

British Heart Foundation

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>	<p>The proposed rule and definitions adequately reflect the requirements of Section 321A of the Communications Act.</p> <p>The BHF supports the proposal that advertising for identifiable less healthy food and drink may not be shown on television between 5.30am and 9.00pm.</p> <p>However, more clarity and guidance is required around the definition of ‘identifiable food and drink products’ as detailed in our comment below.</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>The proposed rule and definitions adequately reflect the Department for Health and Social Care’s (DHSC), and we support the proposal that 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>However, more clarity and guidance is required around the definition of ‘identifiable food and drink products’ and the means of differentiating between product and brand sponsorship as detailed in our answer to Question 3.</p>
<p>Question 3:</p> <p>a) Do you agree with Ofcom’s proposal to designate the ASA as a co-</p>	<p>The BHF supports the proposal for Ofcom to be appointed as the regulator for broadcast media, with ASA as the co-regulator for online advertising, in the short term.</p> <p>Ofcom</p> <p>Ofcom is a statutory regulatory agency with experience as a co-regulator of television advertising. As the backstop regulator, we would expect Ofcom to</p>

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.

include details of the application, compliance with and breaches of these new regulations, along with any commentary on emerging areas for consideration of inclusion in the scope of these regulations, in its annual report, to be laid before Parliament. This would provide transparency and the very minimum level of scrutiny required to ensure that the regulations are being applied and enforced appropriately.

ASA

The ASA is the current co-regulator of advertising with BCAP, and should therefore be able to take on this role with the appropriate support and guidance from Government, Ofcom and Trading Standards. However, there are some aspects of their current approach to regulation that we believe require consideration.

The ASA's current model operates on the basis of investigation of complaints. This reactive approach does not allow for proper assessment of overall compliance with the rules, nor does it sufficiently discourage breaches. We would like to see a more proactive approach to the enforcement of these rules, rather than a reliance on the public to understand the rules sufficiently to bring complaints to the ASA for investigation. This could consist of more regular "avatar-based" research, like that published by the ASA in 2021,ⁱ and more compliance assessments like that published in 2020, which found that overall, 159 age restricted advertisements broke the advertising rules. Of these, 78 different adverts for products high in fat, salt and sugar from 29 advertisers appeared on 24 websites and 5 YouTube channels.ⁱⁱ

Given this demonstrated lack of compliance, the regulator should be equipped with powers to issue fines for repeat non-compliance, with limited scope for "informal resolution" of complaints against repeat offenders. This would require a clear definition of repeated breaches to be written into the legislation, alongside the development of a consistent approach to the level of fines. Fines must provide sufficient deterrent to non-compliance.

The ASA is an industry-funded regulator which operates on a self-regulation model. In order to ensure independence and consistency in the day-to-day application of these regulations, key definitions must be laid out in the legislation to avoid the need for judgement calls to be made on a case-by-case basis. These include (but are not limited to), the following:

- Defining a brand as synonymous with HFSS
- Identifiable HFSS brands
- Content/platforms whose principal purpose is to facilitate an online transaction
- Factual claims
- Repeated breach
- Severe breach

With regards to the first of these, the definition of "brands synonymous with HFSS" is an important part of this regulation, and the BHF believes that it cannot be left to interpretation by the regulator. While the ASA has developed

	<p>guidance on brand advertising,ⁱⁱⁱ this guidance is imprecise, and subject to interpretation. The application of this guidance needs to be consistent, coherent and objective, especially in cases where the definition of a brand as synonymous with HFSS is in dispute.</p> <p>Moreover, the guidance specifically states that the ASA would “decide on a case by-case basis whether an advertisement has the effect of promoting an HFSS product and should therefore be subject to the HFSS product advertising rule.^{iv}” There are an incredibly large number of brands selling food and drink products, hence it is unrealistic to take this case-by-case approach.</p> <p>The ASA must also publish details of all complaints received and investigations made, to ensure transparency and enable proper review of these regulations and their enforcement. Ofcom should have oversight of all complaints, and it should not be left to the ASA alone to decide on which complaints should be referred to Ofcom. All breaches should be reported to Government.</p> <p>Finally, in developing a mechanism for regular reporting on complaints the ASA must also report on new and emerging online platforms that may currently be exempt from the restriction.</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>The BHF is supportive of the Government’s intention to introduce a 9pm watershed on television advertising of HFSS food and similar restrictions on online advertising, in order to protect children from these demonstrated influences on their food behaviours and preferences,^v and, consequently, their health. Restricting advertising in this way is an important part of a comprehensive approach to address obesity, by creating a healthier food environment.</p> <p>The UK Government’s own impact assessment found that implementing the HFSS advertising restrictions could reduce the number of children with obesity by more than 20,000,^{vi} and this is likely an underestimation of the potential benefits.^{vii}</p> <p>This policy is also widely supported by the public. 2022 polling commissioned by the Obesity Health Alliance (OHA) and Diabetes UK showed that 71% of people would support a policy that would mean children only see healthier food and drinks adverts on television, with only 7% of people indicating they wouldn’t support this policy.^{viii} Equally, 71% of people agreed that it is important to protect children from HFSS advertising online, compared to only 6% who disagreed with this statement.</p> <p>However, the BHF reiterates its strong disappointment at the long delay to the implementation of this vital legislation until October 2025. Urgent action in this space is vital to the Government’s stated aims to halve childhood obesity by 2030 and to increase healthy life expectancy by five years by 2035, and the planned measures are evidenced-based, proportionate and hugely necessary given the burden of ill health in the UK.</p> <p>Data from the National Child Measurement Programme shows that 22% of reception-age children and 38% of year 6 children in England are living with excess weight or obesity.^{ix} Children with obesity are around five times more likely to become adults with obesity,^x increasing their risk of developing</p>

conditions including type 2 diabetes, heart disease, several types of cancer and liver disease.

Sadly, children living in the most deprived areas of England are more than twice as likely to be living with obesity as those living in the least deprived areas,^{xi} and are also more likely to be exposed to and influenced by unhealthy advertising.^{xii}

Industry now has another two and a half years to prepare for implementation of these regulations and has a number of routes open to it to shift practices and ensure compliance. Reformulation of products to reduce salt, sugar and fat could enable products to meet the nutritional requirements for advertising. Furthermore, analysis by Cancer Research UK found that, of 63 HFSS brands, 84% had a non-HFSS product in the same brand, master brand, parent company or licence holder company which could be advertised in place of HFSS products.^{xiii} Of those who advertise HFSS products between 6pm and 9pm, 54% had an alternative non-HFSS product, which could be advertised when these restrictions have been implemented.^{xiv}

In the longer term, we would like to see development of a comprehensive approach to the regulation of all types of harmful marketing. However, we recognise that this would require the establishment of a new enforcement body, and do not support further delay to the implementation of these regulations by the end of 2025 to enable this. To support this, regular review of the impact and enforcement of these regulations should be undertaken in order to allow the scope to be adjusted to capture novel marketing techniques, to avoid displacement of adverts to media that are currently exempt by virtue of their novelty. The review should also assess the suitability of the definitions outlined in the guidance, again to capture any novel products or business practices that have come into being after the commencement of the regulations and enable further policy development.

ⁱ Advertising Standards Agency (2021), Protecting Children in Mixed-age Online Media: Targeting Age-restricted Ads Away from Children, An ASA Monitoring and Enforcement Report.

<https://www.asa.org.uk/static/6d5593da-4b5e-43c4-82f97598dac03019/Mixed-Age-Avatar-Report.pdf>

ⁱⁱ Advertising Standards Agency (2020), Protecting Children Online, Monitoring ad breaches that occur on children's websites and YouTube channels. <https://www.asa.org.uk/static/e8efd8a6-b66a-49ba-9819090c921db26f/ASA-tech4good-protecting-children-infographic.pdf>

ⁱⁱⁱ Advertising Standards Agency (2017). Identifying brand advertising that has the effect of promoting an HFSS product Advertising Guidance. <https://www.asa.org.uk/asset/6B42B9F3-96EC-4A66-A9B50F0E21D845BF/>

^{iv} *Ibid.*

^v Boyland, E. J., Nolan, S., Kelly, B., Tudur-Smith, C., Jones, A., Halford, J. C., & Robinson, E. (2016), Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and nonalcoholic beverage advertising on intake in children and adults. *The American journal of clinical nutrition*, 103(2), 519–533. <https://doi.org/10.3945/ajcn.115.120022>

^{vi} Department of Health and Social Care & Department of Digital, Culture, Media and Sport (2021), Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response. <https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and-sugar/outcome/introducing-further-advertising-restrictions-on-tv-and-online-for-products-high-in-fat-salt-and-sugar-government-response>

^{vii} Tatlow-Golden, Mimi, and Daniel Parker. 2020. "The Devil Is in the Detail: Challenging the UK Government's 2019 Impact Assessment of the Extent of Online Marketing of Unhealthy Foods to Children" *International Journal of Environmental Research and Public Health* 17, no. 19: 7231.

<https://doi.org/10.3390/ijerph17197231>

^{viii} YouGov Plc. Total sample size was 5,232 adults. Fieldwork was undertaken between 7th - 11th December 2022.

^{ix} NHS England (2022), National Child Measurement Programme, England, 2021/22 school year, <https://digital.nhs.uk/data-and-information/publications/statistical/national-child-measurement-programme/2021-22-school-year>

^x Simmonds, M., Llewellyn, A., Owen, C. G., & Woolacott, N. (2016), Predicting adult obesity from childhood obesity: a systematic review and meta-analysis. *Obesity reviews : an official journal of the International Association for the Study of Obesity*, 17(2), 95–107. <https://doi.org/10.1111/obr.12334>

^{xi} *Ibid.*

^{xii} Cancer Research UK (2018), A Prime Time for Action, https://www.cancerresearchuk.org/sites/default/files/a_prime_time_for_action.pdf; Backholer, K., Gupta, A., Zorbas, C., Bennett, R., Huse, O., Chung, A., Isaacs, A., Golds, G., Kelly, B., & Peeters, A. (2021). Differential exposure to, and potential impact of, unhealthy advertising to children by socio-economic and ethnic groups: A systematic review of the evidence. *Obesity reviews : an official journal of the International Association for the Study of Obesity*, 22(3), e13144. <https://doi.org/10.1111/obr.13144>

^{xiii} Cancer Research UK (2021), Analysis on the potential for UK's leading food and soft drink brands to switch to marketing their non-HFSS products.

https://www.cancerresearchuk.org/sites/default/files/cruk_uk_leading_brand_product_analysis.pdf

^{xiv} *Ibid.*