

ASA system submission to Scottish Government Consultation on ending the sale of energy drinks to children and young people

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 57 years and the broadcast Advertising Code (written and maintained by BCAP) for 15, 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 take action against misleading, harmful or offensive advertisements. We are committed to evidence-based regulation and we continually review new evidence to ensure the rules remain fit-for-purpose.
- 1.4. 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 550,000 pieces of advice and training in 2019.
- 1.5. The ASA system is providing this written submission in response to the Scottish Government consultation on ending the sale of energy drinks to children and young people.

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. This responds to evidence of the need to limit children’s exposure to less healthy 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 seen by 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 have a view on whether the sale of energy drinks to young people should be banned.
- 3.2. However, if the Scottish 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 consult publicly on corresponding advertising restrictions.
- 3.3. In our provisional view, what the Scottish 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 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. Alongside placement restrictions for energy drinks, CAP and BCAP may consider the need for restrictions on the content of ads to limit their appeal to children.
- 3.5. Another challenge arises in the event that only Scotland moves to introduce a sales ban; we note the UK Government is presently considering such a proposal for England. Any new rules would apply to Scottish media or media targeting Scottish consumers. However, marketing channels, principally many online platforms, present challenges in appropriately demarcating jurisdictions.
- 3.6. If the Scottish 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.
- 3.7. 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; the CAP's remit is set out [here](#), BCAP's is set out [here](#).
- 3.8. We would be happy to elaborate on the information provided here at the request of the Scottish Government.

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