Kellogg Marketing & Sales UK Ltd

Question	Your response
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.**	Disagree. The definitions in both the BCAP and CAP codes should make specific reference to the 2004/5 nutrient profiling model. In addition, although the Health and Care Act sets out that rules apply to 'identifiable less healthy food or drink' advertisements, it should be made clear in the Communications Act, BCAP and CAP codes, that there is an express exemption for 'Masterbrand advertising' which permits advertising and promotion where are no identifiable HFSS products. Furthermore, the synonymous test (the test used for safeguarding against **children's** placement of HFSS products) should be expressly disapplied to ensure that brands are not pigeonholed and allows manufacturers to reformulate and move towards healthier products. Avoiding HFSS products being 'pigeonholed' and therefore deemed 'synonymous' is something which the Government wanted to avoid. This is because the Government expressly stated that brands should not be 'pigeonholed as being synonymous with HFSS products' so that brands have the freedom to reformulate and offer healthier products. It was never the intention to apply synonymous testing to determine application of the Masterbrand. Whilst ideally a clear and express exemption for the Masterbrand should be contained in the secondary legislation itself (subject to a recent DHSC consultation) and ultimately clarify what constitutes an 'identifiable HFSS food product,' rules in the BCAP code would also be appropriate. This should specifically confirm application of the Masterbrand exemption when: (a) the food product does not physically appear; or (b) only food product packaging is shown (regardless of food imagery appearing

	on the packaging itself); or (c) a product is not the sole subject of an advertisement, but instead appears in the course of an advertisement for a broader occasion or event in which a multitude of products are present. We believe that where there are no identifiable HFSS products there should be a clear exemption for use of the 'Masterbrand'. This is because manufacturers rely on their brand to generate awareness and without an exemption to continue to use this, it will disincentive reformulation of current HFSS products as the brand would be unable to leverage its well-known brand with the reformulated product. It would also be unreasonable to expect companies to undertake a rebrand when new non-HFSS products are released. A failure to develop a regulatory or co-regulatory approach which minimises impacts on Masterbrands also risks an unreasonable and/or a disproportionate interference with the rights protected by Article 10 (commercial expression) and Article 1 of the First Protocol (commercial possessions) (A1P1) of the European Convention on Human Rights (ECHR) (as incorporated in domestic law under Schedule 1 to the Human Rights Act 1998 (HRA 1998)). This is because a failure to minimise impact on Masterbrands would have a significant negative impact on the value of trade mark rights and 'marketable goodwill' of brands, which would severely harm the economic interests of food manufacturers and retailers. Marketable goodwill is recognised as a possession for the purposes of A1P1 of the ECHR and the engagement of Article 10 by advertising and point of sale restrictions is well-established in law. In addition, any interference with property rights must be proportionate. Excessive restrictions on the use of Masterbrands would dispossess companies of their property in a manner that would be irrational and disproportionate to the aims of the policy.

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.**	Disagree. The definitions in both the BCAP and CAP codes should make specific reference to the 2004/5 nutrient profiling model. In addition, as set out in Question 1 above, although the Health and Care Act sets out that rules apply to 'identifiable less healthy food or drink' advertisements, it should be made clear in the Communications Act, BCAP and CAP codes, , that there is an express exemption for 'Masterbrand advertising' which permits advertising and promotion where are no identifiable HFSS products. Furthermore, the synonymous test (the test used for safeguarding against **children's** placement of HFSS products) should be expressly disapplied to ensure that brands are not pigeonholed and allows manufacturers to reformulate and move towards healthier products. Avoiding HFSS products being 'pigeonholed' and therefore deemed 'synonymous' is something which the Government wanted to avoid. This is because the Government expressly stated that brands should not be 'pigeonholed as being synonymous with HFSS products' so that brands have the freedom to reformulate and offer healthier products. It was never the intention to apply synonymous testing to determine application of the Masterbrand. Whilst ideally a clear and express exemption for the Masterbrand should be contained in the secondary legislation itself (subject to a recent DHSC consultation) and ultimately clarify what constitutes an 'identifiable HFSS food product,' rules in the BCAP code would also be appropriate. This should specifically confirm application of the Masterbrand exemption when: (d) the food product does not physically appear; or (e) only food product packaging is shown (regardless of food imagery appearing on the packaging itself); or (f) a product is not the sole subject of an advertisement, but instead appears in the course of an advertisement for a broader occasion or event in which a multitude of products are present. We believe that where there are no identifiable HFSS products there should be a clear

	exemption for use of the 'masterbrand'. This is because manufacturers rely on their brand to generate awareness and without an exemption to continue to use this, it will disincentive reformulation of current HFSS products as the brand would be unable to leverage its well-known brand with the reformulated product. It would also be unreasonable to expect companies to undertake a rebrand when new non-HFSS products are released. The synonymous test should be expressly disapplied to ensure that brands are not pigeonholed and allows manufacturers to reformulate and move towards healthier products. A failure to develop a regulatory or co-regulatory approach which minimises impacts on Masterbrands also risks an unreasonable and/or a disproportionate interference with the rights protected by Article 10 (commercial expression) and Article 1 of the First Protocol (commercial possessions) (A1P1) of the European Convention on Human Rights (ECHR) (as incorporated in domestic law under Schedule 1 to the Human Rights Act 1998 (HRA 1998)). This is because a failure to minimise impact on Masterbrands would have a significant negative impact on the value of trade mark rights and 'marketable goodwill' of brands, which would severely harm the economic interests of food manufacturers and retailers. Marketable goodwill is recognised as a possession for the purposes of A1P1 of the ECHR and the engagement of Article 10 by advertising and point of sale restrictions is well-established in law. In addition, any interference with property rights must be proportionate. Excessive restrictions on the use of Masterbrands would dispossess companies of their property in a manner that would be irrational and disproportionate to the aims of the policy.

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.**	Agree. We fully support designation of ASA as a coregulator for this purpose. We believe the ASA has the capability and capacity in place alongside its track record of acting independently.
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.	It is essential that a comprehensive and independent review of the policy is undertaken within five years from implementation and that a sunset clause is included. If the policy is not effective, it must be revoked. We still remain concerned about the validity of the 2011 NPM Technical Guidance to define whether a food is less healthy or not, and referred to on numerous occasions in this consultation. Although it is clear as to the score at which food and drink will be categorised as a 'less healthy food or drink product', the use of the 2011 NPM Technical Guidance to determine the score for the food or drink is unclear as the 2011 NPM Technical Guidance does not state or specify the state in which the food should be in when it is assessed using the NPM. This means that inconsistent approaches are taken to food, which produce different results and scores as to whether food is 'less healthy'. We would encourage Ofcom to emphasise to DHSC that the 2011 NPM Technical Guidance should be independently reviewed to reflect the state in which the food should be assessed, as this will more accurately assess the nutritional status of the food. The 2011 Technical Guidance specifies how the NPM algorithm is to be applied to certain foods and for example states that the NPM score for dried pasta and noodles should be calculated on the basis of the product mixed and heated with water in accordance with manufacturers' instructions. However, in respect of breakfast cereals, the Technical Guidance provides that:

	"The nutrient profile score for breakfast cereals should be calculated on 100g of the product as sold, on a dry weight basis". Breakfast cereals are a form of dehydrated products which are specifically designed and marketed to be, and are in fact eaten with, milk, this difference in approach has no logic from a public health perspective. It is not explained in the current 2011 Technical Guidance and has never been adequately explained by those who developed and applied the Technical Guidance. Breakfast cereals have been recognised for their importance as part of a daily meal and a source of vitamins and nutrients, and it is especially important that the NPM score for breakfast cereals is assessed fairly and rationally and takes account of the nutritional and health benefits of eating breakfast cereals in the manner they are intended to be, and are in fact, eaten. We would suggest that the technical guidance is updated to include a new rule that breakfast cereals are to be nutritionally profiled by reference to a conservative baseline mixture of cereal and milk. Based on Kellogg's research, a minimum baseline should be 1 part cereal to 2.2 parts milk (1:2.2). Such an approach would not leave room for gaming of NPM scores and would provide a more consistent and clearer approach to the application of the NPM to food and the state in which it is normally consumed.