

Sustain: the alliance for better food and farming

Question	Your response
<p>Question 1:</p> <p>Do you consider Ofcom's proposed rule and the proposed definitions to be inserted into the</p>	<p>Yes, Ofcom's proposed rule is in line with Section 321A of the Communications Act to prohibit television programme services provided between 5.30am and 9.00pm from including advertisements for identifiable HFSS products (section 321A)</p>
<p>BCAP Code reflect appropriately the requirements of Section 321A of the Communications Act? If not, please explain why.</p>	<p>However, we have concerns about the definition of 'identifiable food and drink products', see additional comments section of this consultation response.</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>Yes, Ofcom's rule 9.17A: 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 is in line with Section 321A of the Communications Act to prohibit television programme services provided between 5.30am and 9.00pm from including advertisements for identifiable HFSS products (section 321A).</p> <p>We have concerns about the definition of 'identifiable food and drink products' for sponsorship, see comments.</p>

<p>Question 3:</p> <p>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?</p> <p>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.</p>	<p>Many of the below points are recommendations Sustain has repeatedly called for following experiences with researching and using the ASA's complaint system which has enabled us to understand the system up close. See the recommendations section of Sustain and Food Active's Taking Down Junk Food Ads report for further information. In particular:</p> <ul style="list-style-type: none"> - The ASA must have, and use, powers to levy fines on any company (the brand owner, the immediate marketing agency or the company that physically places the advert) whose advertisement breaks the rules more than once in 3 years. Any advertisement that has the same circumstances of a previously adjudicated complaint, should go straight to compliance. - The ASA should be more transparent in publishing and publicising the names of all companies that have been in breach of the rules, not just those that have been subject to investigation and a formal ruling. Where the case has been informally resolved or dealt with through compliance, more information should be published and publicised on the nature of the breach/complaint.¹ <p>As a member of the Obesity Health Alliance, Sustain's Children's Food Campaign fed into their position and agrees with their statement:</p> <p>In the short-term our preference is for Ofcom to be appointed as the regulator for broadcast media, with ASA as the co-regulator for online advertising, as proposed. To undertake this role effectively, Ofcom and the ASA require clear and unambiguous implementational guidance.</p> <p>Ofcom</p> <p>Ofcom has existing experience as a regulator of television advertising, with the ASA as a co-regulator via BCAP. They are already required to provide annual reports to DCMS which are laid before Parliament. If appointed, this existing process could be enhanced to provide a mechanism whereby transparent information on the number of complaints, investigations and resolutions should be reported.</p> <p>ASA</p> <p>The ASA has existing experience as an online regulator as well as a co-regulator of television advertising with BCAP. Therefore the ASA should be able to extend to further these regulations in line with current proposals given the right support from Ofcom, government and Trading Standards (the current backstop regulator for online).</p> <p>The ASA, like Ofcom, should have full parity on enforcement and reporting of breaches of the regulations. The ASA must also provide a mechanism for regular transparent reporting on all complaints etc, and on new and emerging online platforms that may be exempt from the restriction.</p> <p>We consider that it is vital that Ofcom, as the backstop regulator, has full oversight of all complaints submitted to the ASA.</p> <p>We understand that the 'pre-approval' of adverts and media plans via ClearCast for broadcast and powers to act in advance for broadcast media is well established and acts to deter breaking of the regulations. The ASA is currently based on complaints, and there is a need for a more pro-active research role, however, as the ASA will be given full statutory powers we understand that is a strong deterrent from breaking the regulations. We understand that further clarity will be provided here as part of DCMS's Online Safety Bill Consultation.</p>
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As such, we support an approach to enforcement that encompasses the principles below:

- Regular proactive monitoring to identify non-compliance: Given the vast nature and volume of the online environment and the short lifespan of digital marketing campaigns, it is vital that level of compliance with this policy is not based on reactive complaints alone.
- Fines for repeat non-compliance: To prevent significant non-compliance, financial penalties are needed as a meaningful deterrent.
- All breaches should be reported to Ofcom, and the responsible government department should hold a repository of breaches. We suggest that this is planned in advance as part of the post implementation review. Full transparency: Full details on all complaints, investigations and resolutions should be publicly available. Where the case has been informally resolved or dealt with through compliance, more information should be published and publicised on the nature of the breach/complaint.
- We recommended that the ASA undertake avatar research on a more regular basis:

On 29 July 2021, the ASA published a monitoring and enforcement report, Protecting Children in Mixed-age Online Media, in which it assessed the distribution of adverts for alcohol, gambling and HFSS products on websites and YouTube channels where adults comprise over 75% of the overall audience. In its report the ASA called on advertisers to make better use of audience and media targeting tools to minimise children's exposure to dynamically served age-restricted adverts on mixed-age sites.

The ASA also undertook a year-long project to assess whether online advertisers were complying with the CAP Code requirement that adverts for certain products be targeted away from child audiences. They found that overall, 159 age-restricted ads broke the advertising rules, 35 advertisers placed age-restricted ads in 34 websites and 5 YouTube channels media aimed at or attracting a disproportionately large child audience.

This kind of research is very useful for identifying compliance and weak spots that will require more pro-active targeting from ASA.

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.

The Children's Food Campaign brings together over 100 organisations, including children's and health charities and professional bodies, trade unions, school food experts and environmental organisations. We have been calling for tighter restrictions to unhealthy food advertising on broadcast and non-broadcast for 20 years and we fully support the proposal to introduce a 9pm watershed on TV and a total online HFSS advertising restriction imminently, as the most effective way to protect children from influential unhealthy food and drink adverts.

It is important that this proposed policy works in conjunction with other policies aiming to make food healthier and more sustainable such as the local outdoor advertising policies, so that it does not create confusion for industry and policymakers, and also to ensure that companies are incentivised to move in a healthier direction, and not just shift to another channel which has less robust policies. By not aligning fully with the Nutrient Profiling Model, the Government's proposed policy on TV and online is relatively weaker than other advertising restrictions. We expect that where regulation is weaker and enables industry to advertise products that they cannot on other channels, it will incentivise them to simply shift their spending to such areas. The displaced spend to less regulated channels was highlighted in the Government's own evidence note for this policy. It includes data from Kantar showing industry's 'offsetting behaviour', which would shift advertising spend to less regulated channels (see Table 12).²

In addition to supporting the Mayor of London to write and implement the HFSS advertising restrictions across the Transport for London estate, more than 100 local authorities across the country have consulted us for advice to implement their own policies, 6 of which we have successfully supported to implement. Local governments are providing the precedent to show that this is not only practical to do for both governments and business, but also that it results in great improvements to public health at negligible or no cost to advertising revenues, as well as savings to the NHS.

Since the first implementation in 2019, Healthier Food Advertising Policies have now been recognised as a key method to address child obesity, diet-related diseases and health inequalities. An independent evaluation of TfL's policy found there has been an estimated 6.7 per cent decrease in average weekly household purchases of energy from HFSS products, and the average weekly purchases of chocolate and sweets fell by 19.4 per cent. This equates to a 1000 calorie decrease in energy from unhealthy food purchases in Londoners' weekly shopping.³ Recent evidence further shows that it has had a positive effect on preventing obesity and diet-related diseases for almost 100,000 Londoners, especially those living in more deprived areas. The research suggests it will lead to 94, 867 fewer cases of obesity, 1, 915 fewer cases of cardiovascular disease, and prevent or delay 2,857 cases of diabetes, as well as saving the NHS £218million.⁴

Despite predictions of huge revenue losses after the policy was implemented across the TfL network, the revenue increased. Some analysts had warned it would cost TfL as much as £35m per year.⁵ However, TfL confirmed that revenues had in fact gone up by £1m in the first quarter after the policy was implemented⁶ and increased by £2.3m in the first year.⁷ Initial concerns about financial losses have not been borne out; advertising revenues have continued to be maintained. The same pattern has emerged across local authorities: where none of them have declared any losses in advertising revenues

since implementing the advertising restrictions.

We would like to raise concerns about the terminology of the proposals. 'Identifiable-HFSS products' adds subjectivity to an otherwise objective measure. Many companies that produce, market and sell high fat, salt, sugar (HFSS) products choose to use brand only advertising instead of product advertising, indicating that it is an effective method of promoting their products. As Meiksin et al (2022) said: "Brand-only marketing has been shown to be associated with brand awareness and brand loyalty and may be a driver of product purchases from these brands, irrespective of whether products themselves are advertised (Gabrielli et al., 2021; Fischer et al., 1991)."⁸ Therefore we strongly recommend that Ofcom restricts products which are HFSS according to DHSC's Nutrient Profiling Model (NPM), as well as brand-only advertising. There is good precedent on this – the Mayor of London's Healthier Food Advertising Policy which has been implemented since 2019, as well as a growing number of local authorities have all restricted brand-only food and drink advertising. Instead "all food and non-alcoholic drink brands (including food and drink service companies or ordering services) will only be able to place such advertisements if the advertisement promotes healthier options (i.e. non-HFSS products) as the basis of the copy."⁹

Further, all food and drinks featured in advertising can be assessed for their nutritional impact. If the nutritional information of the product is difficult to identify (for example, because the nutritional information is not publicly available, or because it is incidentally featured in the advertising copy for an unrelated product or service) the product can be assessed using the DHSC's Composition of foods integrated dataset (CoFID). There is good precedent for employing this method: the Mayor of London and all local authorities with Healthier Food Advertising Policies do so.

Both of these measures help to address loopholes, remove the subjective element of whether a product is or is not "identifiable" to make this policy much more robust, objective and effective. For more information or questions on this, please do feel free to reach out to us on the email address provided.

As a member of the Obesity Health Alliance, Sustain's Children's Food Campaign fed into their position and agrees with their statement:

Independent security is essential: In the long-term we would like to see a comprehensive new approach to regulation of all types of harmful marketing. However, we would not want the need to set up a new body to act as a barrier to bringing in the restrictions by the end of 2025 as per the Government's commitment.

Parity between online and broadcast: Whilst the liability differs between TV (broadcasters are liable) and online (advertisers are liable), which follows the existing enforcement framework, it is important that there is a level-playing field of consequences for non-compliance on both online and broadcast media.

Defining Brand vs product sponsorship: Experience from the TFL restrictions regarding deciding the line between brand and product-identifiable sponsorship has shown this to be not clear cut.

Defining brands as synonymous with less healthy products: Less healthy products can be promoted both directly, by including them in an advertisement, and indirectly, through using brands or branding

that is synonymous with a specific less healthy product. This can be through product related branding or, more broadly, company or corporate branding.

CAP and BCAP acknowledge that differentiating a less healthy product advertisement from a brand advertisement is not always easy, it has therefore published guidance.

We have serious concerns about leaving the frontline regulator to define when a brand is considered synonymous with less healthy products. The existing guidance from the Advertising Standards Authority (ASA) is vague and lists scenarios rather than providing an objective definition of an HFSS brand. The guidance states, "...it is for the ASA to 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 rules." Given the sheer number of brands, it is completely unrealistic for whether restrictions should apply to individual social media platforms to be decided on a case-by-case basis. Furthermore, we have concerns about the impartiality of the ASA to make an objective judgement on whether a brand is synonymous with HFSS. It is our view that responsibility for defining a brand as HFSS should not rest with an industry-funded regulator.

In the first instance, we recommend that both Ofcom and ASA collaborate with the experienced nutrition teams at OHID/DHSC to decide on what is product-identifiable.

There is huge public support for these measures. Recent polling commissioned by 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 tv. Just 7% of people said they wouldn't support this policy. 71% of people agreed that it is important to protect children from HFSS advertising online (with only 6% disagreeing with this statement)¹¹

Even small calorie reductions across the population are predicted to have large impacts on preventing childhood obesity.² Childhood obesity rates have increased dramatically in the last 10 years and are now significantly above pre-pandemic levels. December 2022 data indicates that obesity prevalence amongst children in England was 10.1% for Reception-aged children, rising to 23.4% for children aged 10-11 (Year 6).¹³ 31.3% of Year 6 children living in the most deprived areas were living with obesity, compared to 13.5% of those living in the least deprived areas.¹⁴

Action is needed now to address this situation if the UK has any chance of even curtailing these increases, let alone reducing prevalence enough to meet the 2030 target. Until this is achieved, thousands of children will be put at avoidable risk of developing obesity. Children with obesity are five times more likely to become adults with obesity, increasing their risk of developing conditions including type 2 diabetes, cancer, heart and liver disease.¹⁵ Moderate to extreme obesity in adults may shorten life expectancy by 3-10 years.

Children's exposure to junk food advertising is substantially underestimated. The IA uses a measure of children's exposure to junk food adverts calculated by Kantar.¹⁶ Due to the lack of transparency and independent data for adverts served online, this analysis relied on estimates and extrapolations. An independent analysis of the methodology used highlighted a significant flaw in that it relies on advertising spend data as a proxy for the reach of that advertising.¹⁷ We under-

stand that only a very limited set of websites are included in the analysis, and reporting only includes display advertising, not social or pay per click activity. This is notoriously unreliable in digital marketing as brands can significantly boost the reach of their paid advertising via social media engagement. Children's exposure to online advertising is likely to be substantially higher, meaning removing it will have greater benefits than previously estimated.

Research shows children with overweight and obesity consume around 45 kcals more than their peers when they see junk food advertising. The IA does not take this into account, meaning the benefits to children with excess weight are significantly underestimated.¹⁸ Children from lower socio-economic groups tend to watch more TV and spend more time online and are also more likely to have a weight classed as overweight or obese than their more affluent peers.¹⁹

The impact of the restrictions will be far bigger than stated in the children who already have obesity and those from the most deprived groups – i.e. those that need the most protection from junk food advertising.

This policy will have a more positive effect on people from lower socio-economic backgrounds who are more likely to have excess weight. According to the latest data from the National Childhood Measurement Programme, obesity prevalence for children living in the most deprived areas was more than double that of those living in the least deprived areas for both reception and year 6.²⁰

Research from Cancer Research UK found young people from the most deprived communities were 40% more likely to remember junk food advertisements every day compared to young people from better-off families.²¹ A systematic review found children from minority and socio-economically disadvantaged backgrounds are disproportionately exposed to unhealthy food advertising.²² This increased exposure, combined with their already recognised greater risk of unhealthy weight outcomes, suggests that they would potentially have the most to gain from regulation designed to reduce junk food advert exposure.

Even a one-off exposure to food advertising will increase children's food intake by around 30 to 50 calories.²³ This is important because research has shown that an energy gap of only about 69-77 kcal per day over a number of years can make the difference between normal weight and overweight in young children.²⁴ Indeed, the UK Government's own figures suggest that implementing the HFSS advertising restrictions could reduce the number of children with obesity by more than 20,000.²⁵

The estimate is based on a narrow measure of impact on children's food consumption. Advertising works in multiple ways, both in the short and longer-term. The impact assessment calculation is based on highly credible evidence showing the relationship between seeing advertising and immediate food consumption – watching just 4.4 minutes leads to eating an additional 60 kcals.²⁶ This is important, given it takes as little as 46 excess calories each day for a child to develop overweight or obesity.²⁷

But advertising also has other equally important effects that influence food consumption in the longer-term. It increases product and brand awareness and builds positive attitudes towards these brands and products.^{28,29} The advertising we see influences our dietary norms.³⁰ For example, regularly seeing unhealthy food advertising can lead to us to think eating unhealthy food is part of the 'average' diet and large

portions and high levels of snacking are normal. Restrictions on junk food advertising has the potential to change long-term food consumption, meaning the benefits are currently under-stated.³¹

This kind of advertising is not designed to drive direct sales and should not be measured in that way. What it does, is to create the food culture which enables sales. From snacking, to rewarding, to the need for convenience are all constructs of the advertising industry to create an environment for sales.³² There has been massive growth in sales of many high sugar products since 2015, likely to be as a result of extensive advertising. Large companies (over 250 employees) have been doing very well, commercially.

Brands who wish to continue advertising their brands have many options open to them. This includes reformulating their products, shifting their advertising to post 9pm or advertising alternative non-HFSS products in their portfolio. There is clear evidence that industry had made progress in preparing for the regulations to come into force by product reformulation and range innovation to come into compliance. These delays (and the potential for even further changes to this policy) not only provide further uncertainty to industry, they also undermine the positive steps taken by progressive retailers to improve health and meet ethical responsibilities.

Research by Cancer Research UK found that over half (54%) of brands advertising HFSS products on TV between 6pm and 9pm had an alternative non-HFSS product which could be advertised instead.³³ Cancer Research UK research also found “The majority of HFSS products (84%) [looked at in a study of 63 HFSS brands] had an alternative non-HFSS product from the same brand, master brand, parent company, or licence holder company brand portfolio that could be substituted in advertising when restrictions are implemented across TV and online.³⁴ This figure does not include companies promoting a service or a message rather than a product, such as Deliveroo or Just Eat, who could easily feature a non-HFSS product in their adverts. When including brands whose parent company own a non-HFSS brand, or brand with non-HFSS products, this rises to over 80%.

Nesta ran a project with young people aged 13-16 to analyse their food and drink marketing exposure.²⁵ They found:

- Of the 4,879 food and drink adverts collected, over 70% were deemed unhealthy.
- Young people in lower income groups reported about 50 per cent more examples of unhealthy food and drink marketing than those in higher income groups.
- 65 per cent of teenagers agreed that the government should take action to ban online marketing.
- 80 per cent of participants agreed that food and drink marketing has a great influence on eating and drinking habits.
- more than 60 per cent of the unhealthy marketing that young people reported seeing in this study was paid-for product advertising.

The existing rules do not go far enough. They restrict high fat, sugar and salt (HFSS) food advertising in media of obvious appeal to children or where more than 25% of the audience is under 16 years old. ‘Less healthy’ food and drink advertising featured in prime time evening spots, on a YouTube channel, or by a social media influencer popular with both adults and children, can lead to large numbers of

children being exposed without breaching the current threshold; for example, if an online video is watched by 10 million people, a breach does not occur until more than 2.5 million children have seen it.

We were extremely disappointed that the Government has delayed the introduction of these regulations. Retailers and manufacturers have been aware of the Government's intention since chapter 1 of the Childhood Obesity Plan was published in 2016. We are frustrated that the Government has not made more progress in tackling the obesity crisis in our population. There is a pressing need for effective regulation to restrict junk food advertising online as part of a comprehensive approach to reduce obesity. In the UK we have an established principle that unhealthy food marketing causes harm and needs effective restriction. The conversation now should be how to make the restrictions as effective as possible across media accessed by children, and we welcome the opportunity to feed into this consultation.

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