

## Ofcom consultation

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

#### The IPA

1. The IPA is the professional trade body representing advertising, media and marketing communications agencies based in the United Kingdom. We have approximately 270 agency brands within our membership.
2. As a membership body incorporated by Royal Charter, the IPA's role is two-fold: (i) to provide essential core support services to our corporate members who are key players in the industry; and (ii) to act as our members' spokesperson.
3. Advertising is fundamental to the UK economy. Every pound spent on advertising returns £6 to GDP. It plays a crucial role in brand competition, drives innovation and fuels economic growth. It also helps fund our media and employs thousands of people throughout the UK.
4. We support the ASA and the UK's self-regulatory system with whose codes our members are required to comply in accordance with our rulebook.

#### Introduction

We welcome the opportunity to respond to this consultation and hope that it will lead to clarity for advertisers and agencies regarding the advertising restrictions for 'less healthy' products on TV, ODPS and online.

The consultation includes references to the SME exemption to the restrictions but does not refer to other exemptions, including the brand advertising exemption which is expressly included in the government response to its consultations of 2019 and 2020 on introducing the advertising restrictions. As we explained to government in our response to its recent consultation on the draft Advertising (Less Healthy Food Definitions and Exemptions) Regulations 2022, industry needs clarity over all exemptions, including the brand exemption and how it will operate with the CAP and BCAP Codes.

We also asked government for clarity on the meaning of "identifiable" as included in the confirmation of the brand exemption in the government's consultation response noted above and, similarly, in the Health and Care Act 2022 (the "Act"). The Act contains the following definition:

*"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."*

President	Hon. Secretary	Hon. Treasurer	Director General	Secretary
Josh Krichefski	Jaime Elliott	Bronwen Hemming	Paul Bainsfair	Tom Mott



This is also unclear in our view. A specific reference to guidance to be produced by CAP clarifying the meaning would be useful for our industry.

## Responses to the consultation questions

### 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.*

Yes, we consider that Ofcom's proposed rule and the proposed definitions to be inserted into the BCAP Code do appropriately reflect the requirements of Section 321A of the Communications Act.

Under paragraph 3.10 of the consultation, the proposed rule is:

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

The definition explaining how a less healthy food and drink product is identifiable, mirrors the text from Schedule 18 of the Health and Care Act 2022:

*"...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."*

However, as noted in our introduction above, we do not consider that definition to be sufficiently clear and would also suggest that specific reference is made to CAP guidance. Industry also needs clarity on how the government's brand advertising exemption and other exemptions will apply.

In addition, the proposed definition of 'HFSS products' explains that those:

*"...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."*

While the website linked to in the consultation currently explains that the Nutrient Profiling Model (NPM) was developed in 2004-05, we would ask that the proposed definition expressly refers to that particular model.

Further, a product is defined as 'less healthy' (in addition to being HFSS):

*"if it falls within a food or drink category specified in the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 2021]"*



As we explained in our response to the government's consultation on those draft Regulations, we do not consider the categories to be sufficiently clear and have asked government for guidance to complement the Regulations as soon as possible to give advertisers and agencies sufficient time to fully understand the products in scope and be able to plan compliant advertising campaigns.

**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.*

Yes, we consider that Ofcom's proposed Rule 9.17A and the associated meaning appropriately reflect the requirements of Section 321A of the Communications Act.

However, note 1 explains that the proposed Rule 9.17A:

*"...does not apply to sponsorship by or on behalf of a of a [sic] food or drink SME, within the meaning given by the [Advertising (Less Healthy Food Definitions and Exemptions) Regulations 202X]."*

As explained in our response to Question 1 above, we have asked government for clarity over the brand advertising and other exemptions to the restrictions.

Note 2 reflects the definition provided under Question 1 as to how a less healthy food and drink product is identifiable. As with our answer to Question 1 above, we do not consider the definition to be sufficiently clear.

With regard to the proposed definition of 'less healthy food and drink' set out in paragraph 3.18, please see our response to Question 1 above.

**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.*

Yes, we 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. The ASA, together with CAP and BCAP, have a wealth of experience and expertise in advertising regulation and enforcement, generally. The ASA, as co-regulator for restrictions on TV and ODPS, is clear best placed to act as Ofcom's co-regulator for the online restrictions.

**Consultation Question 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*

President	Hon. Secretary	Hon. Treasurer	Director General	Secretary
Josh Krichefski	Jaime Elliott	Bronwen Hemming	Paul Bainsfair	Tom Mott



*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).*

Ofcom's proposed approach to enforcement:

We agree with Ofcom's expectation that the ASA will be able to achieve broad sector compliance through its day-to-day regulatory work should it be designated as a co-regulator for the online restrictions. And we would expect Ofcom to follow its existing Regulatory Enforcement Guidelines should its intervention become necessary, particularly in light of its confirmation that it will only use its enforcement tools proportionately, having regard to its statutory duties, and only where it considers that the evidence shows their use is justified.

Impact assessment:

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.

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.

**The Institute of Practitioners in Advertising – 21 April 2023**

<b>President</b>	<b>Hon. Secretary</b>	<b>Hon. Treasurer</b>	<b>Director General</b>	<b>Secretary</b>
Josh Kricheski	Jaime Elliott	Bronwen Hemming	Paul Bainsfair	Tom Mott