

Implementing further restrictions on advertising for “less healthy” food and drink products CAP and BCAP consultation from the Advertising Standards Authority (ASA)

Response from Obesity Action Scotland
Closing date: 7 February 2024

Question (i) – Is 3.2 (Products in scope) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective

We do not wish to comment on this question.

Question (ii) – Is 3.3 (Parties subject to the less healthy product advertising rules) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you consider more effective

No, we do not think the guidance is clear and it doesn't accurately reflect the legislation. This section of the guidance is difficult to follow and doesn't make it easy to establish who would be subject to the less healthy product advertising rules. It is not immediately clear in all circumstances who would be regarded as an advertiser.

The legislation set out by the Government deliberately excludes SME's, allowing them to advertise less healthy foods. This is interpreted in the guidance as less healthy advertising rules “... *do not apply to advertisements for identifiable less healthy products by or on behalf of SMEs*”. The use of the phrase ‘on behalf of’ is not included in the legislation and has been added by the ASA. We do not believe it was the intention of the legislation for exemptions to be extended to third parties, such as delivery platforms, often associated with SMEs. Third parties are likely to benefit financially from the sale of less healthy food and drink products without meeting the criteria to qualify for exemptions.

It's important that this guidance is also consistent with other legislation already introduced by the UK Government. For example, the regulations on calorie labelling in the out of home sector exempts SMEs but includes home delivery services and third-party delivery platforms that are within scope¹. Therefore, the ASA's proposed extension of an exemption to third parties is inconsistent with already implemented government legislation. Guidance should fall in line with and complement existing legislation, which this guidance does not. It is inappropriate that the ASA is proposing to extend the exemptions to delivery platforms, as set out in Section 3.3 of Annex A.

It is also not clear within the guidance who would be regarded as the ‘advertiser’. Section 3.3 of Annex A states that the legislation does not explicitly define an “advertiser” and states “*The status of the party ultimately responsible for placing an advertisement is a relevant consideration to the assessment of whether an advertisement is within the scope of the rules*”. Based on this, it is not immediately clear in all circumstances who would be regarded as the advertiser.

Furthermore, we do not believe it is practical to determine adherence to the rules and guidance based on business arrangements, which are not transparent. The ASA states “*In making this*

¹ [Calorie labelling in the out of home sector: implementation guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/guidance/calorie-labelling-in-the-out-of-home-sector-implementation-guidance)

determination, the ASA will consider the extent to which relevant information, including any commercial relationship between the two parties, sheds light on the association between the two parties.” However, the nature of the commercial and financial relationship between relevant actors is not explicitly known by the ASA, the public and other stakeholders such as NGOs, who may wish to make a complaint. This creates more work for the ASA to investigate and determine the nature of such business relationships, in order to determine who would be the responsible party for placing the advert and complying with the guidance.

Additionally, ASA guidance states: *“As the restrictions apply to advertisements for identifiable less healthy products, advertisers most likely to be subject to the rules are businesses involved in or associated with the manufacture or sale of food or drink.”* However, this neglects the large contribution made by companies that do not directly manufacture or sell food and drink. Delivery platforms advertise unhealthy food and drinks regularly and account for almost all of the online delivery market. In 2021, Just Eat, Uber Eats, and Deliveroo made up 98% of the UK online takeaway and delivery market², further highlighting the need for them to be included with the regulations.

We would like to see the phrase ‘on behalf of’ removed from the guidance, as this does not accurately reflect and interpret the legislation and the Government’s intention for the legislation.

Question (iii) – Is 3.4 (Media and scope) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you would consider more effective

No, we do not think the guidance is clear and the ASA’s interpretation does not accurately reflect the relevant legislation.

Page 9 of Annex A outlines that the ‘Scope of the Code’ (CAP code)³ provides a list of media to which the CAP code applies. However, this list is not future proofed, and so is likely to quickly become out of date, as technology and advertising methods continue to develop. It is important that there is scope built into the guidance for them to be regularly and formally reviewed to keep up to date with emerging evidence and practice, such as new and emerging technologies, to ensure these are covered by the regulations.

Related to this, section 3.1 Overview on page 10 of Annex A outlines that one of the exemptions to the rules are adverts in online media which are not intended to be accessed principally by people in the UK. However, it is unclear in the guidance document how this will be determined and how it will be applied in practice. For example, would this apply to content created in the US which was principally created for a US audience but which is then shown on an online platform in the UK? This is not clear within the guidance and could lead to advertising related to such content reaching a UK audience.

Question (iv) - Is 3.5 (Identifiable less healthy product advertisements) of the proposed guidance clear and does it accurately reflect the relevant legislation? If not, please state why, including details of any alternative approach you would consider more effective

No, we do not think the proposed guidance accurately reflects the relevant legislation. When proposing to introduce legislation to restrict the advertising of less healthy products, the government stated the reason for doing so was to improve population health and reduce children’s exposure to HFSS products⁴. This is not reflected in the guidance.

² Obesity Action Scotland (2023) Online Ordering (Out of Home) factsheet
https://www.obesityactionscotland.org/media/hisjmj0s/ordering_food_online_-_ooh_-_final.pdf

³ ASA/CAP Scope of the Code https://www.asa.org.uk/type/non_broadcast/code_folder/scope-of-the-code.html

⁴ UK Government (2022) Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: consultation on secondary legislation <https://www.gov.uk/government/consultations/introducing-further-advertising-restrictions-on-tv-and-online-for>

We believe the proposed guidance is weakening the application of the legislation by extending the exemptions to significantly more products than the legislation intended. The regulations/legislation states that it is “*less healthy products that are of most concern to childhood obesity*”⁵. The legislation is clear on the process and definition to be used to identify what a less healthy product is, and what any exemptions are with regards to the legislation. However, the proposals within the ASA guidance go much further, adding additional exemptions. These include: a specific product, identifiable by a SKU (Stock Keeping Unit); is not a generic product; is not shown as a range or variant; and has to be shown with sufficient prominence. We’ll address each of these in turn below.

Identifiable less healthy products by SKU and specific products

We are concerned about the narrow interpretation of an identifiable less healthy product.

The guidance doesn’t accurately reflect the relevant legislation with regards to identifiable less healthy products. The narrow interpretation of an ‘identifiable’ less healthy product by the ASA in the guidance will not protect children from exposure to (marketing of) unhealthy food and drink products, as was intended by the legislation/regulations.

Section 321A of the Communications Act 2003, as amended, states a product is identifiable “*...in relation to advertisements... if a person could reasonably be expected to identify the advertisements as being for that product*”⁶. The definition put forward in the guidance by the ASA differs substantially from this and does not accurately reflect the legislation.

The proposed definition in the ASA guidance refers to the less healthy product advertising rules applying only to a ‘specific product’. The guidance document states a ‘specific product’ should be understood as “*... a single food or drink item for presentation to the final consumer, either in it’s packaging or without it, which can be purchased by the consumer*” and is based on stock keeping unit (SKU) codes. SKU codes are unique codes assigned to each product, including different variants, pack sizes and formats within a product range. The SKU does not have a bearing on the healthiness of the product. We believe this definition is far too narrow and doesn’t accurately reflect that a person could reasonably be expected to identify an advert as one for a less healthy product.

For example, it is logical to expect a consumer to be able to reasonably identify an advert for pizzas, doughnuts, or a range of cakes, as being adverts for less healthy products. Products such as these are generally understood to be less healthy, regardless of whether a SKU is shown, and are included within the less healthy product categories, detailed within the proposed regulations. The definition of ‘specific product’ should instead be based on product type such as ‘pepperoni pizza’, as a ‘pepperoni pizza’ in and of itself is a specific product, rather than being determined by a product SKU code.

The Obesity Health Alliance recently undertook some polling, which presented participants with a range of adverts featuring products from the less healthy product categories either generically, in a range or variant, shown without sufficient prominence, or on behalf of another advertiser. The polling aimed to establish whether adverts and advertising materials for less healthy products were perceived as ‘healthier’ or ‘less healthy’ by consumers. *Each question asked: Do you consider the advert to be – for a healthier food and drink product; a less healthy food and drink product; not sure/don’t know.* The results show that for each of the adverts shown, the majority - between 52-85% of the public - would consider the advert to be for a less healthy product. Additionally, each

[products-high-in-fat-salt-or-sugar-secondary-legislation/introducing-further-advertising-restrictions-on-tv-and-online-for-products-high-in-fat-salt-or-sugar-consultation-on-secondary-legislation](#)

⁵ UK Government (2022) Policy paper. Health and Care Bill: advertising of less healthy food and drink

<https://www.gov.uk/government/publications/health-and-care-bill-factsheets/health-and-care-bill-advertising-of-less-healthy-food-and-drink>

⁶ <https://www.legislation.gov.uk/ukpga/2003/21/section/321A>

example shown in the survey was assessed using the ASA current guidance and it was found they would likely be exempt, based on the guidance. The results from the survey indicate that the public agree that the ASA guidance is not a common-sense interpretation of the term ‘identifiable less healthy product’

Despite including it in the guidance, the ASA does not set out how it will determine if “*people in the UK can reasonably be expected to identify the advertisement for that product*”. As a key determinant of whether an advert complies with the policy, these decisions need transparency, accountability, and they need to be proportionate and consistent in their application. However, the ASA has not detailed any of the processes for making these decisions or set out any plan for transparency or accountability for how decisions will be reached.

The Government has specially set out a process for determining which products are restricted and therefore which advertisements are restricted (as clearly outlined in Schedule 2 of the regulations - Less healthy product categories). The ASA’s interpretation is adding an unnecessary layer of complexity which weakens the application of the Government’s legislation. There is already excellent practice to draw on with well evidenced, clear, robust policy which has delivered on both ambitious public health impacts as intended, while setting out clear guidance to industry and maintaining advertising revenues. Healthier food advertising policies have been implemented by the Mayor of London across the Transport for London⁷ (TfL) estate as well as twelve UK councils since 2019, demonstrating it can be done effectively.

We do not believe that the definition of an identifiable less healthy product by the ASA is accurate. It vastly limits the scope of the restrictions, and waters down the restrictions. As a result, they will not protect children from unhealthy food advertising/marketing as the legislation intended.

Generic products

Page 10 of Annex A outlines that as a result of the above guidance, the less healthy product advertising rules will not apply to generic products. This includes generic depictions or references to products such as pizzas or doughnuts which are not specific enough for a consumer to identify a specific product for sale. We believe this definition does not accurately reflect the legislation. For example, an advert showing a selection or general display of pizzas or doughnuts is still clearly an advertisement for products which can be determined as pizzas or doughnuts, and which are (generally) less healthy, as defined by the Government’s own regulations.

Products like doughnuts and other baked goods, for example, are often sold as loose items or are packaged into multipacks by stores themselves shortly prior to sale. It is therefore unlikely there would be any actual recognisable packaging. The main discernible feature of the product in identifying it as a less healthy product is the doughnut itself. If a person sees a product e.g. a doughnut, in an advert from a food and drink business, if it is a generic product, it would be assumed that it is a product that is available for purchase from that business and so should be in scope.

Further, the use of the term ‘generic’ could create an uneven playing field and inequity for businesses, with companies/brands advertising specific products placed at a disadvantage compared to those advertising using generic product imagery. This is likely to be unpopular with manufacturers and advertisers, who in response to other proposed government regulations and legislation, have repeatedly called for the need to ensure a level playing field is maintained at all times⁸.

⁷ Yau, A, N. Berger, C. Law et al (2022) Changes in household food and drink purchases following restrictions on the advertisement of high fat, salt, and sugar products across the Transport for London network: A controlled interrupted time series analysis, *PLOS Medical* <https://doi.org/10.1371/journal.pmed.1003915>

⁸ <https://www.fdfscotland.org.uk/dfd/what-we-do/food-regulation/>

The use of the term 'generic' is not a legitimate interpretation of the legislation, it has no precedence in the current HFSS advertising restrictions to children, and has been deliberately excluded from the TFL policy. If the term remains in the guidance, advertisers will be able to continue advertising less healthy foods, and child health will not be improved. 'Generic' is not included in the current regulations of HFSS advertising to children, and there is no evidence to suggest 'generic less healthy products' are any less harmful than 'SKU-defined less healthy products'. If there is evidence that showing a 'generic' product does not prompt persons in the UK to think of that product then this evidence must be shared.

We understand it is helpful to have specific product details in order to work out the Nutrient Profile Model (NPM) score for individual products. However, it is possible to use an average, the biggest seller, or most likely product depicted – using widely available data. The onus should be on the advertiser to show that all the product(s) they are shown generically, or as part of a range/variant, will pass the NPM.

The term 'generic' should be removed from the guidance.

Ranges and variants of products

Current ASA guidance states: *"The less healthy product rules apply only to advertisements where a specific product is identifiable as opposed to those that lead people to identify a range of products"*. This could be interpreted as meaning that less healthy products are allowed to be advertised so long as they are part of a range. The Government legislation restricts advertising of less healthy products regardless of whether they are part of a range so the ASA guidance must also do so and make it clear that this is the case within the guidance to avoid confusion and difficulties for all parties.

The guidance doesn't make it clear whether ranges that are made up of entirely less healthy products would be restricted. An advertisement featuring a range of products where the only options available are less healthy products should undoubtedly be regarded as an advertisement for less healthy products. Exposure to food brand advertising, such as via a variant or range, even if consumers do not pay attention to it, could still influence subsequent food choices. This priming effect can override habitual choice, such as causing individuals to choose a less favoured brand, as a result of the advertising⁹.

This approach disproportionately benefits established unhealthy (HFSS) synonymous brands – brands that can advertise their master brand and are likely to prompt purchase of their flagship, HFSS, products. The issue of synonymous branding is discussed in CAP guidance on identifying brand advertising which promotes an HFSS product. This guidance document outlines a number of scenarios in relation to HFSS brand advertising that are likely to be regarded as an advert for an HFSS product and so would be subject to the rules. One of these scenarios is in relation to synonymous branding (scenario 3 in the table on page 4) and states *"An advertisement refers to or features a brand name is synonymous with a specific HFSS product. That name could be featured on other products or product variants but is inextricably linked to a specific HFSS product"*¹⁰. This guidance suggests that synonymous brand advertising is therefore subject to HFSS advertising rules. However, it is not clear from the consultation and guidance documents for less healthy product advertising that this would also be the case for less healthy products, and is therefore an inconsistency in the guidance between HFSS and less healthy products.

Under the legislation/regulations set out by the Government, the ASA should presume that all less healthy products, as identified by the 2-stage process outlined in the guidance document, are in

⁹ Smarandescu, L., & Shimp, T. A. (2015). Drink coca-cola, eat popcorn, and choose powerade: Testing the limits of subliminal persuasion. *Marketing Letters: A Journal of Research in Marketing*, 26(4), 715–726. <https://doi.org/10.1007/s11002-014-9294-1>

¹⁰ Advertising Standards Agency (2017) Identifying brand advertising that has an effect of promoting an HFSS product <https://www.asa.org.uk/static/uploaded/d6617362-4ff8-493d-bc53f7fff57e0078.pdf>

scope (apart from the exemptions). Where the nutrition information for the product is not directly available, for example, because it is a generic product or a graphic of a product, the ASA can use the precedent set by other healthier food advertising policies, and refer to its closest equivalent, to determine the likely NPM score of the product in question. Further, these products should be assumed to be less healthy unless the company can provide evidence to indicate otherwise.

An advertiser must be able to demonstrate that the product shown is healthier than a typical product within that specific less healthy product category.

Sufficiently prominent

The final paragraph on page 10 of Annex A introduces the phrase ‘sufficiently prominent’ and states that only “...other imagery or other representations of a specific less healthy product that are sufficiently prominent and that people can reasonably be expected to identify it as being for a specific less healthy product”, will be subject to the less healthy product advertising rules. We are concerned with use of the term ‘sufficiently prominent’ and it being a determining factor as to whether the less healthy product advertising rules apply.

The guidance document states that the ASA will consider factors such as product positioning, duration of its appearance, and the general focus of the advertisements to determine if a less healthy product is sufficiently prominent within an advert. The guidance provides no detail on what is regarded as an appropriate duration or positioning, and so is likely to lead to subjectivity and inconsistency when applying this principle. The use of vague terms like ‘sufficient prominence’ make applying and enforcing the guidance much more challenging and undermine the effectiveness of it.

There is no evidence to suggest that showing a product in an advert with or without ‘sufficient prominence’ impacts on likelihood of purchase, and raises the question how this can be reasonably enforced. There is also the issue of what is regarded as sufficient prominence for one person will not for another, which adds a further level of complexity to enforcement. All adverts are designed with a deliberate purpose – if a product is shown, it is there for a reason, and the intention is for the product to be purchased. This is likely to lead to confusing and ambiguous rulings that will have to undergo extensive review.

We believe the term ‘sufficient prominence’ should be removed from the guidance.

Question (v) – Do respondents have any comments on any other parts of the proposed guidance document?

We are concerned that the guidance places onus to prove the product in question in less healthy, rather for advertisers to prove their products are healthier. The guidance as it currently stands will leave the restrictions very limited in scope, and unable to deliver the policy as intended.

The stated objective of the ASA is to ensure adverts are legal, decent, honest and truthful. This sits alongside the general principles of the CAP and BCAP codes that the rules are easily understood, easily implemented, and easily enforced. We commend the ASA for developing these guidelines to complement the legislation, but we do not feel that these objectives, principles and criteria have been met and delivered in the guidance. We understand a pre-consultation exercise was held between the ASA and representatives from the food and drink industry, including the Food and Drink Federation, and the British Retail Consortium, and that this has heavily influenced the guidance outside of this formal, public consultation. We are concerned that as a result of this the guidance favours businesses over public health. As far as we are aware, output from this has not been published. This should be made available for consideration with the next iteration of the guidance.

Responsibility should sit with the ASA to gather and provide robust evidence that the guidance will still work as intended and deliver on the intentions of the Government's regulations, despite the changes and exemptions it introduces, such as the definition of an 'identifiable' less healthy product. We are currently unaware of any mechanism for this to be delivered, and the guidance as it stands will not achieve this.

There is no information provided on how the rules on advertising of less healthy products will be enforced and what the penalties will be when an advert is found to be in breach. The strength of such rules is in how they are enforced – consistent and stringent enforcement is essential for the rules to be effective, and the guidance provided will not enable this to be achieved. Throughout, the guidance is not specific enough, with subjective and undefined terms that are open to interpretation. It is also unclear in many areas and so this is likely to lead to an inconsistent use and understanding of the guidance, and subsequently an inconsistent application of the rules.

Additionally, the consultation does not provide information on the complaints process, and how complaints will be handled and reported by the ASA. We would like to understand how the complaints process will be undertaken in practice, and by whom it will be monitored and evaluated, to ensure it is fair and open, and that all complaints are given equal consideration.

Question (vi) – Recognising that guidance produced in accordance with a statutory duty must focus on statutory restrictions, and the need for the new less healthy product advertising rules to function within the wider framework of food and drink advertising rules, respondents are invited to provide detail of further resources that would be useful, in addition to the guidance, to help affected businesses comply

We would like highlight the Nutrient Profile Model (NPM) Calculator¹¹, created by the University of Leeds, which includes information about the NPM, and can be used to calculate whether the product and product category will be in scope or out of scope of restrictions, and whether a product is an HFSS product. This calculator is publicly available online and can be useful to help affected businesses comply by enabling them to quickly and easily check if their products pass or fail the NPM and therefore whether they are affected by the restrictions.

Question (xi) – Do you agree that the proposed consequential amendments to the CAP and BCAP's HFSS branding guidance in Annex D are clear, having regard to the changes of the Codes summarised above? If not, please state why including details of any alternative approach you consider more effective

We note section 3 of Annex D proposes the deletion of the introductory paragraph beginning "*The restrictions on advertisements for HFSS products...*". This paragraph outlines the general context and reason for HFSS advertising restrictions, namely to promote and encourage healthier diets, particularly in children, and to address childhood obesity. Having this paragraph included demonstrated an awareness and understanding of the importance of regulating advertising for contributing to improving population health and weight outcomes. Proposing to delete it no longer links the advertising code and guidance to the central aim and purpose of the regulations/legislation.

About us

Obesity Action Scotland provide clinical leadership and independent advocacy on preventing and reducing overweight and obesity in Scotland.

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¹¹ Nutrient Profile Model Calculator <https://npmcalculator.cdrc.ac.uk/>