible.<sup>37</sup>
- 6.4 While the Guidelines do not specifically refer to enforcement of the new online advertising prohibition, we note that they are intended to be flexible and applied broadly. As stated in the Guidelines, where we gain any new enforcement powers (such as those in respect of the prohibition on online advertising for less healthy food and drink products), when considering enforcement action we would be likely to use the process which appears to us most closely analogous in terms of the statutory framework, and we will be clear about the process we intend to follow at the outset of any investigation.<sup>38</sup> We will also consider whether it is appropriate for these Guidelines to be amended in the future to reflect the new regime for online advertising for less healthy food and drink products.
- 6.5 If Ofcom decides that formal enforcement action is necessary, we will investigate the issue to determine if there has been a breach of the statutory restrictions and determine what further action might be appropriate. 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.

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<sup>35</sup> Communications Act 2003, s.368Z15, s.368Z16 and s.368Z17

<sup>36</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0029/249095/enforcement-guidelines.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0029/249095/enforcement-guidelines.pdf)

<sup>37</sup> Ofcom has separate procedures for handling complaints, investigations and sanctions on TV, radio and video-on-demand services which apply, as relevant, to licensed television broadcasters and ODPS providers: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/procedures>. The new restrictions on advertising for less healthy food and drink products on TV and ODPS will be covered by these procedures.

<sup>38</sup> See p paragraph 2.8 of the Guidelines.

- 6.6 In addition to the consultation questions set out in this document, stakeholders are invited to comment on Ofcom's proposed approach to enforcing the online prohibition.

## 7. Impact assessment

- 7.1 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.<sup>39</sup>
- 7.2 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).
- 7.3 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.
- 7.4 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.
- 7.5 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.
- 7.6 In addition, Ofcom considers that there is a benefit for consumers in maintaining a single point of contact for advertising complaints.

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<sup>39</sup> [Impact assessment \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67111/impact-assessment-publishing-service-gov-uk)

## Equality impact assessment

- 7.7 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”)<sup>40</sup>.
- 7.8 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.<sup>41</sup> 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.
- 7.9 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.
- 7.10 In addition to the consultation questions set out in this document, stakeholders are invited to comment on Ofcom’s assessment of the impact of our proposed approach to implementing the new restrictions on advertising and sponsorship for less healthy food and drink products.

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<sup>40</sup> Further detail is set out in section 149 of the Equality Act 2010 and section 75 of the 1998 Act.

<sup>41</sup> <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>

## A1. Consultation questions

A1.1 The consultation questions are set out below.

**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.

A1.2 For the text of the proposed rule and definitions referred to in Consultation Question 1, see paragraphs 3.10 and 3.11.

**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.

A1.3 For the text of the proposed rule and associated meaning referred to in Consultation Question 2, see paragraphs 3.17 and 3.18.

**Consultation Question 3:**

- a) Do you agree with Ofcom's proposal to designate the ASA as a co-regulator for the prohibition on online 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.

A1.4 In addition, stakeholders are invited to comment on: Ofcom's proposed approach to enforcing the new prohibition on advertising for less healthy food and drink products online (see section 6); and 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 (see section 7).

## A2. Extracts from legislation

A2.1 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).

## A3. Amended Authorisation and ODPS designation

### Authorisation

#### **Authorisation (amended) by virtue of The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004<sup>42</sup>**

#### **WHEREAS –**

A. Part 2 of the Deregulation and Contracting Out Act 1994 (the 1994 Act<sup>42</sup>) allows, if a Minister by order so provides, certain statutory functions to be exercised by, or by employees of, such person as may be authorised in that behalf by the office-holder or Minister whose function it is;

B. Section 1(7) of the Communications Act 2003 ('the 2003 Act') gives effect to Part 2 of the 1994 Act in relation to the functions conferred on OFCOM by or under any enactment as if OFCOM were an office-holder within the meaning of Part 2 of the 1994 Act. Section 1 (7)(b) of the 2003 Act limits the effect of section 69 of the 1994 Act such that OFCOM's functions in respect of the making of subordinate legislation may be contracted out except where such functions are to be exercised by statutory Instrument;

C. The Secretary of State, by the Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 ('the 2004 Order') made under sections 69 and 77 of the 1994 Act has provided that certain functions of OFCOM conferred by the 2003 Act and the Human Medicines Regulations 2012<sup>43</sup> ('the 2012 Regulations')<sup>44</sup> may be exercised by, or by such employees of, such person as may be authorised in that behalf by OFCOM to such extent as may be specified in the authorisation;

D. Having contracted out certain broadcast advertising functions in 2004 to the Advertising Standards Authority ('ASA') for a period of ten years, which period expires on the 1 November 2014, OFCOM have consulted, by way of an open letter to the Chairman of the ASA dated 1 May 2014 and published on that date, on their intention to contract out for a further period of ten years certain of their functions in relation to the regulation of broadcast advertising to the existing co-regulators working together with and under the umbrella of the existing framework of co-regulation currently carried out by the ASA, namely:

- (a) The Advertising Standards Authority (Broadcast) Limited ('ASA(B)'); and
- (b) The Broadcast Committee of Advertising Practice Limited ('BCAP');

E. The functions to be contracted out by OFCOM to the ASA are:

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<sup>42</sup> SI 1975/2004 as amended by SI 2008/1277, SI 2012/1916

<sup>43</sup> The Human Medicines Regulations 2012 replaced the Medicines (Monitoring of Advertising) Regulations 1994

<sup>44</sup> SI 2012/1916

## Regulation of advertising of less healthy food and drink

(a) OFCOM'S functions in respect of the setting, reviewing and revising of standards codes for broadcast advertising to BCAP; and

(b) OFCOM'S functions in respect of the handling and resolving of complaints about the observance of broadcast advertising standards codes to ASA(B);

(together 'the relevant functions') subject to certain exceptions, limitations and conditions set out in this authorisation;

F. The relevant functions are contained in:

(a) Sections 319 to 328 of the 2003 Act which confers functions on OFCOM with respect to programme and fairness standards for television and radio, including the duty to set, and from time to time review and revise standards for the content of programmes to be included in television and radio services, and the duty to establish procedures for the handling and resolution of complaints about the observance of such standards;

(b) Section 321A of the 2003 Act which confers functions on Ofcom to set standards 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 ; and

(c) Chapter 3 (monitoring of advertising) of Part 14 of the 2012 Regulations 2012 which confers functions on OFCOM with respect to the consideration of complaints about advertisements containing material prohibited by any of regulations 286 to 290 of the 2012 Regulations.

G. In giving this Authorisation, OFCOM have duly considered and taken into account all the responses to their consultation;

H. OFCOM have, on 31 October 2014 concluded a Memorandum of Understanding with ASA(B), BCAP and the Broadcast Advertising Standards Board of Finance (BASBOF) ('the Memorandum of Understanding') which replaces the Memorandum of Understanding between Ofcom and those parties dated May 2004 and sets out their agreed understanding in relation to the practical operation of the exercise by ASA(B) and BCAP of the relevant functions proposed to be contracted out to them, including the arrangements for adequate funding and staffing of ASA(B) and BCAP to enable those functions to be properly carried out;

I. OFCOM are satisfied that the co-regulatory scheme envisaged by the Memorandum of Understanding will promote and facilitate the use of effective forms of self-regulation, further OFCOM recognise the benefits to consumers and industry members alike of, where appropriate, a coordinated and consistent approach to advertising standards regulation across broadcast and non-broadcast media;

J. For the reasons set out in OFCOM's 'Renewal of the co-regulatory arrangements for broadcast advertising', OFCOM are satisfied that in giving this authorisation, they have acted in accordance with their relevant duties set out in section 3 of the 2003 Act;

**NOW, THEREFORE, BY VIRTUE OF THE CONTRACTING OUT (FUNCTIONS RELATING TO BROADCAST ADVERTISING) AND SPECIFICATION OF RELEVANT FUNCTIONS ORDER 2004, OFCOM HEREBY GIVES**

**THE FOLLOWING AUTHORISATION SUBJECT TO THE EXCEPTIONS, LIMITATIONS AND CONDITIONS SET OUT HEREIN –**

Standards functions to be exercised by BCAP

1. BCAP are authorised to exercise any function of OFCOM conferred by section 319(1) of the 2003 Act (a standards function’).

2. BCAP shall only exercise a standards function for the purpose of setting, reviewing or revising standards relating to advertising as appear to them best calculated to secure the standards objectives. The following standards objectives are excluded for these purposes:

(a) the objective set out at paragraph (c) of section 319(2), namely that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 of the 2003 Act are complied with;

(b) the objective set out at paragraph (d) of section 319(2), namely that news included in television and radio services is reported with due accuracy;

(c) the objective set out at paragraph (g) of section 319(2), namely that advertising that contravenes the prohibition on political advertising set out in section 321(2) of the 2003 Act is not included in television or radio services;

(d) the objective set out at paragraph (j) of section 319(2), namely that the unsuitable sponsorship of programmes included in television and radio services is prevented:

(e) the objective set out at paragraph (k) of section 319(2), namely that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services; and

(f) so much of the objective set out at paragraph (i) of section 319(2), namely that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with, as relates to the obligations set out in Articles 10, 11, 20, 23, 24 of Directive 2010/13/EU.<sup>45</sup>

3. Without prejudice to the generality of Article 8 of the 2004 Order, BCAP shall only exercise a standards function where such exercise is in accordance with, in particular, the following sections of the 2003 Act as appropriate as if references in the following sections to OFCOM were references to BCAP:

(a) section 319(3), paragraphs (a) to (e) of section 319(4), 319(5) and 319(6) (as modified from time to time by any order of the Secretary of State under section 323);

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<sup>45</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

## Regulation of advertising of less healthy food and drink

(b) section 321(1), although only insofar as that section relates to advertising;

(c) section 321A; and

(d) section 324.

4. Before and in exercising any standards function, BCAP shall:

(a) consult OFCOM; and

(b) secure OFCOM's written agreement with BCAP's proposals for the exercise of such function.

5. BCAP shall, biannually, provide OFCOM with a written report detailing BCAP's exercise of the standards functions in the preceding calendar year. This report may be combined with the report referred to in paragraph 14 below at the discretion of BCAP and ASA(B).

6. BCAP shall forthwith provide such information and assistance to OFCOM as OFCOM shall from time to time reasonably require for purposes connected with the exercise by OFCOM of their functions under sections 26, 321(5) and/or 325(3) of the 2003 Act, and generally to assist OFCOM to review how effectively BCAP has exercised, or is exercising, any standards function.

### Code complaints functions to be exercised by ASA(B)

7. ASA(B) are authorised to exercise any function of OFCOM conferred by the following provisions of the 2003 Act (a code complaints function'):

(a) section 325(2);

(b) section 325(4) in so far as it provides for a direction to be given to a licence holder with respect to any of the matters mentioned in paragraphs (a) and (b) of section 325(5), subject to paragraph 11 below; and

(c) section 14(1) of Schedule 12 in so far as it provides for a direction to be given to the Welsh Authority with respect to any of the matters mentioned in paragraphs (a) and (b) of section 14(2) of that Schedule.

8. ASA(B) shall only exercise a code complaints function for the purpose of handling and resolving complaints about the observance of such standards as BCAP may set, review or revise in accordance with paragraphs 1 to 6 above.

9. ASA(B) are authorised to exercise any function of OFCOM conferred by regulation 314 of the 2012 Regulations (a 'medicinal advertisements function'), in accordance with the 2012 Regulations, as if references in those regulations to OFCOM were references to ASA(B).

10. ASA(B) shall not exercise a medicinal advertisements function for the purposes of or in connection with the prevention of unsuitable sponsorship of programmes included in television and radio services.

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11. ASA(B) shall only exercise a function conferred by subsection (b) of section 325(4) of the 2003 Act in connection with the exercise of a medicinal advertisements function.

12. ASA(B) are authorised to exercise any function of OFCOM relating to advertising conferred by or in connection with a provision listed in Part 2 of the Schedule to the 2004 Order only so far as to determine that no such direction as is mentioned in that provision should be made.

13. ASA(B) are authorised to exercise any function of OFCOM relating to advertising conferred by or in connection with a provision listed in Part 3 of the Schedule to the 2004 Order only so far as to determine that no such notice as is mentioned in that provision should be served on the holder of a Broadcasting Act licence or the Welsh Authority.

14. ASA(B) shall, biannually, provide OFCOM with a written report detailing ASA(B)'s exercise of the code complaints functions in the preceding calendar year. The report shall include quantitative and qualitative information regarding complaints received and handled and the monitoring of such standards set under section 319 of the 2003 Act as relate to advertising. This report may be combined with the report referred to in paragraph 5 above at the discretion of ASA(B) and BCAP.

15. ASA(B) shall forthwith provide such information and assistance to OFCOM as OFCOM shall from time to time reasonably require for purposes connected with the exercise by OFCOM of their functions under sections 26, 321(5) and/or 325(3) of the 2003 Act, and generally to assist OFCOM to review how effectively ASA(B) has exercised, or is exercising, any code complaints function.

### Information disclosure between BCAP and ASA(B)

16. For the purposes of Schedule 15 to the 1994 Act, OFCOM certify that:

(a) a standards function appears to OFCOM to be a function related to a code complaints function and a medicinal advertisements function;

(b) a code complaints function and a medicinal advertisements function both appear to OFCOM to be functions related to a standards function; and

(c) the following descriptions of disclosure between BCAP and ASA(B) are capable of being necessary or expedient for the purpose of each of them exercising their relevant functions or related functions:

(i) any disclosure by BCAP to ASA(B) of information relating to the exercise by BCAP of a standards function or the exercise by ASA(B) of a related function;

(ii) any disclosure by ASA(B) to BCAP of information relating to the exercise by ASA(B) of a code complaints function or a medicinal advertisements function, or the exercise by BCAP of a related function.

### Interpretation

17. In this authorisation references to BCAP and ASA(B) include references to their respective employees, as defined by section 79 of the 1994 Act.

18. Except where otherwise defined or in so far as the context otherwise requires, any word or expression shall have the same meaning as it has in the 2003 Act and any reference to sections or subsections of legislation is to the 2003 Act.

19. The Interpretation Act 1978 (except section 11 of that Act) shall apply as if this Authorisation were an Act of Parliament.

20. Any references in this Authorisation to any provisions of the 2003 Act, the Broadcasting Act 1990 and the Broadcasting Act 1996 are to include, as appropriate, references to those provisions as modified from time to time for the purposes of community radio by any order of the Secretary of State under section 262 of the 2003 Act.

21. Headings and titles shall be disregarded in the interpretation of this Authorisation.

22. This Authorisation shall take effect from 1 March 2015 and subject to the Co-Regulatory Parties entering into a new Deed of Arrangement with Ofcom by 31 March 2015, such new Deed to replace the 2004 Deed of Regulation and set out the operational arrangements to be agreed between them including any provisions as to termination and compensation as may be appropriate, shall continue until 2 November 2024 unless revoked at any time by OFCOM, or unless the 2004 Order is previously revoked.

23. Should Ofcom and the Co-Regulatory Parties fail to enter into a new Deed of Arrangement by 31 March 2015, this Authorisation shall be revoked on that date.

## **ODPS Designation**

### **Designation pursuant to section 368B of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of advertising included in on-demand programme services**

#### **WHEREAS:**

- (1) Section 368B(2) and (3) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of on-demand programme services<sup>46</sup>;
- (2) Section 368B(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368B(9) to be, to the extent provided for in the designation, the appropriate regulatory authority for the purposes of any provision of Part 4A of the Act;
- (3) Ofcom originally designated certain of its functions in relation to the regulation of on-demand programme services to the Advertising Standards Authority Limited (Registered number 733214) ('the ASA') with effect for a period of ten years from 1 September 2010.

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<sup>46</sup> Inserted by the Audiovisual Media Services Regulations 2009 (SI 2009/2979) and amended by the Audiovisual Media Services Regulations 2010 (SI 2010/419) and Audiovisual Media Services Regulations 2014 (SI 2014/2916).

- (4) This followed an Ofcom consultation entitled Proposals for the Regulation of Video on Demand Services published on 14 September 2009, and subsequent statement on 18 December 2009<sup>47</sup> addressing the principle of co-regulation and appropriateness of the ASA's proposal at that time;
- (5) The original designation expires on 31 August 2020 and Ofcom has decided to renew it in substantively the same form from 1 September 2020 until 31 October 2024 in order to align dates with those applying to arrangements for broadcast advertising<sup>48</sup>;
- (6) Ofcom, in making this Designation, is satisfied that:
- (i) the ASA is a fit and proper body to be so designated,
  - (ii) the ASA will ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular:
    - a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Communications Act 2003 ('the Act') as appear to be relevant to it in the circumstances;
    - b. to consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act;
    - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
  - (iii) the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Function;
  - (iv) the ASA is sufficiently independent of providers of on-demand programme services; and
  - (v) the ASA has consented to being so designated.
- (7) In concluding the above, Ofcom has in particular taken into account the ASA's written undertakings to Ofcom as annexed to this Designation, the ASA's co-

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<sup>47</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/vod>

<sup>48</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/58942/statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/58942/statement.pdf)

regulatory proposal (Annex 8 of the 2009 consultation), responses to the 2009 consultation, information provided by the ASA pursuant to its reporting obligations since 2009 and other information relevant to the ASA's performance of its functions over the period;

- (8) Ofcom is satisfied that in making this Designation it has acted in accordance with its duties under the Act;

**NOW THEREFORE BY VIRTUE OF PART 4A OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:**

1. Ofcom in exercise of the powers conferred on it under section 368B of the Act hereby designates the ASA, for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368R of the Act) for the purpose of carrying out the function set out in Paragraph 5 of this Designation in relation to advertising included in on-demand programme services to the extent and subject to the Obligations, Conditions and other such circumstances as are described in this Designation ('the Designated Function').
2. This designation incorporates the Schedules and Annex which form part of this Designation for all purposes and includes such variations as from time to time may be made by Ofcom in accordance with paragraphs 9 and 10 of this Designation.
3. This Designation shall be legally binding and, as Ofcom's designee, the ASA shall be liable to Ofcom for any failure to carry out the Designated Function in accordance with the terms of this Designation.

**Interpretation of terms**

4. The following terms referred to in this Designation shall have the following meanings:
  - (i) 'Designated Function' has the meaning given in Paragraph 1 of this Designation;
  - (ii) 'Rules' shall be construed in accordance with Paragraphs 6(ii) and 7(iv) of this Designation;
  - (iii) 'relevant requirements of the Act' means the requirement set out in section 368D(1) of the Act as it applies in relation to sections 368E (insofar as they relate to advertising included in an on-demand programme service), 368F and 368FA of the Act;
  - (iv) 'Service Provider' means a provider of an on-demand programme service;
  - (v) for the purposes of this Designation, 'advertising' is included in an on-demand programme service and therefore subject to the exercise of powers under this Designation, if, in accordance with section 368R(3) of the Act, it can be viewed by a user of the service as a result of the user selecting a programme to view; and

- (vi) other terms and expressions used in this Designation shall have the meanings given to them in the Act.

### **The Designated Function**

- 5. Ofcom designates the ASA to carry out the following function:

In accordance with section 368C(1) of the Act, to take such steps as appear to the ASA best calculated to secure that the relevant requirements of the Act are complied with by Service Providers.

### **Powers**

- 6. In carrying out the Designated Function the ASA shall exercise the following powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:
  - (i) to decide what constitutes 'advertising included in an on-demand programme service' in accordance with section 368R(3) of the Act for the sole purpose of applying the Rules and having regard to guidance prepared and published by the ASA following consultation with Ofcom;
  - (ii) to publish (or have published) Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act;
  - (iii) to secure that accompanying guidance to aid interpretation of those Rules is prepared and published;
  - (iv) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the Rules and to require the Service Provider to co-operate fully and promptly to secure compliance with its decision;
  - (v) to refer any particular case to Ofcom to determine whether there has been a contravention of any of the relevant requirements of the Act;
  - (vi) to carry out, commission or support (financially or otherwise) research in connection with its Designated Function (section 368B(11)); and
  - (vii) to use any recording, script or transcript provided to it in connection with its performance of any of the Designated Function as permitted under section 69(5) of the Copyright, Designs and Patent Act 1988 (as inserted by Regulation 12(2)(c) of the Regulations).

### **Obligations and Conditions**

- 7. In carrying out the Designated Function and in exercising the Powers set out in Paragraph 6 above the ASA shall comply with the following Obligations and Conditions:
  - (i) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and

obligations that apply to Ofcom in performing its regulatory functions, including in particular:

- a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
  - b. to consult and carry out impact assessments in relation to the carrying out of the Designated Function in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
  - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
- (ii) following referral or appeal to Ofcom, to accept any decision of Ofcom as to whether advertising is included in an on-demand programme service;
- (iii) to require every Service Provider to secure that advertising included in the service they provide complies with the Rules;
- (iv) to ensure that the Rules are expressed as the relevant requirements of the Act (as amended from time to time) are expressed without material additions or omissions. Specifically:
- a. in relation to advertising content of on-demand programme services only, the requirements set out in section 368E of the Act;
  - b. the requirements set out in section 368F of the Act (which specifically relate to advertising in on-demand programme services); and
  - c. the requirements set out in section 368FA of the Act (which specifically relate to advertising for an identifiable less healthy food or drink product in on-demand programme services);
- (v) to consult with Ofcom in securing the preparation of interpretative guidance to the Rules (and any subsequent material changes to that guidance), before it is published, or any changes to it are published;
- (vi) to ensure that in drawing up any interpretative guidance referred to in this Designation, such guidance reflects the following:
- a. that it is provided only in order to aid interpretation of the Rules in light of the relevant requirements of the Act; and
  - b. that compliance with the Rules will not necessarily be taken by Ofcom to be compliance with the relevant requirements of the Act;
- (vii) to draw up and, from time to time, review and revise, guidance setting out their intentions concerning the exercise of their functions under Part 4A of the Act in relation to the prohibition imposed by section 368FA and to consult the Secretary of State before drawing up or revising such guidance.

- (viii) to consult with Ofcom prior to consulting the Secretary of State when drawing up or revising guidance setting out their intentions concerning the exercise of their functions under Part 4A of the Act in relation to the prohibition imposed by section 368FA of the Act;
- (ix) to have in place and publish appropriate and robust complaints handling processes for the assessment, investigation and adjudication of complaints in order to carry out the Designated Function, such processes to be formulated in consultation with Ofcom;
- (x) to handle complaints received by it and any passed to it by Ofcom in accordance with its obligations in this Designation ensuring that all complaints assessed under the statutory rules are recorded as such;
- (xi) to comply with the reporting obligations set out in the Schedule to this Designation;
- (xii) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xiii) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the Rules, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as he or she may authorise, a Service Provider has:
  - a. failed to comply fully and promptly with a decision of the ASA;
  - b. failed to co-operate fully and promptly with a decision of the ASA;
  - c. demonstrated a repeated disregard for the reasonable requests or decisions of the ASA; or
  - d. has committed one or more breaches of the Rules of sufficient seriousness so as to warrant in the ASA's opinion investigation by Ofcom;and to refer those matters to Ofcom (together with copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom;
- (xiv) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a Service Provider may have breached the Rules due to the inclusion in the service of advertising that contains material likely to encourage or to incite the commission of crime, or to lead to disorder and where the potential contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
- (xv) to cooperate fully with Ofcom at all times, including:
  - a. to consult Ofcom, as appropriate, in cases where there is any doubt in connection with the Designated Function and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and

- b. to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
  - c. to consult Ofcom, as appropriate, in cases where there is any doubt in connection with the Designated Function and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
  - d. to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xvi) to consult Ofcom and in cases where there is doubt or disagreement as to whether a service constitutes an on-demand programme service for the purposes of section 368A(1) of the Act or, as appropriate, in connection with any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
- (xvii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Function for any reason and/or can no longer satisfy the relevant requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Function and in each case to use its best endeavours to resolve any such issues promptly; and
- (xviii) in the event that the ASA no longer wish to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Function and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Function, setting out its reasons.
8. For the avoidance of doubt, this Designation shall not be revoked except in accordance with Paragraphs 15 and 16 below.

#### **Variation of this Designation**

9. Ofcom may vary this Designation at any time, subject to Ofcom notifying the ASA in writing not less than thirty days prior to the date that the proposed variation is to come into force in order to give the ASA a reasonable opportunity to comment or, exceptionally, in such lesser period as Ofcom considers appropriate.
10. The ASA may also request a variation of this Designation at any time for Ofcom's consideration. Any variation will take effect only on Ofcom signing and issuing a notice of variation to that effect.

#### **Duration of this Designation**

11. This Designation is to have effect from 1 September 2020 and to continue until 31 October 2024 ('the expiry date') or until such time as it is revoked in accordance with Paragraphs 15 and 16 below.

## **Regulation of advertising of less healthy food and drink**

12. No less than twelve months before the expiry date, Ofcom and the ASA shall discuss in good faith a renewal of this Designation for such period as they may agree; the decision whether or not to renew shall rest with Ofcom.

### **Review of this Designation**

13. Ofcom may review this Designation at any time where, in Ofcom's reasonable opinion, regulatory development, including any changes in relevant legislation, make it appropriate to do so.

### **Publication of this Designation**

14. Ofcom shall publish this Designation in such manner as it considers appropriate for bringing it to the attention of persons who, in its opinion, are likely to be affected by it. The ASA shall publish this Designation in the same manner as Ofcom and subsequent to Ofcom having first published it.

### **Revocation of this Designation**

15. Ofcom may revoke this Designation in accordance with section 368B(7) of the Act.
16. Ofcom must revoke this Designation if it is no longer satisfied that the ASA is able to satisfy the requirements for being the appropriate regulatory authority set out in section 368B(9) of the Act or if the ASA no longer consents to being designated, having first notified Ofcom in accordance with the obligations in Paragraph 7(xvi) above.
17. In exercising its powers to revoke under Paragraphs 15 and 16 above, Ofcom will give reasonable notice to the ASA of its intention to revoke and will give the ASA an opportunity to make representations and, where in the circumstances Ofcom considers it appropriate, an opportunity to take any remedial steps within such period as Ofcom requires; that period of notice being of such period as Ofcom shall determine to be appropriate in all the circumstances.

### **For the Avoidance of Doubt**

18. The duties and obligations that apply to each of Ofcom and the ASA as an appropriate regulatory authority include those referred to in Paragraph 7(i) of this Designation as well as public law duties such as the duty to act reasonably in all the circumstances.
19. The ASA is only empowered to carry out the Designated Function and exercise the powers specifically designated to them in this Designation. Accordingly, and for the avoidance of doubt, the ASA is not the appropriate regulatory authority in relation to any function set out in the Act that does not form part of the Designated Function (including in particular, all functions not relating to advertising content, the power under section 368I of the Act to determine in relation to advertising included in an on-demand programme service that a

## Regulation of advertising of less healthy food and drink

Service Provider is contravening or has contravened the relevant requirements of the Act and the powers under section 368J, 368K and 368L associated with the enforcement of those requirements).

20. Compliance by Service Providers with the Rules will not necessarily be taken to be compliance with the relevant requirements of the Act and the ASA's investigation and recommendation will not be binding on Ofcom;
21. Any Notice given by the ASA under Paragraph 7 (xv) and (xvi) above, would not have the effect of revoking this Designation unless or until Ofcom decided to revoke in accordance with Paragraphs 15 and 16 above.
22. The ASA may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
23. Where the ASA is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of the ASA (section 368B(3) of the Act) and will notify the ASA as appropriate.
24. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368B(2) of the Act).
25. Where there is any inconsistency or conflict between the provisions of this Designation and the provisions of the Act, the provisions of the Act shall prevail.

### Ofcom's Commitments to the ASA

26. Ofcom shall consider any referrals from the ASA promptly and if having taken into account any representations from the relevant Service Provider, Ofcom determines that section 368D of the Act has been contravened, take such steps as it considers appropriate by way of enforcement action against the Service Provider.
27. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements.
28. Subject to any restriction in law, Ofcom shall provide the ASA with such assistance and information as the ASA may reasonably require from time to time under section 368B(4) and 10(c) of the Act, including, where appropriate, assisting in relation to the carrying out of impact assessments.
29. Ofcom shall have regard to any comments made by the ASA under Paragraph 9 and shall consider in good faith any requests made by the ASA from time to time under Paragraph 10 for a variation of the Designation.

Signed:

Date:

## A4. Responding to this consultation

### How to respond

- A4.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 21 April 2023.
- A4.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-1/consultation-regulation-of-advertising-of-less-healthy-food-and-drink>. You can return this by email or post to the address provided in the response form.
- A4.3 If your response is a large file, or has supporting charts, tables or other data, please email it to [FoodAndDrinkAdvertising@ofcom.org.uk](mailto:FoodAndDrinkAdvertising@ofcom.org.uk), as an attachment in Microsoft Word format, together with the [cover sheet](#).
- A4.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- Advertising Team, Standards and Audience Protection  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A4.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files; or
  - upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A4.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential).
- A4.7 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt of a response submitted to us by email.
- A4.8 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A4.9 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 1. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A4.10 If you want to discuss the issues and questions raised in this consultation, please contact [FoodAndDrinkAdvertising@ofcom.org.uk](mailto:FoodAndDrinkAdvertising@ofcom.org.uk).

## Confidentiality

- A4.11 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish responses on [the Ofcom website](#) at regular intervals during and after the consultation period.
- A4.12 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A4.13 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A4.14 To fulfil our pre-disclosure duty, we may share a copy of your response with the relevant government department before we publish it on our website. This is the Department for Business, Energy and Industrial Strategy (BEIS) for postal matters, and the Department for Culture, Media and Sport (DCMS) for all other matters.
- A4.15 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

## Next steps

- A4.16 Following this consultation period, Ofcom plans to publish a statement.
- A4.17 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

## Ofcom's consultation processes

- A4.18 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 5.
- A4.19 If you have any comments or suggestions on how we manage our consultations, please email us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A4.20 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Corporation Secretary  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA  
Email: [corporationsecretary@ofcom.org.uk](mailto:corporationsecretary@ofcom.org.uk)

## A5. Ofcom's consultation principles

### Ofcom has seven principles that it follows for every public written consultation:

#### Before the consultation

- A5.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

#### During the consultation

- A5.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A5.3 We will make the consultation document as short and simple as possible, with an overview of no more than two pages. We will try to make it as easy as possible for people to give us a written response.
- A5.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A5.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A5.6 If we are not able to follow any of these seven principles, we will explain why.

#### After the consultation

- A5.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish the responses on our website at regular intervals during and after the consultation period. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

## A6. Consultation coversheet

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? \_\_\_\_\_

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If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom aims to publish responses at regular intervals during and after the consultation period. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)