

ANNEX A

BCAP's evaluation of responses to its consultation on the impact of (EC) Regulation 1924/2006 on nutrition and health claims made on foods

Significant Responses		Evaluation	
Respondent(s)	Key Points	BCAP Comments	Amendment required
Q1: Do you agree that it is necessary for BCAP to reflect Article 12(b) of the NHCR into BCAP Radio rule 3:13(d) and BCAP TV rule 8.4.3? If not, please explain your reasoning clearly.			
Proprietary Association of Great Britain (PAGB); British Retail Consortium (BRC); GlaxoSmithKline (GSK); Danone (Confidential respondent)	1.1 Agree	1.1 BCAP agrees.	NA
	1.2 Respondent considers that the proposed amendments to these sections of the Codes accurately reflect the requirements of Regulation (EC) 1924/2006.	1.2 BCAP agrees.	NA
Q2: Do you agree that BCAP has correctly reflected the requirements of Article 12(b) into BCAP Radio rule 3:13(d) and BCAP TV rule 8.4.3? If not, please explain your reasoning clearly.			
PAGB; GSK; Confidential respondent	2.1 Agree	2.1 BCAP agrees.	NA
BRC	2.2 Respondent considers the proposed wording suggests	2.2 The independent ASA Council is experienced in	NA

	<p>that all claims related to the rate and amount of weight loss are banned, when as highlighted in the FSA guidance on the Regulation it is not so straightforward. (page 47 http://www.food.gov.uk/multimedia/pdfs/ec19242006complianceguide.pdf)</p> <p><i>"In the absence of case law, it is difficult to make categorical assertions about the scope of this prohibition. Reference to periods of time alone, particularly in more general terms such as "rapid", "fast", etc should not mislead consumers, but may not be subject to this prohibition. When considering compliance with this provision context will often need to be considered. For example, personal experiences and before and after photographs that can be substantiated and which are presented in a way that does not imply a guarantee of effect for the average consumer and which make no reference to an amount of weight or an amount of weight over a period of time, are probably beyond the scope of this prohibition. However, they are likely to be caught by the definition of health claim and as such may need to be either subject to a specific authorisation, or, as the case may be, under the provisions in Article 10(3) accompanied by an authorised claim".</i></p> <p>Respondent considers the provisions in the Codes should reflect that reference to terms such as 'rapid' or 'fast' could be used.</p>	<p>interpreting advertisements and administering the advertisement content codes and will apply the letter as well as the spirit of the rule.</p> <p>BCAP considers the FSA Guidance is helpful and stakeholders are advised to consult it: however, it does not bind the ASA Council or BCAP Compliance and Monitoring team.</p> <p>The existing rules on slimming and weight loss have been easily interpreted and applied over many years by broadcast stakeholders. The ASA and CAP(B) have an established position on 'rapid' and 'fast' weight loss claims for a variety of slimming and weight loss products, including foodstuffs. Additionally, the ASA and CAP(B) are experienced in assessing the context of an advertisement and have on numerous occasions adjudicated on before and after photographs that depict a rate or amount of weight loss that is not compatible with good medical or nutritional practice.</p>	
BRC	<p>2.3 Respondent considers it is also important to explain that the Regulation allows for products placed on the market or labelled prior to 1st July 2007, with claims which do not meet these requirements, to be marketed until their expiry date, but not later than 31st July 2009.</p>	<p>2.3 The NHCR provides for a number of complex transitional measures in Article 28 (1, 2, 3, 4, 5 & 6) for products, labels, nutrition claims, health claims, trade marks and brand names. The Code cannot provide detailed rules and guidance on those transitional measures and to do so would be impractical.</p> <p>BCAP considers the BRC's concern is adequately</p>	NA

		addressed by maintaining this wording in the Codes: <i>On 1 July 2007, a new and important regulation governing nutrition and health claims for foods came into force. The regulation is complex and mandatory. BCAP encourages broadcasters to take advice on the effect of the regulation and to consult the Food Standards Agency's Guidance to Compliance with Regulation (EC) 1924/2006 on Nutrition and Health Claims on Foods, which is available at http://www.food.gov.uk.</i>	
Danone	<p>2.4 Respondent agrees that BCAP have correctly reflected Article 12(b) in their amendments. Claims which reference a specific amount, or rate of weight loss are misleading as not all individuals will experience the same quantifiable weight loss made in the claim. As a result specific quantified and measurable weight loss claims should be prohibited. For example, "Lose 6lbs in just 2 weeks with..." or "Each week you could lose 2kgs."</p> <p>This prohibition on quantified health claims is exclusive to weight loss and rate of weight loss claims, and does not preclude the ability to make substantiated, quantifiable claims on other health relationships. For example, "...helps reduce cholesterol by 10% in 3 weeks...."</p>	<p>2.4 BCAP agrees this prohibition is applicable to claims which make reference to rate or amounts of weight loss on foodstuffs. Stakeholders are reminded the NHCR defines a health claims as "any claim that states, suggests or implies that the consumption of a food category, a food or one of its constituents and health".</p> <p>Additionally if an advertisement implies a rate or amount of weight loss incompatible with good medical advice and nutritional practice, the ASA would likely uphold. Advertisements for foodstuffs which include references, implied or otherwise, to rates or amounts weight loss must comply with relevant legislation and the Codes.</p>	NA
Q3: Do you agree that, in the light of NHCR provisions that ensure children are protected against false or otherwise misleading nutrition or health claims made on foods, it is not proportionate to maintain the part of BCAP Radio Rule 3:12.1 that imposes a blanket ban on the use of those claims in radio food advertisements targeted directly at pre-school or primary school children? If not, please explain your reasoning clearly.			
PAGB; GSK	3.1 Agree	3.1 BCAP agrees.	NA
Danone	3.2 Respondent agrees that the Regulation (in particular Articles 4 and 14) affords sufficient protection on the	3.2 BCAP agrees.	NA

	nutrition and health claims used in food or soft drink product advertisements targeted directly at pre-school and primary school children so as to render the blanket prohibition under the BCAP rules unnecessary.		
BRC	<p>3.3 Respondent agrees that the Code should be amended to reflect the provisions of the Regulation. We also believe that the level of control imposed by the Regulation will protect from misleading and inaccurate claims being made. However the interpretation of the provisions of the Regulation given under '<i>Rationale for proposed changes</i>' is incorrect.</p> <p>Article 14 of the Regulation lays down provisions for claims referring to children's development and health and not for food-related health claims specifically targeted at children.</p> <p>The Commission has written guidance on certain aspects of the Regulation that clearly explain the scope and how this article should be interpreted:</p> <p>http://ec.europa.eu/food/food/labellingnutrition/claims/guidance_claim_14-12-07.pdf (pages 13-14)</p>	<p>3.3 BCAP included this text in error in its rationale for proposed changes: "...make food-related health claims specifically targeted at children".</p> <p>Recital 16 of the NHCR indicates: "Where a claim is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the claim be assessed from the perspective of the average member of that group". BCAP considers that requirement in conjunction with the new regime of the NHCR (specifically Articles 3, 5(2) and 14) adequately ensures that pre-school and primary-school children are not misled by health claims. In light of that, BCAP considers it is no longer necessary to maintain the blanket prohibition on nutrition and health claims used in food or soft drink product radio ads targeted directly at pre-school or primary school children. The existing rules that require advertisements to comply with the law, hold evidence and not mislead, adequately cater for the removal of this blanket restriction.</p>	NA
Confidential respondent	<p>3.4 Respondent does not take issue with the removal of the BCAP Radio Code rule prohibiting the use of nutrition and health claims in all advertisements aimed at pre-school or primary school children from the Code, but points out that Regulation (EC) 1924/2006 states that all claims must be understood by the average consumer. The pre-amble to this Regulation indicates that where a claim is specifically aimed at a particular group of consumers, such as children, the claim should be</p>	<p>3.4 [See response to 3.3] The ASA Executive and Council are well experienced in assessing whether an advertisement is targeted at a child or the parent.</p>	NA

	<p>assessed from the perspective of the average member of that group. This raises the question of how to determine whether claims in advertisements about foods aimed at young children are directed at the child itself or at the parent, and therefore whether consideration should be given to the understanding of the child or parent (or both). Article 14 of the Regulation puts in place specific measures to address claims about children’s development and health but does not regulate the targeting of claims or consider whether the claim is aimed at the child or the parent; it only regulates the substance of the claim. However, in the rationale for this proposed change the BCAP consultation document states that Article 14 controls claims “specifically targeted at children” which does not quite reflect this situation.</p>		
<p>Q4: Do you agree that BCAP has correctly amended the examples of a nutrition claim and a health claim in BCAP TV rule 8.3.1(a)? If not, please explain your reasoning clearly.</p>			
<p>PAGB</p>	<p>4.1 Agree</p>	<p>4.1 BCAP agrees.</p>	<p>NA</p>
<p>BRC</p>	<p>4.2 Respondent agrees with the changes to the examples. Respondent considers reference to “must be supported by sound scientific evidence” in section 8.3, rule 8.3.1 (a) of the present BCAP TV Code, should also be amended to reflect the new criteria that allows the use of nutrition and health claims. Regarding generic health claims, the Regulation establishes that only claims that are included within the article 13 positive list will be allowed to be used. These claims would have gone through an EFSA assessment and approval through comitology with scrutiny. Regarding nutrition claims, only claims for which criteria have been set under Annex I of the Regulation will be allowed to be used once the transitional period is over.</p>	<p>4.2 In proposing to make now the minimum number of changes necessary to ensure consistency with the NHCR, BCAP acknowledges that the updated Codes will not explicitly reflect some of the general or specific provisions of the Regulation that are relevant to broadcast advertisements. BCAP considers the BRC’s response does not suggest that BCAP TV rule 8.3.1 (a) is inconsistent with the Regulation; rather, that 8.3.1 could better give effect to specific provisions of the Regulation. BCAP proposes to give effect to some of the general and specific provisions of the Regulation, including the provisions to which BRC’s response refers, in its proposed new Code (of relevance to BRC’s response,</p>	<p>NA</p>

	Again, reflecting the appropriate transitional period for the application of these criteria is crucial.	see page 109 of the BCAP Code Review Consultation Document): http://www.cap.org.uk/cap/Consultations/open/BCAP_Code_Review_consultation/BCAP+Code+Review+Consultation.htm	
GSK	<p>4.3 Respondent agrees that the amendments BCAP has proposed bring those particular examples in line with the NHCR.</p> <p>However, we believe there are further examples within rule 8.3.1(a) that also require amending because they are likely to create confusion.</p> <p><i>'Ambiguous wording that could be understood as a health claim must be avoided. For example, "goodness" should not be used as a synonym for "wholesomeness".'</i></p> <p>Whilst we agree with the sentiment that ambiguous wording that could be understood as a health claim should be avoided, the intention behind the example has always been difficult to understand, even prior to the implementation of the NHCR. It has always been unclear whether the example sought to outlaw the word "goodness" altogether, whether there might be acceptable contexts where "goodness" was not being used as a synonym for "wholesomeness", or whether a wholesome food could reasonably be described as "good" if that statement did not mislead. The root of confusion is probably that the word "wholesomeness" is barely more tightly defined than the word "goodness". Indeed it is questionable whether the dictionary definition of wholesome, "tending to promote physical health", would be consistent with the average consumer's interpretation of that word. To be blunt, it has always been an unhelpful example of ambiguity because it is, in itself, ambiguous.</p>	<p>4.3 BCAP understands the NHCR places strict controls on the use of ambiguous wording in claims, for example goodness, good for you etc. For an advertisement to use the word 'goodness', it would have to be accompanied by an authorised health claim. Until the Community Register of health claims is published (January 2010), national rules apply. BCAP can see no justification for removing the example in the present rule, which is intended to protect the audience from potentially misleading claims.</p>	NA

	<p>The NHCR has now defined the concept of a health claim. Furthermore, Article 10(3) explicitly permits “general, non-specific benefits of the nutrient or food for overall good health or health-related well-being... if accompanied by a specific health claim included in the lists provided for in Article 13 or 14”. Both “goodness” and “wholesomeness” (going by the dictionary definition) are plainly examples of general, non-specific health claims and are therefore permitted by the NHCR if accompanied appropriately; whether one term is a synonym for another is irrelevant. Because the example is ambiguous it is difficult to determine with absolute certainty whether it is inconsistent with the NHCR: at worst it is inconsistent with the NHCR; at best it is confusing and unhelpful as an example of an acceptable or unacceptable claim.</p> <p>For those reasons we request that BCAP delete that example from rule 8.3.1(a).</p> <p>The same BCAP rule continues to state “<i>The scientific meaning of the word “energy”, i.e. calorific value, should not be confused with its colloquial meaning of physical vigour.</i>”</p> <p>You will be aware that section 67 of the FSA’s guidance on the NHCR acknowledges that energy claims are within the remit of the Regulation and states that, in some cases, claims might be considered nutrition claims, in other cases they might be considered health claims. This is a reasonable stance and might not be inconsistent with the energy example in 8.3.1(a). The food industry across the EU has proposed both nutrition claims and health claims about energy to the European Commission. The Commission, advised by EFSA, is currently considering both of these submissions along with many others. In forthcoming months the annexes to the regulation will be updated to permit (or not) claims about energy. The</p>	<p>BCAP understands the references to energy in the Annex of the NHCR refer to calorific values. BCAP understands the Community register of health claims will be in place in January 2010 and may well include “health energy” claims; however, until that list is in place and BCAPs revised Codes are published (Q4 2009) BCAP can see no justification for removing the example from the present TV code which was introduced to avoid advertisements misleading the audience.</p> <p>BCAP is not persuaded that the examples given in the BCAP TV Code are inconsistent with the NHCR; it will, however, take into account whether the examples should form part of the equivalent rule in BCAP’s proposed Code, which is presented as part of BCAP’s Code Review, see:</p> <p>http://www.cap.org.uk/cap/Consultations/open/BCAP_Code_Review_consultation/BCAP+Code+Review+Consultation.htm</p>	
--	---	---	--

	<p>wordings will be suggested in those annexes and will be accompanied by conditions of use that should make it clear when a “nutrition energy” claim can be made and when a “health energy” claim can be made. It is unclear what the current BCAP example adds to the framework of the NHCR’s positive lists or whether it will be relevant and consistent with the Regulation at that time. The FSA’s guidance carries the caveat that it will be updated before the adoption of the positive lists.</p> <p>We therefore request that BCAP delete that example from rule 8.3.1(a). If in due course there is any potential for breaching the NHCR or the Code it would be better practice to address such a specific matter in a guidance note by the FSA or BCAP at that time, rather than in a rule, along with any other claim-related matters that might emerge requiring guidance. Indeed we note that a similar example features in a current CAP Help Note, rather than within a CAP Code rule, which we believe would be a more appropriate way to deal with matters like this if they remain relevant in the future.</p>		
Danone	<p>4.4 Respondent does not agree that BCAP has correctly amended the examples of a nutrition and health claim. The proposed change does not encompass the need for consumers to understand the claim, a key principle of the Regulation, and the examples proposed unnecessarily restrict the application of the Regulation. Danone propose the following amendment –</p> <p>“Nutrition claims (e.g. ‘high in vitamin C’) or health claims (e.g. ‘aids a healthy digestion’) must be understood by the average consumer and supported by sound scientific evidence. Claims where consumer understanding is unclear should be avoided. Adjectives which could be considered health claims should not be used as synonyms for adjectives which could be considered as nutrition</p>	<p>4.4 BCAP understands a key principle of the NHCR is to protect consumers from misleading or false nutrition or health claims. The BCAP Codes have numerous existing rules that are intended to protect the audience from misleading, offensive or harmful advertisements. BCAP considers the Codes have an established, clear position on consumer protection (particularly misleadingness) and believe it unnecessary to spell out this particular element of the NHCR in the Codes.</p> <p>BCAP understands the Community register of health claims will be in place in January 2010. Ambiguous claims such as goodness/good for you/healthy will only be permitted if accompanied by an authorised health</p>	NA

	<p>claims, and vice versa.”</p> <p>Under the Regulation, nutrition and health claims shall not be false, ambiguous or misleading (Article 3(a)) and they can only be permitted if the average consumer can be expected to understand the beneficial effects expressed in the claim (Article 5 (2)). The Regulation defines an average consumer to be one who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. The change proposed to the BCAP Code, while acknowledging that the claim needs to be supported by science, does not make reference to the need for the average consumer to understand the claim. This is fundamental to the Regulation and should therefore be adopted at this interim stage of consultation.</p> <p>Furthermore, the proposed amendment to the BCAP Code states that – “Ambiguous wording that could be understood as a nutritional health claim must be avoided. For example, ‘goodness’ should not be used as a synonym for ‘wholesomeness’.”</p> <p>Ambiguous wording that could be understood to mean a health claim is not ambiguous if the average consumer can be expected to understand the beneficial effect expressed in the health claim. Whether a claim is considered ambiguous or not should be defined by consumer understanding, and not by reference to examples proposed in the BCAP Codes. This is particularly important when considering the context in which a claim is delivered. For example, claiming ‘goodness’ on a pot of yogurt may be understood to mean that the yogurt is ‘good for you’ (Article 10(3) of the Regulation, requiring an Article 13 or 14 specific health claim). However, when the context of the claim is changed, ‘all the goodness of a glass of milk,’ this may be</p>	<p>claim. Until that point, BCAP considers the correction of the rule is necessary; BCAP is not persuaded that the examples given in the BCAP TV Code are inconsistent with the NHCR; it will, however, take into account whether the examples should form part of the equivalent rule in BCAP’s proposed Code, which is presented as part of BCAP’s Code Review, see:</p> <p>http://www.cap.org.uk/cap/Consultations/open/BCAP_Code_Review_consultation/BCAP+Code+Review+Consultation.htm</p> <p>The independent ASA Council is experienced in interpreting advertisements and administering the advertisement content codes and will apply the letter as well as the spirit of the rule. The ASA Council routinely makes judgments on the consumer take-out from advertisements.</p> <p>BCAP has already amended the Codes to ensure they are in line with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). BCAP consulted in June 2008 and introduced amendments to the TV and radio Codes on 21 November 2008. (www.cap.org.uk/cap/news_events/news/2008/BCAP+Consultation+The+Regulation+of+Unfair+Commercial+Practices+in+TV+and+Radio+Advertisements.htm).</p> <p>The definitions in the CPRs comprise tests to determine whether a practice is unfair, misleading or aggressive and is, therefore, prohibited. Instead of incorporating the tests set out in the CPRs into every BCAP Code rule that relates to unfair, misleading or aggressive advertisements, BCAP has included an appendix in the TV and Radio Codes that summarises those tests and states that, whenever the ASA considers complaints under the rules that prohibit</p>	
--	--	---	--

	<p>understood to mean that one pot of yogurt contains the same beneficial nutrients as a glass of milk, which could be interpreted as a comparative claim.</p> <p>Under this provision, the respondent does not believe it is beneficial for the BCAP Codes to give specific examples of claims. Claims need to rely on the strength of the scientific support available at the time and the average consumers understanding, particularly given the context of the claim. Therefore, it is unnecessarily restrictive for the BCAP Codes to provide examples of claims.</p>	<p>unfair, misleading or aggressive advertisements, it will have regard to the tests set out in the CPRs. Of particular relevance to the points raised by Danone the ASA must interpret potentially misleading advertisements by reference to the Annex 4 of the BCAP TV Code:</p> <p><i>Many rules in this Code prohibit misleading advertising. All rules that refer to misleading advertising should be read, in relation to business-to-consumer advertising, in conjunction with the summary below.</i></p> <p>Consumers</p> <p><i>The likely effect of an advertisement is generally considered from the point of view of the average consumer who it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.</i></p> <p><i>In some circumstances, an advertisement may be considered from the point of view of the average member of a specific group:</i></p> <ul style="list-style-type: none"> <i>• If the advertisement is directed to a particular audience group, the advertisement will be considered from the point of view of the average member of that group.</i> <i>• If an advertisement is likely to affect the economic behaviour only of a clearly identifiable group of people who are particularly vulnerable to its contents, in a way that the advertiser could reasonably be expected to foresee, because of mental or physical infirmity, age or credulity, then the advertisement will be considered from the point of view of the average member of the affected group.</i> 	
Confidential	4.5	4.5	NA

respondent	<p>Respondent agrees “high in vitamin C” is a nutrition claim and that claims such as “goodness” are likely to be considered to be general health claims rather than nutrition claims, and we consider that the proposed amendments to this rule reflect this.</p> <p>However, the rule does not seem to make a distinction between claims that make general reference to health (such as “goodness”) which are permitted but must be supported by an authorised health claim once the list is adopted, and claims that are so ambiguous that they would be misleading to consumers and so would be prohibited.</p>	<p>BCAP agrees.</p> <p>The aim of this interim consultation is to identify and accurately correct inconsistencies between the present BCAP Codes and the NHCR. BCAP proposes the <u>minimum</u> number of changes necessary to ensure that the present Codes do not allow practices that are explicitly prohibited by the NHCR and do not unduly restrict the use of nutrition or health claims that are permitted by the NHCR. Claims that are ambiguous would likely be considered misleading by the ASA. BCAP considers reference to the acceptability of general claims such as ‘goodness’ supported by authorised health claims when the Community Registered is in place, may be worth highlighting in the proposed Broadcast Code that is currently under public consultation and due for publication in Q1 2010.</p>	
Q5: Do you agree that present BCAP Radio rule 3:12.2 (a) and (b) and present BCAP TV rule 8.3.5 (a) and (b) could unfairly restrict disease risk reduction claims that are compatible with the NHCR? If not, please explain your reasoning clearly			
PAGB	<p>5.1 Respondent agrees the current Codes could unfairly restrict disease risk reduction claims that are compatible with the NHCR but they also restrict Article 13 claims (please see response to Q6).</p>	<p>5.1 BCAP agrees. See response to 6.1.</p>	NA
BRC; GSK Danone	<p>5.2 Respondents agree</p> <p>Respondent agrees the BCAP Radio rule and BCAP TV rule should be amended to align with the Regulation on the making of disease risk reduction claims on dietary supplements.</p>	<p>5.2 BCAP agrees.</p>	NA

Q6: Do you agree that BCAP has correctly amended BCAP Radio rule 3:12.2 (a) and (b) and present BCAP TV rule 8.3.5 (a) and (b) to take into account the disease-risk-reduction claims that are compatible with the NHCR? If not, please explain your reasoning clearly			
PAGB	<p>6.1 Respondent agrees the wording has been amended sufficiently to take into account disease risk reduction claims. However, the BCAP TV Code could unfairly restrict Article 13 claims. The proposed wording:</p> <p>“Advertisements must not suggest that it is necessary for the average person to augment the diet or, unless the claim is authorised by the European Commission, that dietary supplements can enhance normal good physical or mental condition”</p> <p>would be better amended to:</p> <p>“Unless the claims are authorised by the European Commission, advertisements must not suggest that it is necessary for the average person to augment the diet, or that dietary supplements can enhance normal good physical or mental condition”</p> <p>It is possible that the European Commission may approve a claim that the average person or most people could benefit from a particular supplement or particular type of supplement. Should this arise, the TV Code should not prohibit advertisers from using claims which have been authorised by the Commission.</p>	<p>6.1 BCAP amended its TV and radio Codes to exempt authorised claims from the ban on claims that dietary supplements can enhance normal good physical or mental condition because disease-risk reduction claims on products that could benefit consumers in general are <i>likely</i> to be included in the Community Register of Health Claims.</p> <p>BCAP considers that, even if the Commission might allow a claim that the average person could benefit from a particular supplement, it does not follow that the TV ban on stating “Advertisements must not suggest that it is necessary for the average person to augment the diet” or the radio ban on stating “Advertisements must not state or imply that dietary supplements, including vitamins or minerals, are necessary to avoid dietary deficiency” would unduly prohibit such claims.</p>	NA
BRC	<p>6.2 Respondent agrees with the proposed changes to the Codes; however the reference to the approval by the Commission should be removed. The Commission has the responsibility of proposing legislation but they cannot approve it. This is the role of Council and Parliament.</p> <p>The rationale for proposed changes is incomplete. It</p>	<p>6.2 BCAP is not persuaded that its proposed wording: “authorised by the European Commission” is an inaccurate statement. The Standing Committee and Parliament have a role within the approvals process, under the overarching arm of the ‘European Commission’.</p>	NA

	<p>currently only refers to Article 14 claims on reduction of the risk of a disease but the majority of claims made on food supplements will be Article 13 health claims.</p> <p>We believe that the currently proposed wording may mislead the reader to believe that they have to comply with one of the two requirements; the claim having to be authorised (a) or a statement on who may benefit from consuming that supplement. This paragraph should be reworded to clearly indicate that both requirements have to be complied with.</p>	<p>The NHCR provides different routes of authorisation for different types of claims: for example, the Commission will make the decision about an Article 13(5) claim and the Standing Committee will do so in the case of Article 14 claims; in both cases, the Council and Parliament can comment on the decisions taken. BCAP considers that to refer to four separate bodies that have a role to play in the approvals process in the Codes is confusing for readers.</p> <p>BCAP considers it is clear that advertisements must comply, as appropriate, with part (a) and part (b) of radio rule 12.2 and TV rule 8.3.5. See also BCAP's response in 6.1</p>	
GSK	<p>6.3 Respondent does not agree. Although we understand that BCAP wishes to minimise amendments to the Codes at this time, we believe some of the wording might create confusion with the NHCR and that other elements are unworkable in practice.</p> <p>The background to these difficulties is that the BCAP Codes (and the CAP Code) have always exceeded the requirements laid down by "the Food Supplements Directive", 2002/46/EC. It is not a requirement of that Directive that advertisements or other commercial communications identify a group at risk of inadequate nutritional intake. We assume the rationale behind that additional BCAP restriction is an extension of the Directive's requirements that supplement labelling should make clear that supplements should not be used a substitute for a varied diet and should not imply that a varied and balanced diet cannot provide adequate nutrition.</p>	<p>6.3 [see response to 6.1]</p> <p>BCAP is not persuaded that Radio rule 12.2 b) and TV rule 8.3.5 b) are inconsistent with the NHCR. Those rules ensure that if claims are relevant (provide a beneficial effect) to a specific group only, the advertisement must identify that group to prevent a misleading implication that the claim has wider benefit to the average consumer.</p> <p>BCAP is not the expert body on nutrition and in cases such as this must take advice from bodies such as the Department of Health and the Food Standards Agency.</p>	NA

	<p>The draft amendments have sought to harmonise that historic provision of the BCAP Codes with the NHCR by including the caveat that the advertisement state the group likely to benefit “if the claim is relevant only to a group that is at risk of inadequate intake”. It is unclear how that “relevance” will be judged, which introduces unnecessary scope for differing interpretations by advertisers, Clearcast, the RACC and the ASA, which would be unhelpful to all those parties. Furthermore, those interpretations might still place an additional restriction on the claim over and above those of the NHCR.</p> <p>In practice, if this relevance is an important factor in determining the acceptability of the claim then EFSA and the Commission are likely to address this within the wording of the claim or the associated conditions of use. We therefore suggest that BCAP deletes the explicit requirement imposed by 12.2b and 8.3.5b. The general provisions of NHCR claims authorisation will be implemented in 12.2a and 8.3.5a and should encompass that requirement if it is relevant to a given claim. We believe this would provide a clearer, more workable solution for all parties.</p>		
Danone	<p>6.4 Respondent agrees that the changes proposed to the BCAP Radio rule and BCAP TV rule should be amended to align with the Regulation on the making of disease risk reduction claims on dietary supplements.</p>	<p>6.4 BCAP agrees.</p>	NA
Confidential respondent	<p>6.5 Respondent considers that the proposed amendments to these sections of the Codes reflect the fact that Regulation (EC) 1924/2006 allows authorised health claims to be used on all foods, including supplements. Although the Regulation puts in place general requirements that all claims must comply with, such as ensuring that they are not false or misleading, there is no specific requirement to state the group likely to benefit. When assessing claims, the European Food Safety</p>	<p>6.5 [see response to 6.1] BCAP is not persuaded that Radio rule 12.2 b) and TV rule 8.3.5 b) is inconsistent with the NHCR. Those rules ensure that, if claims are relevant to a specific group only, the advertisement must identify that group to prevent a misleading implication that the claim has a wider benefit to the average consumer.</p>	NA

	<p>Authority will consider whether the specific study group(s) in which the evidence was obtained is representative of the target population for which the claim is intended, and may indicate which population group(s) the claim is valid for. However, it is unclear at the moment whether this will translate into a specific requirement to indicate which groups would benefit from the food. The respondent considers that the change to the wording of part (b) of the Codes to state that advertisements “may” rather than “must” be aimed at certain population groups reflects the Regulation.</p>		
<p>Q7. Do you agree that BCAP has correctly reflected the requirements of Article 4(3) into BCAP Radio rule 3:11.3.1 and BCAP TV rule 11.8.2 (f)? If not, please explain your reasoning clearly.</p>			
<p>PAGB</p>	<p>7.1 Respondent does not agree. The amended text in the TV and Radio Codes requires specific wording to be used whereas the NHCR allows flexibility. Article 4 (3) of the NHCR allows claims “referring to low alcohol levels, or the reduction or absence of alcohol or energy...” Similarly, the Annex to the NHCR, “Nutrition claims and conditions applying to them” uses phrases such as “and any claim likely to have the same meaning for the consumer”. The revised TV and Radio codes, which state: “The only permitted nutrition and health claims are “low alcohol”, “reduced alcohol” and “reduced alcohol” and “reduced energy,” are overly restrictive.</p>	<p>7.1 BCAP agrees. It intends to change the last sentence of TV rule 11.8.2 (f) and Radio rule 3.11.3.1 to read: The only permitted nutrition claims are “low alcohol”, “reduced alcohol” and “reduced energy” and any claim likely to have the same meaning for the audience.</p>	<p>The only permitted nutrition claims are “low alcohol”, “reduced alcohol” and “reduced energy” and any claim likely to have the same meaning for the audience.</p>
<p>BRC</p>	<p>7.2 Respondent agrees with the interpretation of the provisions. The European Regulation leaves business operators the flexibility to use equivalent wording to the one specified in the legislation. We believe it is important that this is reflected in the BCAP Codes. Providing a few examples would be useful, e.g. ‘reduced energy’ or equivalent wording such as ‘reduced calories’ or ‘less calories’. The Codes should make clear that these claims can only</p>	<p>7.2 BCAP agrees. The aim of this interim consultation is to identify and accurately correct inconsistencies between the present BCAP Codes and the NHCR. BCAP proposes the <u>minimum</u> number of changes necessary to ensure that the present Codes do not allow practices that are explicitly prohibited by the NHCR and do not unduly restrict the use of nutrition or health claims that are permitted by the NHCR.</p>	<p>NA</p>

	be made providing that the criteria detailed in Annex I of the Regulation for the chosen claim is fulfilled.	BCAP proposes to give effect to some of the general and specific provisions of the Regulation, including the provisions to which BRC's response refers, in its proposed new Code, due to be published in 2010.	
Danone	7.3 Respondent agrees that the BCAP has correctly reflected the requirements of Article 4(3) in the BCAP Radio rule and BCAP TV rule.	7.3 BCAP agrees.	NA
Confidential respondent	Respondent considers that the proposed changes to these sections of the Codes accurately reflect Regulation (EC) 1924/2006.		
GSK	7.4 Respondent has no comment on this question as they do not market alcoholic drinks.	7.4 N/A	NA
Q8: Do you agree that, subject to the changes proposed in this consultation, the present Codes do not allow practices that are explicitly prohibited by the NHCR and do not unduly restrict the use of nutrition or health claims that are permitted by the NHCR? Please explain your reasoning clearly			
PAGB	8.1 Agree, if the changes above are incorporated. We presume the prohibition on recommendations of individual health professionals will be more closely reflected in the new version of the BCAP Code. FSA's Guidance Note on this area is very precise as to what is and is not prohibited. Specifically page 49 of the FSA's guidance document: http://www.food.gov.uk/multimedia/pdfs/ec19242006complianceguide.pdf	8.1 BCAP considers its present TV and radio rules on healthcare professional endorsement of products that have a therapeutic, prophylactic or nutritional effect (including food) are not inconsistent with the NHCR. BCAP proposes to give effect to some of the general and specific provisions of the Regulation, including the provisions to which PAGB's response refers, in its proposed new Code, due to be published in 2010. For its review of those rules please refer to page 88 of the BCAP Con Doc Code Review: http://www.cap.org.uk/NR/rdonlyres/AB393FD6-9CDE-40A2-BD7C-EC53171F427D/0/BCAPConsultationdocumentandAnnex1.pdf	NA

GSK	<p>8.2 Respondent considers rules 8.1.2 and 4.12 of the TV and Radio Codes respectively are inconsistent with Article 12 of the NHCR, which restricts <u>health claims</u> that make reference to recommendations of individual doctors or health professionals. Broadly speaking, the codes seem to prevent presentation and recommendations by health professionals, whereas the FSA's guidance on interpretation of Article 12 explicitly states that such recommendations are lawful, provided those recommendations do not include health claims (sections 35-44, notably 35 and 41).</p> <p>We would support harmonisation of the codes with the NHCR and the FSA's position.</p>	<p>8.2 [See response to 3.3]</p> <p>BCAP considers its present TV and radio rules on healthcare professional endorsement of products that have a therapeutic, prophylactic or nutritional effect (including food) are not inconsistent with the NHCR.</p> <p>BCAP proposes to give effect to some of the general and specific provisions of the Regulation, including the provisions to which GSK's response refers, in its proposed new Code, due to be published in 2010. For its review of those rules please refer to page 88 of the BCAP Con Doc Code Review:</p> <p>http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx</p>	
BRC	<p>8.3 The Nutrition and Health Claims Regulation is a complex piece of legislation. Not only does it introduce new criteria and conditions for the use of health claims, but many of the provisions of the Regulation apply at different times.</p> <p>Respondent considers it is imperative that all the different transitional periods, some of which are up to 15 years long, are somehow accurately reflected in the Code.</p> <p>While it is very important that the body of the Regulation is correctly interpreted into the Code, we would at all cost like to try to avoid unnecessary restrictions or challenges because the legal transitional periods have not been taken into account.</p>	<p>8.3 In proposing to make now the minimum number of changes necessary to ensure consistency with the NHCR, BCAP acknowledges that the updated Codes will not explicitly reflect some of the general or specific provisions of the Regulation that are relevant to broadcast advertisements.</p> <p>Whilst the Codes reflect certain provisions in law, they cannot provide for every requirement of food law. The NHCR introduces a number of transitional periods that are product specific in many cases and to reflect those transitional periods and provide guidance is impractical. The onus is on stakeholders to apply relevant parts of this complex Regulation to their product/advertisement.</p> <p>BCAP considers the BRC's concern is adequately</p>	NA

		addressed by maintaining this text in the Codes: <i>On 1 July 2007, a new and important regulation governing nutrition and health claims for foods came into force. The regulation is complex and mandatory. BCAP encourages broadcasters to take advice on the effect of the regulation and to consult the Food Standards Agency's Guidance to Compliance with Regulation (EC) 1924/2006 on Nutrition and Health Claims on Foods, which is available at http://www.food.gov.uk.</i>	
Danone	8.4 Respondent agrees that, subject to the changes proposed in this consultation, the present Codes do not allow practices that are explicitly prohibited by the Regulation. Subject to the changes Danone has proposed under the question 4 above, Danone finds that the BCAP Codes will not unduly restrict the use of nutrition or health claims permitted by the Regulation.	8.4 [see response to 4.4]	NA
Confidential respondent	8.5 Rule 8.3.1(b) of the BCAP (Television) Code This rule states that nutrition and health claims should be relevant to groups likely to be strongly interested in the advertisement. This is not fully compatible with Regulation (EC) 1924/2006 as, although Article 5 makes it a requirement that claims are understood by the average consumer, there is no requirement to direct claims at those that are interested in the advertisement.	8.5 BCAP agrees. BCAP considers that the intent of present rule is to ensure that groups that are <u>strongly</u> attracted to an ad are not misled by nutrition or health claims that are not necessarily of benefit to them. BCAP agrees this is more proscriptive than the Regulation requires; BCAP considers that the mischief of directly targeting an ad containing a health or nutrition claim at a defined group of people to whom the claim does not apply would likely be considered under its general misleading clauses. BCAP proposes to amend the rule as follows: "b) Nutritional claims and health claims should relate to benefits that are significant and relevant to groups likely to be strongly interested in the advertisement. Claims should be presented clearly and without exaggeration"	"b) Nutritional claims and health claims should relate to benefits that are significant and relevant to groups likely to be strongly interested in the advertisement. Claims should be presented clearly and without exaggeration".

<p>Confidential respondent</p>	<p>8.6 Rule 8.3.1(d)(2) of the BCAP (Television) Code and rule 12.1 of the BCAP (Radio) Code These rules refer to the FSA Guidelines for the Use of Certain Nutrition Claims in Food Labelling and Advertising”. This guidance has been overtaken by Regulation (EC) 1924/2006 and has now been withdrawn. Regulation (EC) 1924/2006 specifically prohibits “% fat free” claims (see the Annex) so the reference in the Codes should be amended accordingly.</p>	<p>8.6 BCAP agrees. The reference to the FSA’s guidance is out of date and will be deleted. Reference to the NHCR and its scope is highlighted at the start of the relevant sections of the TV and radio Codes.</p>	<p>(TV) Notes: <i>(1) Claims of nutritional or health benefits should be considered in the context of a balanced diet or lifestyle or both. For the avoidance of doubt, HFSS product advertisements may make nutritional or health claims in accordance with 8.3.1.</i> <i>(2) A wide range of guidelines that offers best practice advice for nutritional claims and healthy eating is available. For example, The Food Standards Agency’s Guidelines for the Use of Certain Nutrition Claims in Food Labelling and Advertising.</i></p>
---------------------------------------	--	---	---

			<p>include a recommendation to avoid “% fat free” claims (issued November 1999). Appropriate consideration and uniform application of such guidelines is needed from the relevant pre-clearance and adjudicatory bodies.</p> <p>(Radio) Particular attention should be paid to the requirements of the Food Labelling Regulations 1996, especially the prohibited and restricted claims set out in Schedule 6. Guidelines that offer best-practice advice for nutritional claims and healthy eating are</p>
--	--	--	---

			<i>available. For example, The Food Standard Agency's Guidelines for the Use of Certain Nutrition Claims in Food Labelling and Advertising include a recommendation to avoid "% fat free" claims (issued November 1999).</i>
Confidential respondent	<p>8.7 Rule 8.1.2 of the BCAP (Television) Code This rule prohibits professional advice or recommendations from health professionals. When we commented previously we said this was consistent with the prohibition in Article 12(c) of Regulation (EC) 1924/2006. Respondent considers BCAP's rules must follow the intention of article 12(c) as closely as possible. Interpretation of this article is likely to become clearer in the coming months as relevant stakeholders agree on the intention of the restriction.</p>	<p>8.7 [See response to 3.3]</p> <p>BCAP considers its present TV and radio rules on healthcare professional endorsement of products that have a therapeutic, prophylactic or nutritional effect (including food) are not inconsistent with the NHCR.</p> <p>BCAP proposes to give effect to some of the general and specific provisions of the Regulation, including the provisions to which this response refers, in its proposed new Code, due to be published in 2010.</p> <p>For its review of those rules please refer to page 88 of the BCAP Con Doc Code Review:</p> <p>http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx</p>	NA

Confidential Respondent	<p>8.8 Rule 8.4.6(3)(c) of the BCAP (Television) Code and rule 13(g) of the BCAP (Radio) Code</p> <p>These rules prohibit the use of testimonials or specific case histories. Respondent considers testimonials should be treated in the same way as claims, and as such will have to comply with Regulation (EC) 1924/2006 and be authorised and listed. Therefore a prohibition on testimonials or specific case histories that are tantamount to an authorised claim is not compatible with the Regulation. This may be an area of the Codes that does not need updating until the authorised list of claims is adopted.</p>	<p>8.8</p> <p>BCAP is not persuaded that its rules/notes on testimonials require amendment. BCAP agrees testimonials that include/imply a claim require substantiation. BCAP considers its prohibition of testimonials or specific case histories in advertisements for these products is justified given the nature of the product and the need to ensure that the welfare of children and young persons, and the vulnerable (particularly those with poor self-image) are protected.</p>	NA
Confidential respondent	<p>8.9 Rule 8.4.6(2)(b) of the BCAP (Television) Code and rule 13(f) of the BCAP (Radio) Code</p> <p>These rules refer to the Foods Intended for Use in Energy Restricted Diets for Weight Reduction Regulations 1997 and prohibit claims referring to the rate or amount of weight loss or a reduction in the sense of hunger or an increase in the sense of satiety. However, since the European Regulation 1924/2006 on nutrition and health claims made on foods allows claims describing or referring to 'a reduction in the sense of hunger' or 'an increase in the sense of satiety' to be made on foods for general consumption under certain conditions, the legislation covering foods intended for use in energy restricted diets has been amended (see SI 2007/2591) to allow such claims to be made on slimming foods. The amendment brings these provisions in line with the provisions on the use of such claims in relation to foods for general consumption and as such the Code should be updated to reflect this change.</p>	<p>8.9</p> <p>BCAP agrees. It has proposed rules that reflect this provision in its proposed Code (see page 96 of BCAPs consultation document: http://www.cap.org.uk/NR/rdonlyres/AB393FD6-9CDE-40A2-BD7C-EC53171F427D/0/BCAPConsultationdocumentandAnnex1.pdf</p> <p>BCAP considers maintaining this note and rule in the present Codes would be inconsistent with the NHCR.</p>	<p>TV Rule 8.4.6 Underweight</p> <p>Advertisements for products and services in this category must not suggest that to be underweight is acceptable or desirable. Where testimonials or case histories are used, they must not refer to subjects who are or appear to be underweight</p> <p><i>Notes (2) (b)</i></p>

			<p><i>advertisements for such foods may not refer to the rate or amount of weight loss that may result from the use of the product, or to a reduction in the sense of hunger or an increase in the sense of satiety.</i></p> <p>Radio Rule 3.13(f) ii advertisements for such foods may not refer to the rate or amount of weight loss that may result from use of the product, or to a reduction in the sense of hunger or an increase in the sense of satiety.</p>
<p>EUROPEAN ALLIANCE OF LISTENERS' AND VIEWERS' ASSOCIATIONS (EURALVA)</p>	<p>8.10 1. Respondent welcomes the proposal by BCAP to amend its codes to bring them into line with the requirements of EC Regulation 1924/2006, in order to help identify and accurately correct inconsistencies between the present BCAP Codes</p>	<p>8.10 BCAP must ensure its codes do not allow practices that unduly restrict the use of nutrition or health claims that are permitted by the NHCR or allow practices that are prohibited by the NHCR, as the Regulation is a maximum harmonisation measure. It considers the</p>	<p>NA</p>

	and the Regulation. We would therefore welcome an assurance from BCAP that, in ensuring that it only proposes the minimum number of changes necessary to ensure that the Codes do not allow practices that are specifically prohibited by the Regulation, BCAP will not dilute, or roll back, any practices which are designed to protect consumers, that are currently prohibited by BCAP in the UK.	proposed amendments provide adequate protection to vulnerable members of the audience. This interim consultation ensures the Codes are aligned to the NHCR: BCAP's full consultation on the Radio and TV Code due for publication in Q1 2010, will be more closely tailored to the requirements of the NHCR.	
	8.10.1 2. EURALVA also welcomes the Guidance issued to suppliers of products with nutritional and health claims which has been issued by the UK Food Standards Agency.	8.10.1 BCAP understands this response is not a comment on the proposed BCAP interim changes to the Codes.	NA
	8.10.2 3. In addition, EURALVA notes that Recital 4 of Regulation 1924/2006 states that the provisions of the Regulation extend to all nutrition and health claims made in commercial communications. We assume therefore, that the provisions of this Regulation will extend to all forms of audiovisual media commercial communications. These will include product placement in television and video-on-demand services which, although formally prohibited, will become legal in circumstances, when the EU's Audiovisual Media Services Directive enters into force in December 2009.	8.10.2 BCAP understands that this response is not a comment on the proposed BCAP interim changes to the Codes, but on the application of the NHCR. The CAP Code presently regulates non-broadcast audiovisual marketing communications; CAP has updated its Code to ensure consistency with the NHCR.	NA
	8.10.3 4. Although it is not yet clear precisely what position the UK Government will adopt in relation to the possible introduction of product placement in television programmes shown on UK screens, or in UK-licensed video-on-demand services, EURALVA would nevertheless welcome confirmation that should product placement be subsequently allowed	8.10.3 The Secretary of State for Culture, Media and Sport, issued a statement in March this year: (http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx/) that the Government expects Ofcom to designate, and delegate powers to, the ASA to regulate advertising in video-on-demand services. That is part of the Government's announcement on	NA

	<p>by the UK Government, BCAP will extend its code of practice to any nutritional or health claims that are included in either the dialogue or the visuals contained in any television programmes, or video-on-demand services, which are broadcast by UK-licensed broadcasters, or supplied by UK-licensed providers of audiovisual media services generally.</p>	<p>how it intends to implement the Audiovisual Media Services (AVMS) Directive which regulates television broadcasting and video-on-demand services in the EU. Ofcom is in the process of consulting on proposals to that effect: http://www.ofcom.org.uk/consult/condocs/vod/</p> <p>The NHCR applies to all food marketing communications; to the extent that BCAP/CAP is responsible for regulating food commercial communications on VoD services, they must ensure those comply with the NHCR.</p>	
Advertising Association (AA)	<p>8.12 Having read the consultation document, respondent considers all the amendments seem very sensible.</p>	<p>8.12 NA</p>	NA
British Medical Association (BMA)	<p>8.13 Respondent has considered the consultation and at this time does not feel a response is necessary but would be interested in receiving a copy of the consultation report once it has been produced.</p>	<p>8.13 NA</p>	NA