

Designation pursuant to section 368Z19 of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of online advertising of less healthy food and drink

WHEREAS:

- (1) Section 368Z19(2) and (3) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of online advertising of less healthy food and drink;¹
- (2) Section 368Z19(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368Z19(9) to be, to the extent provided for in the Designation, the appropriate regulatory authority for the purposes of any provision of Part 4C of the Act;
- (3) Ofcom issued a public consultation on 21 February 2023² seeking views on its proposals for the regulation of advertising and sponsorship of less healthy food and drink in different media. These included a proposal to designate the Advertising Standards Authority Limited (Registered number 733214) ('the ASA') in relation to online advertising of less healthy food and drink and also included Ofcom's preliminary assessment of the ASA against the criteria set out in section 368Z19(9);
- (4) Ofcom published a statement on 10 July 2023³ which included its final assessment and reasons for deciding to designate functions to the ASA in accordance with the proposals set out in the consultation. Accordingly, and to the extent provided for in this Designation, Ofcom is designating the ASA to be the appropriate regulatory authority under Part 4C of the Act for the purpose of regulating online advertising of less healthy food and drink;
- (5) Ofcom, in making this Designation, is satisfied that:
 - i. the ASA is a fit and proper body to be so designated;
 - ii. the ASA has consented to being so designated;
 - iii. the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Functions, taking into account any financial assistance that Ofcom may provide to the ASA in connection with the Designated Functions in accordance with section 368Z19(4);

¹ Inserted by the Health and Care Act 2022.

² Ofcom, [Consultation – Regulation of advertising of less healthy food and drink: implementation of new statutory restrictions](#), February 2023.

³ Ofcom, [Statement – Regulation of advertising for less healthy food and drink: implementation of new statutory restrictions](#), July 2023.

- iv. the ASA is sufficiently independent of persons who carry on a business that involves or is associated with the manufacture or sale of less healthy food or drink products; and
 - v. the ASA will ensure, in performing the Designated Functions, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in exercising its powers, including in particular: 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 in the circumstances;
- (6) In concluding the above, Ofcom has taken particular account of its existing co-regulatory arrangements with the ASA for the regulation of broadcast, on-demand and VSP advertising, the existing self-regulatory system for online advertising administered by the ASA, and responses to the consultation referred to in Recital 3;
- (7) 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 4C OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:

1. The Office of Communications ('Ofcom'), in exercise of the powers conferred on it under section 368Z19 of the Communications Act 2003 ('the Act'), hereby designates the Advertising Standards Authority Limited (Registered number 733214) ('the ASA'), for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368Z19 of the Act) for the purpose set out in Paragraph 5 of this Designation in relation to online advertising of less healthy food and drink, to such extent, and subject to the Obligations, Conditions and other such circumstances, as described in this Designation.
2. This Designation incorporates the Schedule which forms 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 Functions 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) 'less healthy', in relation to a food and drink product, means a food or drink product that: (a) falls within a description specified in regulations made by the Secretary of State; and (b) is 'less healthy' in accordance with the guidance entitled 'Nutrient Profiling Technical Guidance' published by the Department of Health on 1 January 2011;
- (ii) 'Designated Functions' has the meaning given in Paragraph 5 of this Designation;
- (iii) 'Rules' shall be construed in accordance with Paragraphs 7(ii) and 7(iii) of this Designation, and as being synonymous with the relevant requirements of the Act (for the avoidance of doubt, 'Rules' may include a single rule);
- (iv) 'relevant requirements of the Act' means the prohibition of paid-for advertising of less healthy food and drink as set out in section 368Z14 of the Act;
- (v) 'advertiser' means a person paying for advertisements to be placed on the internet, in accordance with section 368Z14(5) of the Act;

Other terms and expressions used in this Designation shall have the meanings given to them in the Act.

The Designated Functions

5. Ofcom designates the ASA to carry out the following functions:

- (i) to take such steps as appear to the ASA best calculated to determine whether an advertiser is contravening or has contravened the relevant requirements of the Act (in accordance with section 368Z15(2) of the Act); and
- (ii) to draw up and, from time to time, review and revise, guidance (in accordance with section 368Z18 of the Act) setting out their intentions concerning the exercise of their functions under Part 4C of the Act in relation to the relevant requirements of the Act; to consult the Secretary of State before drawing up or revising such guidance; and to publish such 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.

Powers

6. In carrying out the Designated Functions, the ASA may exercise the following Power, in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (i) the power to carry out, commission or support (financially or otherwise) research in connection with its Designated Functions.

Obligations and Conditions

7. In carrying out the Designated Functions and in exercising the Power set out in Paragraph 6 above the ASA shall take such steps as appear to the ASA best calculated to comply with the following Obligations and Conditions:

General

- (i) to ensure 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 have regard, in relation to the carrying out of the Designated Functions, to the circumstances in which it may be necessary to carry out an impact assessment in accordance with Ofcom's duty under section 7 of the Act; and
 - c. to have regard, as appropriate, to complying and securing that its staff comply with section 393 of the Act (confidentiality);
 - d. to act in accordance with public law duties, including the duty of fairness;

Rules and guidance

- (ii) to publish (or have published) Rules for the purpose of securing that advertisers comply with the relevant requirements of the Act;
- (iii) to ensure that the Rules reflect the relevant requirements of the Act (as amended from time to time) without material additions or omissions;
- (iv) to apply the Rules so as to determine whether an advertiser is contravening or has contravened the relevant requirements of the Act;
- (v) to treat a breach of the Rules as a contravention of the relevant requirements of the Act (with reference to the process for referrals to Ofcom set out under paragraph 7(xii)); and
- (vi) to consult with Ofcom prior to consulting the Secretary of State when drawing up or revising the guidance referred to in paragraph 5(ii);

Compliance

- (vii) to secure that advertisers comply with the Rules, and thereby the relevant requirements of the Act;

Complaints handling, assessments/investigations and reporting obligations

- (viii) to have in place and publish appropriate and robust complaints handling processes for the assessment, investigation and determination of complaints and (where the ASA thinks appropriate) publication of rulings in order to carry out the Designated Functions, such processes to be formulated in consultation with Ofcom;
- (ix) to handle complaints received by it in accordance with its obligations in this Designation ensuring that all complaints assessed under the statutory rules are recorded as such;
- (x) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xi) to comply with the reporting obligations set out in the Schedule to this Designation;

Referrals

- (xii) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the relevant requirements of the Act, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as they may authorise, an advertiser has:
 - a. failed to comply fully and promptly with a decision of the ASA;
 - b. failed to cooperate fully and promptly with any non-statutory request for information, or any other reasonable request made by the ASA; and/or
 - c. committed one or more breaches of the Rules which appears to the ASA to be of sufficient seriousness so as to warrant in the ASA's opinion consideration by Ofcom of enforcement action under section 368Z15(1)(a) of the Act (power to give an enforcement notification) and/or section 368Z15(b) (power to impose a financial penalty);

and to refer those matters to Ofcom (together with, as appropriate, the ASA's contravention determination and copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom (as

part of this consideration, Ofcom will satisfy itself that an advertiser is contravening or has contravened the relevant requirements of the Act);

Cooperation with Ofcom

- (xiii) 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 Functions 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 Ofcom's functions;
- (xiv) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Functions for any reason and/or can no longer satisfy the relevant requirements of section 368Z19(9) to be the appropriate regulatory authority in relation to the Designated Functions and in each case to use its best endeavours to resolve any such issues promptly;
- (xv) in the event that the ASA no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Functions and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Functions, setting out its reasons; and
- (xvi) where Ofcom revokes this Designation in accordance with Paragraph 15 or 16 below, the ASA shall, as soon as reasonably practicable, transfer to Ofcom all outstanding cases together with copies of associated documents and files relevant to those cases (including the relevant evidence and submissions, any correspondence between the parties, and any materials in draft format).

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 7 December 2023 and to continue until 31 October 2034 ('the expiry date'), or until such time as it is revoked in accordance with Paragraphs 15 and 16 below.
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 368Z19(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 368Z19(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(xv) 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 the obligations and conditions that apply to the ASA under Paragraph 7 of this Designation. Additional details of the case-handling procedures to be adopted by the ASA are to be agreed between Ofcom and the ASA.
19. For the avoidance of doubt, the ASA is not designated the powers to give an enforcement notification under section 368Z15(1)(a) of the Act or to impose a financial penalty under section 368Z15(1)(b) of Act, and is not the appropriate regulatory authority in relation to any other function set out in the Act that does not relate to the Designated Functions, including the power to give a person a notice demanding information (in accordance with section 368Z17 of the Act), and the function of determining whether a person has failed to comply with a demand for information under section 368Z17 of the Act (in accordance with section 368Z17(6) of the Act).
20. Any Notice given by the ASA under Paragraph 7(xiv) and (xv) 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.
21. The ASA may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
22. 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 368Z19(3) of the Act) and will notify the ASA as appropriate.
23. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368Z19(2) of the Act).
24. 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

25. Ofcom shall consider any referrals from the ASA for consideration by Ofcom of enforcement action under section 368Z15(1)(a) of the Act (power to give an enforcement notification) and/or section 368Z15(1)(b) of Act (power to impose a financial penalty) promptly and take such steps as it considers appropriate by way of enforcement action against the advertiser.
26. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements or any legal restriction on disclosure.

27. 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 368Z19(4) and (10)(c) of the Act, including, where appropriate, assisting in relation to the carrying out of impact assessments.

28. 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:

A handwritten signature in black ink, appearing to be 'SW', followed by a small horizontal line and a period.

Date: 7 December 2023

Siobhan Walsh

Group Director, Broadcasting and Media

Person duly authorised in accordance with Paragraph 18 of the Schedule to the Office of Communications Act 2002

SCHEDULE

Reporting Obligations and Key Performance Indicators

Reporting Obligations

1. The ASA shall report to Ofcom on the carrying out of its Designated Functions as set out below.
2. The ASA shall by no later than the end of April each year, provide Ofcom with a written report detailing its exercise of the Designated Functions in the preceding calendar year.
3. The report shall include quantitative and qualitative information regarding complaints received and handled.
4. In particular, the report in paragraph 3 of this Schedule, shall include the following information:
 - (i) The number of complaints received about online advertising of less healthy food and drink;
 - (ii) The number of such advertisements about which complaints have been received;
 - (iii) Prior to investigation, the number of such advertisements assessed against the Rules and, as applicable, details of the Rule(s) they were assessed against (an assessment of such an advertisement against the Rules is henceforth referred to as a “case”);
 - (iv) The number of cases taken to investigation stage under the Rules; as applicable, details of the Rule(s) they were investigated under; and the status of those investigations, i.e. 'informal investigation' and 'formal investigation' (using the same categories as for completed broadcast advertising cases);
 - (v) The number of cases that after investigation were (a) upheld and (b) upheld in part and the Rule(s) they breached, and whether or not the investigation was referred to Ofcom;
5. The Chair and/or Chief Executive of the ASA will report in person on the matters set out in this designation to Ofcom's Content Board at meetings of the Content Board as reasonably requested by Ofcom.
6. The ASA shall forthwith provide such information and assistance to Ofcom as Ofcom shall from time to time reasonably require for purposes connected with Ofcom's (or another designated body's) functions under Part 4C of the Act and generally to assist Ofcom to review how effectively the ASA has exercised, or is exercising its Designated Functions.

Key Performance Indicators

7. The ASA shall seek to resolve 80% of cases within the number of working days indicated in the table below, depending on the nature of the case.

Turnaround times for complaint cases (in working days)	
No Additional Investigation	15
No Additional Investigation after Council Decision	20
Informal Investigation	35
Formal Investigation	60