

ASA system submission to the Welsh Government's consultation on ending the sale of energy drinks to under 16s

1. Background and Introduction

1.1. This submission is provided by the Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the 'ASA system.'

1.2. The ASA is the UK's independent advertising regulator. We have been administering the non-broadcast Advertising Code (written and maintained by CAP) for 60 years and the broadcast Advertising Code (written and maintained by BCAP) for 18, with our remit further extended in 2011 to include companies' advertising claims on their own websites and in social media spaces under their control.

1.3. We are responsible for ensuring that advertising is legal, decent, honest, and truthful and our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.

1.4. As the UK's frontline advertising regulator, the ASA brings together different statutory, co-regulatory and self-regulatory enforcement mechanisms so they appear seamless to people and businesses. Our system involves the active participation of a range of legal backstops in the consumer protection landscape. We work closely with a network of partners including Ofcom, the Gambling Commission, the Information Commissioner's Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority.

1.5. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line. Together, this 'collective regulation' helps to protect people and responsible business from irresponsible ads: ads that mislead, harm or offend their audience.

1.6. We bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creates a level-playing field amongst them. There are multiple checks and balances in place to ensure the committees' development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System's processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.

1.7. The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don't mislead, harm or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous one-stop-shop benefits for the marketing industry in their application of the rules and for consumers, who benefit from the protection they afford.

1.8. In addition to investigating ads, we also provide a wealth of training and advice services (most of which are free) for advertisers, agencies and media to help them understand their responsibilities under the Codes and to ensure that fewer problem ads appear in the first place. CAP and BCAP provided over 850,000 pieces of advice and training in 2021.

1.9. The ASA system is providing this written submission in response to the Welsh Government's consultation on ending the sale of energy drinks to under 16s.

2. The advertising rules

2.1. Under the advertising rules, energy drinks are treated as any other food product. There are no legal restrictions surrounding their being advertised beyond general consumer and food law.

2.2. Our rules do not contain specific restrictions or prohibitions around drinks that are high in caffeine.

2.3. The Advertising Codes, however, have mandatory rules for high fat, salt or sugar (HFSS) food and drink products based on evidence of the need to limit children's exposure to HFSS food advertising. These rules cover energy drinks high in sugar, but not those artificially sweetened versions.

2.4. The Codes also contain general rules that require ads to be socially responsible, which provides the ASA with latitude to take action against ads that have the potential to cause harm. For example, in 2013, the ASA banned a poster ad for the energy drink, Pussy, on the grounds that the dual meaning of the word "pussy" would be understood by some older children to be intended as an offensive or sexually explicit reference and was therefore unsuitable to be directed at them.

3. Consultation question: Should sales of energy drinks to young people under the age of 16 be banned?

3.1. We do not regulate products or their availability or sale. We consider evidence relating to advertising's impact with a particular focus on the potential for harm to be caused. As such, we do not comment on whether the sale of energy drinks to young people should be banned.

3.2. However, if the Welsh Government concludes that there is a basis to restrict the sale of energy drinks to young people it will likely impact on the acceptability of that product's advertising. If under-16s can't buy a product legally, then it may follow that advertising for energy drinks should not be directed at them. Accordingly, CAP and BCAP would likely explore the need to consult publicly on corresponding advertising restrictions.

3.3. In our provisional view, what the Welsh Government is proposing has implications analogous to the regulatory regime surrounding alcoholic drinks. Alcohol is a distinct class of product because it has a statutory sales restriction. That means it is subject to a dedicated set of restrictions; these are separate from those covering normal food and beverage products. Under-18s can't legally buy alcohol therefore advertising should not encourage them to do so either by being directed at them through targeting or appeal to them through content.

3.4. The Advertising Codes combine restrictions on the placement and targeting of ads to appropriately limit children's exposure to advertising for products like alcohol while respecting the

rights of marketers to direct advertising at audiences who may legitimately consume their products.

3.5. Alongside placement restrictions for energy drinks, CAP and BCAP may consider the potential need for restrictions on the content of ads to limit their appeal to children.

3.6. Another challenge arises in the event that only Wales moves to introduce a sales ban; we note that both the UK Government and the Scottish Government have consulted on similar proposals. Any new rules would apply to Welsh media or media targeting Welsh consumers. However, marketing channels, principally many online platforms, present challenges in appropriately demarcating jurisdictions.

3.7. If the Welsh Government concludes that there is a basis to restrict the sales of energy drinks to young people on a similar model to alcoholic drinks, it may impact on the acceptability of that product's advertising irrespective of any evidence around the direct impact or otherwise of that advertising. However, as a regulator subject to judicial review, we would have to consider the need for public consultation on any restrictions that might apply to the advertising of energy drinks.

3.8. Following the introduction of any new rules, the ASA would enforce them in the same way as other UK Advertising Code rules. The rules apply to all marketing communications within the scope of the Codes.

3.9. We would be happy to elaborate on the information provided here at the request of the Welsh Government.

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