

Advertising Association

Question	Your response
<p>Question 1:</p> <p>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.</p>	<ol style="list-style-type: none"> 1. Yes. 2. We believe that the proposed rule to be inserted into Section 32 of the BCAP Code satisfies the requirements of Section 321A of the Communications Act. 3. With regard to the proposed definitions, we agree the proposals set out in this consultation appropriately reflect the requirements of the Act. We would make some suggested alterations, however, to provide clarity to industry. <ol style="list-style-type: none"> 3.1. We recognise that the definition of a ‘less healthy food and drink product’ as written here replicates the wording used in the Act. This definition is, however, both vague and unhelpful for industry. We would recommend adding wording which references the guidance which CAP is going to publish ahead of the implementation of the restrictions. It may also be useful to move this paragraph to the beginning of the definition to set the context for the remainder of the definition. If the wording is to be updated we would suggest adding a sentence such as: <ol style="list-style-type: none"> 3.1.1. “A less healthy food and drink product is identifiable if it falls within the definition set out in the guidance published by CAP in [Month] 202[X].” 4. We believe that the reference to the nutrient profiling model (NPM) should make clear that this refers to the 2004/5 NPM as spelled out in the Act. This would avoid any confusion, particularly if the Government were to introduce a new NPM in the future. Given that businesses have spent years and millions of pounds of investment on adapt-

	<p>ing to the 2004/5 NPM there is no room for ambiguity – it must be clear at all stages of the process that the NPM being referred to is 2004/5. We accept that the Act requires the Government to consult on any future NPM before requiring its application to advertising restrictions.</p> <p>5. It needs to be clarified, however, whether the current and any future NPM model will only apply to LHF products (newly defined in the 2022 Health Act), or to LHF and HFSS products. We also presume that CAP would be required to update the relevant guidance on LHF and / or HFSS products if a new NPM were to be adopted. This issue is fundamental for businesses. As above, industry has spent considerable time and investment in adapting to the 2004/5 NPM. Any proposed change to this model would place significant burdens on businesses at a time when confidence and regulatory certainty are paramount. We would strongly oppose any move to change to a different NPM than the one spelt out in the Act, either for HFSS or for LHF products.</p>
<p>Question 2:</p> <p>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.</p>	<p>6. Yes.</p> <p>7. We believe that the proposed rule satisfies the requirements of Section 321A of the Communications Act.</p> <p>8. On the proposed definition, as stated above we believe that the reference to the nutrient profiling model should make clear that this refers to the 2004/5 nutrient profiling model (NPM) as spelled out in the Act and we would refer to paragraphs 4 and 5 of this response on our concerns about any future changes to the NPM. This would avoid any confusion, particularly if the Government were to publish a second NPM in the future. As stated in paragraph 4 above, we accept that the Act requires the Government to consult on any future NPM model before requiring its application to advertising. It needs to be clarified if the current and any future NPM model will only apply</p>

	<p>to LHF products, or to LHF and HFSS products. CAP also needs to be required to update the relevant guidance.</p> <p>9. As above, we recognise the need for a definition of “identifiable” less healthy food or drink products but would urge Ofcom to supplement the current legal definition with a reference to the relevant CAP guidance which will be published ahead of the implementation date.</p>
<p>Question 3:</p> <p>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?</p> <p>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.</p>	<p>10. We strongly 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.</p> <p>11. Through the ASA the UK is a recognised world leader for advertising self-regulatory practice and operates without cost to the taxpayer. The ASA model has been emulated in other countries and has proven itself as an effective regulator over the past 60 years.</p> <p>12. We agree with the position set out in the consultation that, given the ASA’s existing role in regulating online advertising under the self-regulatory system and their track record and experience in acting as the frontline regulator for broadcast, on-demand, and VSP advertising, it makes sense for the ASA to be designated as a co-regulator in this space. We agree that the ASA adheres to the criteria set out in paragraph 5.42 – namely the Statutory Criteria (s.368Z(19)(9)) and the Ofcom Principles for Analysing Self- and Co-regulation.</p> <p>13. It would make no sense to have the ASA as a co-regulator for one section of the restrictions – TV and ODPS – and for this not to be replicated for the online restrictions as well. This would not only create confusion for consumers and industry alike but would threaten the underlying basis of the existing self- and co-regulatory system by requiring a different entity to essentially create parallel structures – including guid-</p>

	<p>ance and monitoring – to those already being developed by the ASA for the pre-watershed and ODPS restrictions.</p> <p>14. We would therefore ask that Ofcom pushes back strongly against any suggestion that another body should take on this co-regulatory role, or that Ofcom should remain the sole regulator, given the negative impact that this would inevitably have on consumers and industry.</p>
<p>Any additional comments on: Ofcom’s proposed approach to enforcing the new prohibition on advertising for less healthy food and drink products online; and Ofcom’s 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.</p>	<p>Additional comments: Ofcom’s proposed approach to enforcing the new prohibition on advertising for less healthy food and drink products online.</p> <p>15. The approach set out by Ofcom appears sensible and proportionate, and aligned with existing best practice as outlined in their Regulatory Enforcement Guidelines.</p> <p>Additional comments: impact assessment</p> <p>16. As we made clear in our response to the government’s consultations of 2019 and 2020 on introducing the advertising restrictions, we do not agree with its impact assessment - or policy rationale - and consider that the restrictions are unjustified.</p> <p>17. With regard to Ofcom’s own involvement, however, we agree that co-regulation with the ASA would be the most effective way of fulfilling its statutory responsibilities, including via the appointment of the ASA as co-regulator in respect of the online restrictions. The ‘one-stop-shop’ facility that the ASA affords is a welcome benefit for consumer protection.</p>