



28 April 2023

Sent by email  
([FoodAndDrinkAdvertising@ofcom.org.uk](mailto:FoodAndDrinkAdvertising@ofcom.org.uk))

Dear Sir/Madam,

The British Retail Consortium (BRC) is the trade association for UK retail businesses. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future. We tell the story of retail, work with our members to drive positive change and use our expertise and influence to create an economic and policy environment that enables retail businesses to thrive and consumers to benefit. Our membership comprises over 200 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of niche retail trade associations that are themselves members of BRC.

The retail Industry is committed to helping consumers to make healthier choices. Fresh fruit and vegetables are heavily price promoted and often the very first thing shoppers see when entering food retailing stores. Availability of healthy snack alternatives has risen considerably. Our industry has led the way on reformulating products to reduce salt, sugar, and fat. We pioneered traffic light labelling and clear energy/Kcal information on products and signage to help consumers understand products and make informed choices. These significant changes pioneered by retailers have yet to be fully adopted by other elements of the food and drink industry, for example hotels, restaurants, catering firms and parts of the foodservice industry. By no means is the process complete, but our members are rightly proud of the work they have done.

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Our specific comments:

**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.**

*‘HFSS products’ are those food or drink products that are assessed as High in Fat, Salt or Sugar in accordance with the Department of Health and Social Care’s nutrient profiling model. Information on the nutrient profiling model is available on the Department of Health and Social Care’s website here – We believe it is very important that this paragraph refers to the 2004/5 model. The 2018/19 review has not been formally published; however, many people know the outcome of this review and not being precise in the Code could lead to confusion.*

*A food or drink product is ‘less healthy’ if: · it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X];<sup>13</sup> and – One of the questions in DHSC’s consultation on the draft Regulation listing categories in scope, was whether the proposed draft made it clear which foods were in scope. Our response was a very categorical NO. The draft Regulation only includes lists of categories in scope, with very little definition and with no sets of principles to enable industry to work through logically which products are in and out of scope. Based on our experience with The Food (Promotion and Placement) 2021 Regulations, the law will not provide that clarity. Clarity will be given in supportive guidance.*

**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.**

We do not have a problem with the wording suggested, however, feel very strongly that robust guidance are needed to clearly establish what is an identifiable product.

**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.**

We agree with OFCOM’s suggestion to designate the ASA as the front-line regulator for the aspects of these new provisions for which they are not already playing that role.

Nonetheless, the new provisions are detailed and aspects of them are very technical in nature. They are wide scoping and are going to substantially change the way in which our members advertise both on TV and online. Our members need certainty and consistency, and we believe that some additional safeguards should be considered to support the current system.

First, OFCOM/ASA should establish a round table of experts on food, nutrition and food advertising which meets, as required but no less than twice a year. This group will review how compliance with the provisions and how processes are working and will discuss answers to frequent questions. The agreement reached in this group will be used to update guidance and review processes if necessary. This should be an official forum run by OFCOM. We understand there is a similar experts group covering payments.

Secondly, strong consideration should be given to the appeals process, and the current lack of ability by companies to argue their cases in front of the Committee. BRC and members have always been of this opinion, but it is especially important when these new provisions come into effect. Due to their complex and detailed nature, it will be difficult for companies to be able to properly argue their case in writing.