

ASA, CAP and BCAP response to the Government's HFSS advertising consultation

Introduction

1. A perspective from the UK's ad regulator

The Advertising Standards Authority (ASA), the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are uniquely placed to respond to this consultation as we regulate the TV scheduling, non-broadcast placement and creative content of ads for food and soft drink products high in fat, salt or sugar (HFSS).

We recognise the significant public health challenges related to children's diet and to childhood obesity and the need to give due consideration to a broad range of interventions, including on advertising¹. We have long accepted the need for proportionate restrictions on HFSS advertising and robust enforcement of them to help meet the public policy imperative to change the nature and balance of food advertising to children. This response testifies to the regulatory framework and rules that we've implemented and the enforcement activities we've undertaken to help meet that objective.

The consultation envisages that we will continue to regulate HFSS ads following its conclusion. We consider it important, therefore, that the presentation of evidence, evaluation of responses and policy decisions reached have due regard to the key principles that inform how we and other regulators must work.

In the exercise of our regulatory functions, the ASA, CAP and BCAP may be subject to judicial review. To mitigate the risk of legal challenge, we must ensure that our setting and application of the UK Advertising Codes – the [UK Code of Non-broadcast Advertising and Direct & Promotional Marketing](#) (the CAP Code) and the [UK Code of Broadcast Advertising](#) (the BCAP Code) – are transparent, accountable, proportionate and consistent, and that action is targeted only where it is necessary in line with better regulation principles. An evidence-based approach is generally held to be the best way of living up to these principles. We therefore welcome Government's confirmation that its approach will be led by the evidence and note its openness to new information at various points in the Consultation Document and Impact Assessment².

¹ As outlined in Impact Assessment paragraphs 1-24 particularly.

² Noting Consultation Document section 3, page 7.

2. Our response

Our response draws on our expertise in setting HFSS ad standards, enforcing them and assessing their impact, especially on audience exposure. While we offer top line observations on the potential implications and consequences of the proposed options for change, this response does not include data on the economic, financial and related impact to TV and online media; a detailed assessment of any knock-on effects in terms of displacement of marketing spend, for example to below the line marketing, and the consequences, if any, for plurality of content. Government will need to take into account such data alongside the public health benefits that it considers may accrue from additional HFSS ad restrictions in reaching a proportionate outcome.

We intend our response to help to deliver an outcome compatible with better regulation principles, particularly the need to ensure any new restrictions are proportionate to the evidence of harm arising from HFSS ads and that the harm identified is not already and adequately addressed by existing rules.

In particular, we think it is important to take greater account of the existing ad restrictions; they have played and continue to play an important role in helping to incentivise positive reformulation of food and soft drinks and to deliver significant change in the nature and balance of food advertising seen by children, responding directly to public policy imperatives. Children's exposure to HFSS ads on TV has fallen by around 70% since 2005 and recent data suggests that, as changing media habits lead to greater use of online media, reduction in exposure in TV is not being undermined by exposure there³.

Our response also sets out the legal constraints to which CAP and BCAP, as Code setters, are subject when considering a case for regulatory change. The restrictions we impose must constitute the least restrictive means of achieving a particular objective to meet the test of proportionality. To these ends, we:

- report on the continuing effectiveness of the existing HFSS rules in helping to achieve significant reductions in children's exposure to HFSS ads over the past decade;
- highlight how emerging evidence and our own monitoring and enforcement insights invite CAP and BCAP to review and potentially revise key aspects of the regulatory controls in place; and
- restate positions that CAP and BCAP have previously made public on the likely benefits and costs of the types of timing-based restrictions proposed in the consultation.

Our response benefits from information gathered as part of the BCAP call for evidence (issued in April 2018) relating to TV HFSS ads, and the CAP 12-month

³ Cited in Impact Assessment paragraphs 81-82.

review of the non-broadcast HFSS rules, which were introduced in 2017⁴. Given the Government's subsequent announcement, in June 2018, of its intention to consult on further HFSS ad restrictions, CAP and BCAP consider it is more helpful to Government to include insights from the call for evidence and the 12 month review in this response rather than to publish their outcomes independently.

Annex A provides additional technical detail, data and commentary on the present regulatory controls in place for HFSS advertising.

⁴ Noting Consultation Document section 3, pages 10 and 11 in relation to the CAP and BCAP processes respectively.

Considering the case for regulatory change

3. Legal tests

The right to commercial expression is protected by Article 10 of the European Convention on Human Rights⁵. In assessing the need for new restrictions on advertising, CAP and BCAP must have regard to key legal and regulatory considerations:

- the right to commercial freedom of expression (in most cases, the right of businesses to advertise);
- the principle that restrictions must be necessary in a democratic society for a legitimate aim, including the protection of health (on the basis of evidence of harm or a real potential for harm); and
- the principle that restrictions imposed must be a proportionate means of achieving a legitimate aim: in assessing calls for prohibitions or restrictions of a particular nature, CAP and BCAP must seek to establish the least restrictive means of achieving the same aim.

4. Policy aims and reasons for intervention

Government is pursuing a legitimate policy aim to reduce childhood obesity. The exploration of additional restrictions on HFSS ads, which have been shown to have a modest, direct influence on children's food preferences, is an important consideration in helping Government to meet its policy goal.

The ASA, CAP and BCAP acknowledge the scale of the wider obesity problem in the UK and also the level of public concern that has arisen. Intervening to shape the dietary preferences and behaviour of children can be an important factor in delivering good health outcomes in later life⁶. However, interventions that have a disproportionate impact or create perverse consequences can result in adverse costs to the public, media and advertisers.

The consultation's rationale for intervention notes international evidence of advertising's link to obesity and that "children still see significant volumes of HFSS advertising"⁷. It is important to set this against:

- Government's own data⁸, which shows that children's exposure to TV HFSS advertising has declined by around 70% since 2005;
- exposure data published by the ASA⁹, which found that, in 2017, children saw, on average, 9.6 TV HFSS ads per week or 1.4 per day, including ads for HFSS products unlikely to appeal to or be consumed by children (e.g. ads for condiments and ads for key components of meals);

⁵ Annex A section 7 discusses the application of these tests in more detail.

⁶ Noting Impact Assessment paragraphs 1-5 and 12.

⁷ Noting Impact Assessment paragraph 7.

⁸ Cited in Impact Assessment paragraphs 81-82.

⁹ ASA (2019) [Children's Exposure to Age-Restricted TV Ads](#); key findings are set out in Annex A sections 48-49.

- evidence that suggests children’s reduced exposure to TV HFSS ads is not being replaced by online exposure at the same rate; the consultation found online exposure to be around 20% of that on TV¹⁰; and
- the basis of the evidence referred to in the consultation for advertising’s impact: it centres on acute HFSS ad exposure occurring in concentrated periods of time, featuring ads and/or products likely to have high appeal to children, placed around children’s programmes (a practice banned by the current rules), thus calling into question the significance of real-world impact.

These points are elaborated on later in the response.

5. Consultation objectives

In seeking to achieve its objectives, Government is concerned to limit children’s exposure to HFSS ads (not adults’ exposure to the same), and to target its interventions at HFSS products of most concern from the perspective of a child’s diet¹¹.

It is widely acknowledged that improving childhood diet and tackling obesity present complex, multi-factorial policy challenges. The proposed package of measures in the Government’s Obesity Plan reflects the general view that a broad range of interventions is the best strategy to achieve positive change.

While it is important to assess the case for new advertising restrictions in context, CAP and BCAP consider that any such restrictions must be proportionate to the evidence of advertising’s specific contribution to harm.

When CAP introduced HFSS ad restrictions in non-broadcast media, it recognised the limitations to the evidence base (particularly as it relates to non-broadcast HFSS ads). CAP considered the evidence in the context of wider factors, including, significantly, changes in the media environment brought about by growth of online media platforms and the resultant shift in children’s media habits. CAP was satisfied that there was a basis in the evidence to consider change.

At several points, the consultation hypothesises as to the potential benefits of reducing exposure for adults¹². It is apparent that the additional HFSS restrictions proposed in the consultation document will reduce adult exposure far more significantly than that of children. However, as the consultation itself notes, the evidence around the potential benefits of reduced adult exposure to HFSS ads is, at best, unclear¹³. Existing HFSS ad restrictions have been designed to reduce and appropriately limit children’s exposure to HFSS ads while avoiding unnecessary intrusion into adult TV viewing and adult engagement with non-broadcast media. It

¹⁰ Cited in Impact Assessment paragraphs 81-82.

¹¹ Noting Consultation Document section 4, page 13 and Impact Assessment paragraphs 15-17.

¹² Noting the references on Consultation Document section 2, page 6 and Impact assessment paragraphs 6, 17 and 24. Also, we note paragraph 118 makes reference to products that “may influence adult obesity” when outlining the proposed categories of product to be covered by the proposed restrictions. No further information is provided on why such products could have that impact.

¹³ Noting Impact Assessment paragraphs 57-60.

is not clear from the consultation document whether Government now considers this constraint on advertising restrictions is less valid and, if so, why.

Applying that policy constraint helped to meet the test of proportionality underpinning the existing HFSS ad restrictions. If Government considers it is now a less valid constraint, we would welcome knowing why as the explanation may have implications for other aspects of advertising regulatory policy that attempt to balance the necessary protection of children alongside the legitimate interests of the adult audience, advertisers and media owners.

Existing HFSS ad restrictions are founded on the twin pillars of control: scheduling and placement rules to reduce and appropriately limit children's exposure to HFSS ads and, where children do see HFSS ads in general audience media, content rules that restrict significantly the permissible messages and creative approaches open to advertisers. The consultation objectives focus on reducing children's exposure to HFSS ads only, noting that there is no evidence to suggest the content rules are ineffective. CAP and BCAP consider it is important to consider the advertising rules in the round as the potential for HFSS ads to influence children detrimentally can arise from their TV scheduling, non-broadcast placement and creative content.

6. Appropriate regard to existing interventions

When contemplating additional restrictions, CAP and BCAP consider it is necessary to have appropriate regard to the existing HFSS ad restrictions. This is because the existing restrictions were designed to proportionately address and mitigate identified harms arising from HFSS ads. If those harms have now changed, and/or the public policy context in which they are viewed has now changed, it is important to explain how and to what extent, and equally important to understand how the existing restrictions fall short in addressing the harm.

Annex A sets out in detail the public policy and evidential basis of the existing rules, and their objectives, enforcement and impact, particularly on reducing children's exposure to HFSS ads. This information is fundamental to the evaluation of any additional restrictions on HFSS ads, but it appears to us to be largely absent from the Government's consultation document.

For example, the consultation document is silent on the key evidential basis underpinning the existing restrictions: HFSS advertising is likely to have at least a modest direct effect on children's food preferences. This was the conclusion reached by evidence reviews (Livingstone and Helsper, 2004¹⁴ and Livingstone, 2006¹⁵), which formed part of Ofcom's 2004 research report exploring the wider context of advertising in childhood diet¹⁶. That evidence was pivotal to the introduction of the HFSS scheduling and placement rules, but there is no

¹⁴ Livingstone and Helsper (2004), [Advertising foods to children: Understanding promotion in the context of children's daily lives. A review of the literature prepared for the Research Department of the Office of Communications \(OFCOM\)](#).

¹⁵ Livingstone (2006), [New Research on Advertising Foods to Children: An Updated Review of The Literature](#).

¹⁶ Ofcom (2004), [Childhood Obesity – Food Advertising in Context: Children's food choices, parents understanding and influence, and the role of food promotion](#).

consideration of it within the consultation documents, which focus on contemporary reviews of the evidence¹⁷.

CAP and BCAP consider it is an important point of process to identify what has changed in terms of the understanding of the harms associated with HFSS advertising, which invites important questions:

- is there evidence of a considerably greater effect of food and soft drink advertising on children overall than previously thought that may justify additional regulatory controls;
- are there pathways for harm arising from HFSS ads not previously identified in the evidence and not adequately addressed by the current HFSS ad restrictions; and
- does the evidence suggest that children's receptiveness to marketing messages has changed significantly (for instance, because of significant changes in media habits)?

¹⁷ Noting, for instance, Impact Assessment paragraph 34 referring to Hastings et al (2003), [Review of research on the effects of food promotion to children: prepared for the Food Standards Agency](#), and Kraak, Gootman and McGinnis (eds) (2006) [Food marketing to children and youth: threat or opportunity?](#) (this paper summarises the findings of the Institute of Medicine (US) Committee on Prevention of Obesity in Children and Youth review (2005), Preventing Childhood Obesity: Health in the Balance).

Present framework

7. Assessing controls on HFSS advertising in the UK

The existing TV scheduling, non-broadcast placement and creative content rules are broad-based, apply across all TV and non-broadcast media and cover brand as well as product advertising. Their focus is on reducing proportionately the overall impact of HFSS advertising's potential to influence children's food preferences by limiting children's exposure to HFSS ads and restricting the potential for the creative content to exploit children's vulnerabilities.

CAP and BCAP's HFSS rules are part of an extensive framework of principle-based rules (e.g. advertising must do nothing that could cause physical, mental or moral harm to children) and focused interventions (e.g. prohibiting inappropriate ad content that plays on the particular vulnerabilities of children). In combination, they are designed to protect children from advertising-related harms¹⁸.

Since 2005, various sources of data summarised in the consultation suggest children's exposure to HFSS advertising on TV has fallen by around 70%¹⁹. The ASA's recent exposure report²⁰ demonstrates that, according to data available for 2017, children saw, on average, 9.6 HFSS ads per week or 1.4 per day. This figure includes ads for HFSS products that are unlikely to appeal to or be consumed by children.

In 2017, the introduction of placement restrictions in non-broadcast media complemented the restrictions in place on TV, which means that our protections extend across the full range of media popular with children and meet the needs of their multi-media lives. Finally, ASA complaints and casework data suggest that, whilst there have been some breaches of the rules, compliance rates are generally high.

The long-term trend in children's exposure to HFSS ads is downward for TV²¹ and the available evidence suggests that changes in children's media habits (children now spend more time online than they do watching TV) are not resulting in TV exposure being replaced by online exposure at the same level. These trends look set to continue, absent any intervention that might result in perverse effects.

Along with quantitative measures, it is important to note the changes in the categories of food ads appearing in TV and online. The mix of food advertising has shifted since Ofcom's work on TV advertising. Children's exposure to HFSS ads on

¹⁸ Annex A part B provides an outline of the broader approach the UK Advertising Codes take to protecting children.

¹⁹ Cited in Impact Assessment paragraphs 81-82.

²⁰ ASA (2019), [Children's Exposure to Age-Restricted TV Ads](#). Additionally, the findings of the report are summarised in section 44 of Annex A.

²¹ The specific data on HFSS exposure in [Children's Exposure to Age-Restricted TV Ads](#) is limited to 2016 and 2017. This is arguably insufficient data to predict, with any degree of certainty, whether the decline in children's exposure to HFSS product ads, from an average of 12.4 ads per week in 2016 to 9.6 ads per week in 2017 will carry through to a further decline in 2018. However, between 2010 and 2017 exposure to all food and soft drink ads declined by around 50%. This trend is one aspect of a wider shift in viewing patterns; between 2013 and 2017 children's exposure to all TV ads has declined, on average, by 8.3% each year.

TV, which was previously much greater than their exposure to non-HFSS ads, was, by 2017, on a par with non-HFSS ads. And, by restricting the opportunities for advertisers to reach children in children's media, the UK Advertising Codes are continuing to play their part in incentivising the reformulation of HFSS products and the promotion of healthier options within a brand's product range.

These factors are essential to any consideration of additional restrictions and to ensuring the interventions remain proportionate to the evidence of harm and wider impact on media and advertisers.

8. Supporting information

Annex A provides an outline of CAP and BCAP's HFSS rules and how they work within the wider regulatory system. It includes an outline of the background to the rules (including the wider legal underpinnings of the system), their interpretation and Ofcom and CAP's policy considerations for implementing rules on TV and in non-broadcast media respectively. The performance of the rules in terms of their enforcement by the ASA and their wider impact on food and soft drink advertising are also summarised.

We would urge Government to have regard to the information contained in the Annex as a technical resource to bear out the commentary presented in this document.

Commentary on the evidence base

9. Overview

The consultation document presents evidence – and we are aware of additional evidence identified through BCAP’s call for evidence in April 2018 – that advances our understanding of the impact of food and soft drink advertising on children.

The overall view of CAP and BCAP is that emerging evidence (alongside our own monitoring and enforcement insights) presents a case for us to review and potentially revise key aspects of the regulatory controls in place. The objective will be to better focus restrictions to further mitigate likely harms arising from HFSS ads (see section 28 below for further details).

However, CAP and BCAP consider the current evidence base, in and of itself, does not present a significantly different picture to the one considered by Ofcom in 2006 and CAP in 2016²². Importantly, the evidence does not challenge the generally agreed position that the causation of obesity is multi-factorial, that factors such as parental influence, schools policy, availability of HFSS products and socio-economic circumstances play the primary contributory roles in obesity, and that advertising plays a modest direct role in influencing children’s food preferences. The question remains to what extent advertising’s role now merits additional HFSS ad restrictions of the type proposed in the consultation document.

In rejecting the option for a pre-9pm ban on TV ads for HFSS in 2007, Ofcom concluded that the public health benefits were too uncertain and the cost to broadcast revenues too great to warrant that level of restriction²³. If Government now comes to a different conclusion, it is important that it explains why on both points to help meet the test of proportionality incumbent on anyone setting advertising restrictions.

10. Regulators’ established views on the evidence

It is well-established that HFSS advertising has an effect on children. Both Ofcom in 2007 and CAP in 2017 introduced dedicated frameworks of restrictions to specifically control HFSS advertising in response to the potential for harm to occur. To a significant extent, this was based on the research and literature reviews commissioned by Ofcom²⁴. The “modest direct effect” identified by Ofcom justified appropriate limitation on TV through scheduling restrictions but not elimination of exposure.

CAP and BCAP consider the HFSS restrictions ultimately adopted by Ofcom for TV and CAP for non-broadcast, and the evidential bases they took into account, merit

²² See Annex A sections 25-29 and 38-41 for summaries of Ofcom’s and CAP’s respective considerations of the evidence base. See also our comments in section 6 above on the importance of having regard to existing interventions and how they were developed.

²³ See Annex A section 28.

²⁴ Noted above in section 6 and in Annex A section 26.

greater reflection in the Government's considerations of the next steps in its process. It is important to note that a significant amount of the evidence cited by the consultation was considered by Ofcom before 2007 and CAP a decade later: even later systematic reviews include studies in their analyses that were considered either directly or through their inclusion in meta-analyses at the time of Ofcom's work.

From the perspective of establishing evidence of harm, it is appropriate to question whether the evidence today:

- i. suggests the effect of HFSS advertising exposure is significantly greater than conclusions arrived at by Ofcom and CAP; and
- ii. identifies harms not covered by the present rules that are significant enough to justify a resultant toughening of the rules.

11. Summary of the current evidence base

The current evidence base uses a variety of methodologies from experimental to associational studies. It covers both the general effect of HFSS advertising on children and more specific elements, including the use of particular techniques like characters or branding.

The body of original research has also been subject to a considerable number of systematic reviews including in recent years. It is the view of CAP and BCAP that these validate the positions arrived at by Ofcom and CAP in their decisions to restrict HFSS ads on TV and online.

There is now new evidence furthering our understanding of advertising's impact, but the extent to which that evidence raises advertising regulatory implications is not, in the view of CAP and BCAP, certain.

12. Relevance and generalisability

CAP and BCAP have developed an '[Evidence-based policy making](#)' document, which sets out our key considerations when assessing potential changes to the UK Advertising Codes and the different regulatory options available to us. In the light of this document, we would make the following observations in relation to Government's reliance on the evidence as presented in the consultation documents:

- The evidence of effect cannot be generalised to all products falling into the HFSS category. Many of the experimental studies involved ads for products and test products of likely appeal to children²⁵. In reality, the HFSS category

²⁵ For instance, Halford et al (2007), [Beyond-brand, effect of television food advertisements on food choice in children. The effects of weight status](#), cited in Impact Assessment paragraph 29 included ads for: fish fingers (fish sticks), a fast food burger chain, baked beans, chocolate-flavoured rice cereal, a cheese and biscuit snack, another fast food burger chain, an oat based cereal snack, a white chocolate bar, fruit flavoured sweets and a high-fat savoury potato snack. The products tested were: Quaker Snack-a-Jacks (cheese flavour), Haribo jelly sweets, Cadbury's chocolate buttons, Walker's potato crisps (ready salted flavour), and fruit (green seedless grapes). These kinds of ads and/or products are typical for many of the experimental studies.

represents a very broad range of food and soft drink products intended for different consumers and marketed in a wide variety of ways. This calls into question the consultation's assertion that all advertising is intended to influence children's consumption²⁶.

- The application of the evidence to restrictions on advertising appearing around different types of programming merits further analysis. Most experimental studies involving TV use HFSS ads shown in and/or around children's programming or individual children's programmes (in most cases, a cartoon) to create the media environment during which HFSS ad exposure occurred²⁷. It is reasonable to assume that children tend to be more engaged with advertising content when it is around content intended for them or otherwise of interest to them. It is important to acknowledge that the existing rules ban HFSS ads on children's channels, during dedicated slots of children's programming on other channels and during programmes commissioned for or principally directed at children broadcast at any time. Generalising an effect observed in conjunction with children's programming to wider categories of programming should be done with due caution.
- As the consultation acknowledges, the evidence base overwhelmingly comprises studies involving TV; the evidence for online is much more limited in scope. The only significant cluster of dedicated studies relate to the impact of advergames²⁸. The findings on impact were strong, but advergames cannot be regarded as representative of most online advertising formats. They are in many respects an outlier characterised in many cases by unusually high levels of interactivity and engagement compared, for instance, to ad types that compete with surrounding editorial content for the viewer's attention. The applicability of the evidence base to online media should not be discounted, however; TV-related evidence can be of relevance to audio-visual online formats given the obvious similarities. However, as CAP noted when it considered the introduction of rules in non-broadcast media, this must be treated with a level of caution given the different context in which online audio-visual advertising appears²⁹. This can range from ads that are 'TV-like' appearing before a separate piece of editorial content, as is the case in certain on-demand video services, to outstream video display appearing around editorial content and requiring positive user engagement before being

²⁶ Noting the statement in Impact Assessment paragraph 6. Additionally, see section 22 below for more detail on our views of appropriate product categorisation and the necessity of targeting exclusion-based restrictions at likely instances of harm.

²⁷ For example, Russell et al (2018), [The effect of screen advertising on children's dietary intake: A systematic review and meta-analysis](#) (for the Obesity Policy Research Unit (OPRU)) identified 25 experimental studies; 19 were based on TV viewing of which 13 used a cartoon or other children programming as part of the experimental stimuli (see pp. 558-60, 'Table 1'). Boyland et al (2016), [Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and nonalcoholic beverage advertising on intake in children and adults](#), identified and analysed 13 experimental studies involving children; 8 were based on TV viewing of which 6 used a cartoon as part of the experimental stimuli (see pp. 5-11, 'Table 2').

²⁸ For example, Russell et al (2018) identified 6 studies relating to advergames (see pp. 558-60, 'Table 1'). In its assessment of the non-experimental evidence, Russell et al (2018) identified 2 studies exploring the associations between reported exposure to digital (and, for one of the studies, other forms of) marketing and food behaviours.

²⁹ See Annex A section 40 and CAP (2016), [CAP Consultation: food and soft drink advertising to children](#), section 40, pages 43-46. We also note Impact Assessment paragraph 39 asserts that many of the hypotheses set out for TV can be applied online.

shown. An important factor is the extent of user control over an ad format; how easily it can be disregarded or skipped.

- The experimental evidence continues to focus heavily on studies involving young children and those around the age of 10³⁰. It is commonly established – and reflected in the wider approach taken to protecting children in the UK Advertising Codes – that younger children have different needs and vulnerabilities to older groups. The likelihood of there being a greater impact on such groups raises questions in relation to the role of parents given that younger children do not exercise as much influence over their diets as older children who have more autonomy and disposable income. This underscores the importance of real-world pathways for harm to occur; principally, the evidence for how parental influence mediates the immediate impact of advertising exposure.

13. Evaluating the level of advertising's effect

Experimental studies exploring advertising's direct effects on children are central to the evidence base. As stated above, it is clear from this body of work that HFSS advertising does have an effect. However, the following factors are important when seeking to translate those findings into policy interventions.

- Much of the experimental evidence involves measurement of what could be described as 'acute' exposure effects³¹. Although they provide solid evidence that some food advertising can have an effect on children, certain features of this body of evidence are likely to exaggerate the measurement of advertising impact, in large part, because they are not representative of real-world conditions. Many are based on a model of showing children a series of HFSS ads in breaks during a cartoon or other children's programme³². In some studies, children are exposed to as many as ten HFSS ads in short order. We know from recent ASA research (cited above) that in 2017, children saw, on average, 9.6 TV HFSS ads per week or 1.4 per day. Although this is an average and some children may see more or fewer ads depending on their individual viewing habits, it is unlikely that children are exposed to the same 'acute' degree as in many of the various studies into exposure effects.
- There are real-world factors – such as immediacy of food availability, reinforcement effects derived from communal eating, roles of parents, personal autonomy, disposable income and school meals policy – that are likely to have a significant influence modifying an acute, lab-based effect. For example, the consultation acknowledges the crucial importance of 'pester power' for the transmission of the effect of an ad into dietary behaviours; younger children tend to have limited autonomy. In our view, the evidence

³⁰ For example, of the 25 experimental studies identified in Russell et al (2018), 16 had a mean age of their samples of under-10 years. Only one study included children older than 12 years.

³¹ Boyland et al (2016) is a systematic review of a series of experimental studies over the preceding decade, which specifically seeks to assess the dynamics and impact of 'acute' exposure.

³² See footnote 27 above.

does not suggest pester power is a straightforward, linear pathway for the effects of advertising³³. The role of parents, especially in younger children's diets, is much more complex and must be considered a significant moderating factor, meaning any effect observed in laboratory conditions is unlikely to be translated straightforwardly into impact on children's diets.

- Evidential findings presented in the consultation document must be considered alongside the UK's framework for controlling HFSS advertising; the rules and guidance in place and the ASA's robust enforcement of them. Studies from other countries can be used as useful indicators, but alone are unlikely to support proposals for change unless the underlying circumstances (notably the regulatory controls in place) are sufficiently similar to make the study applicable to the UK. Much of the evidence cited in the consultation predates the introduction of the TV rules (including restrictions on content) or is based on meta-analyses (wholly or partly) of such studies³⁴. Although the consultation recognises the importance of focusing on UK-based evidence, many of the systematic reviews cited are based on significant numbers of older and/or non-UK studies³⁵. CAP and BCAP consider these factors invite close assessment as to whether the evidence is cross-applicable to the circumstances we face in the UK.

14. Significant new areas of evidence

In CAP and BCAP's view, the consultation includes two significant new areas of evidence:

- Modelling a specific calorific impact of exposure – the consultation suggests 4.4 minutes of ad exposure results in an excess consumption of 60kcal based on a systematic review by the Obesity Policy Research Unit (OPRU), Russell et al (2018)³⁶. This is a new approach to the evidence as it attempts to place discrete calorific value on advertising exposure's duration. An excess consumption of just 60kcal is likely, when compounded over time, to result in weight gain. However, the review and the meta-analysis rely on the findings of a range of experimental studies from the past 30 years that focused on acute exposure effects and other factors that may limit their relevance to the circumstances we face in the UK (see the section above). It is also important to note the review commissioned by Ofcom in 2006 noted the widely held

³³ Noting Impact Assessment paragraph 44. Also, the studies cited in paragraph 46 are based on studies carried out in in-store environments rather than in relation to advertising. Several of those studies cited in Impact Assessment Annex A paragraph 31 do relate to advertising but do not support the contention that all effects of advertising exposure translate into successful requests for certain food products.

³⁴ As noted above, Hastings et al (2003) and Kraak, Gootman and McGinnis (eds) (2006) (summarising the Institute of Medicine review from 2005) were assessed as part of Ofcom's work developing the TV HFSS restrictions. Cairns, Angus and Hastings (2009), [The extent, nature and effects of food promotion to children: a review of the evidence to December 2008](#), carried out on behalf of the WHO includes very few studies that capture the changes in the UK context (see Annex 2).

³⁵ For example, Russell et al (2018) identified 25 experimental studies; only 5 were conducted in the UK and 3 of these prior to the full implementation of the TV HFSS restrictions in 2007 (see pp. 558-60, 'Table 1'). Boyland et al (2016) identified and analysed 13 experimental studies involving children of which 6 were conducted in the UK; 3 date from after the full implementation of the TV HFSS restrictions (see pp. 5-11, 'Table 2').

³⁶ Cited in Impact Assessment paragraph 31.

concern that the effect of exposure is cumulative. This theme has arguably already been considered in the development of the present framework.

- Identification of a causal relationship between advertising and food behaviours – Norman (2016)³⁷ uses the established epidemiological framework for inferring causality, the Bedford-Hill criteria. This analysis adds to the case for advertising's longer-term effects. However, as the consultation notes, a direct link between advertising and obesity is difficult to measure and quantify as the causes of obesity are multifactorial. As noted, the Ofcom process took into account likely cumulative effects over time. We would urge caution in drawing significant new conclusions, however. There remains a relative absence of longitudinal evidence³⁸ and wider data suggests trends in childhood diet and obesity indicators have not been influenced by the 70% reduction in children's exposure to TV advertising since 2005.

Overall, CAP and BCAP consider these new areas of evidence, at the least, support Ofcom's stance in 2006 that advertising has a modest direct effect and a larger unquantifiable indirect effect on children's food preferences.

CAP and BCAP will carefully assess the outcome of the Government's consultation before considering whether a review of current rules and/or guidance is merited in the light of evidence submitted to BCAP's 2018 call for evidence. For example, McGale et al (2016)³⁹ found a significant effect on children's food preferences and choice arising from the use of equity brand characters on product packaging. This study builds on Roberto et al (2010)⁴⁰, examining the influence of licensed characters and Robinson et al (2007)⁴¹, which explored branding more generally. While all three studies were packaging and not advertising-based, CAP and BCAP consider they invite further exploration of the creative content rules for HFSS ads, subject to any new restrictions that renders unnecessary that piece of work (see section 28 below for more detail).

³⁷ Cited in Impact Assessment paragraphs 36-38.

³⁸ Noting Impact Assessment paragraphs 48-56.

³⁹ McGale et al (2016), [The influence of brand equity characters on children's taste preferences and food choices](#).

⁴⁰ Roberto et al (2010), [Influence of licensed characters on children's taste and snack preferences](#).

⁴¹ Robinson et al (2007), [Effects of fast food branding on young children's taste preferences](#).

Commentary on Government's policy options

15. Overview

This section sets out what CAP and BCAP consider to be important regulatory considerations relating to the options for change presented in the consultation document. We intend them to assist with Government's assessment of consultation responses and its decision on the outcome (sections 23-27 below focus on more practical considerations).

As a general observation, the range of policy options appears limited and, while they are likely to reduce children's exposure to HFSS ads further and faster than the current rules allow for, it is not clear from the consultation materials whether they offer the same or more incentive for manufacturers to reformulate their products.

We acknowledge, however, Government's invitation to respondents to propose alternative options. If, following its consideration of consultation responses, Government is inclined to consider alternative adjustments to the current framework of restrictions, we think there is an opportunity for it to work with all parties to identify a wider range of options that may better address any harms that are not adequately addressed by the current restrictions. We are committed to being a constructive partner in any such endeavour. In line with customary regulatory practice, we would advise that if Government sees merit in an alternative approach (not adequately reflected in the stated options for change), that it consults separately on that approach.

As Code setters, CAP and BCAP must be vigilant to evidence that suggests the rules need to change to address new harms, or that provides a reassessment of the extent of known harms arising from advertising. Although we are not persuaded that the latest evidence indicates that advertising has a greater impact on children's food preferences than previously thought, that is not say we take a 'do nothing' approach to our regulation.

Findings from the ASA's recent monitoring of online HFSS ads require CAP to review and potentially revise provisions on the responsible targeting of online ads, targeted on the basis of known or inferred information about an audience group. These provisions ensure children's exposure to online ads for HFSS products, alcohol, gambling products and other restricted products is appropriately limited.

Subject to the outcome of Government's consultation, CAP and BCAP may also explore the merits of updating the HFSS content rules in response to evidence submitted to BCAP's Call for Evidence in 2018. This work would likely focus on protecting children aged under 12, in particular, who the Codes recognise as being in need of enhanced protection.

That work and other potential initiatives to further mitigate the potential harms arising from HFSS ads would not be merited if Government adopts a timing-based restriction, in other words a pre 9pm ban, which would eliminate younger children's exposure to HFSS ads on TV and online.

16. No additional regulation

The present framework of HFSS restrictions has achieved considerable successes. ASA complaints and casework data suggest that, while there have been some breaches of the rules restricting the inappropriate placement and creative content of HFSS ads, compliance rates are generally high⁴². The rules have also demonstrably helped to achieve significant reductions in children’s exposure to HFSS ads. The data cited in the consultation document⁴³ and the ASA’s own report, [Children’s Exposure to Age-Restricted TV Ads](#)⁴⁴, demonstrate that overall food ad exposure on TV has declined substantially over the past decade.

In any consideration of additional restrictions, it is important not to overlook the potential for future, further regulatory benefits arising from the present framework of cross-media HFSS ad restrictions. In relation to online, it is notable that dedicated HFSS restrictions only came into effect in July 2017. It is generally regarded as good regulatory practice to allow sufficient time to pass before considering their impact, including the benefits and costs to affected stakeholders.

Notwithstanding this, new evidence presented in the consultation document, CAP and BCAP review processes and ASA compliance insights provided in support of our submission do support a case for reviewing and potentially revising some of the HFSS ad restrictions currently in place (elaborated on in section 28 below).

17. Timing-based restrictions in TV

The concept of the 9pm TV ‘watershed’ traditionally signifies programming that may include more challenging material of interest to adults and potentially unsuitable for children. It currently exists within Ofcom’s Broadcasting Code, which applies to the content of programming⁴⁵. The BCAP Code, covering broadcast advertising, also includes a variety of timing-based restrictions, including a pre-9pm restriction. Following the lead of TV programming policy, BCAP’s timing restrictions relate to the creative content of ads; for example, protecting children from frightening or sexual content. The consultation’s proposal to extend the approach to advertising for an entire category of products is a significant departure. More so, because food and soft drink products are not age-restricted in the way, for example, alcohol is; children can legally buy and consume HFSS products.

The application of timing-based restrictions would remove HFSS ads during the restricted time period. The consultation document states that children’s TV viewing peaks in the early evening, notably during “family viewing” programming. The current scheduling restrictions do not apply across these programmes as children

⁴² See Annex A parts E and F for details ASA enforcement activities relating to TV and online respectively.

⁴³ Cited in Impact Assessment paragraphs 81-82.

⁴⁴ See Annex A section 44 for a summary of ASA (2019) [Children’s Exposure to Age-Restricted TV Ads](#). We would caution against drawing firm conclusions as the data covers only a very short period, but it does present a counter view to the consultation’s concern that the decline in exposure has slowed as stated in Impact Assessment paragraph 83.

⁴⁵ Noting Consultation Document section 5, page 17.

are not over-represented in the audience⁴⁶. In some instances, the absolute numbers of children in the viewing audience of these programmes can be significant.

In 2006, Ofcom rejected a pre-9pm prohibition on the scheduling of HFSS ads. Ofcom considered that, while such a restriction would lead to a very significant reduction in exposure and received significant support from some consultation respondents, even complete elimination of children's exposure to TV HFSS ads would have only a modest direct effect on their food preferences. It cited proportionality concerns noting that a pre-9pm ban would be a relatively inefficient means of targeting intervention at children. Ofcom calculated the restriction would remove 11.4 adult impacts for every one 4-15 child impact it removed⁴⁷.

The proposal to exempt small child audiences from a pre-9pm restriction and narrow the scope of HFSS food and soft drinks covered by the rules may close the wide gap between the resultant reductions in adult and child impacts, but not significantly, in all likelihood. It is important to note that the restriction would continue to remove advertising for products that are of little or no appeal to children – and unlikely to play a part in their diets or choices – from in and around programming on channels with few child viewers. While child viewing in general peaks between 6-9pm, this is not the case for all channels and programmes during this period⁴⁸.

The present rules, which ban HFSS ads around programmes attracting a disproportionately high child audience, apply throughout the broadcast schedule meaning programming appearing later in the evening, including after 9pm, is subject to the restrictions. The 'cliff-edge', which is an inherent component of timing restrictions, might result in high concentration of HFSS ads in the period after a timing restriction expires. Older children form a quite significant part of the TV audience in general after 9pm. There are some indications in related advertising studies that advertiser behaviour can lead to higher concentrations of restricted ads when timing restrictions expire. For example, a study from the Netherlands⁴⁹ looking at alcohol advertising found that timing restrictions are likely to reduce advertising exposure to the youngest viewers while increasing exposure for teenagers.

18. Adopting a 'laddered' approach

The 'laddered' option would, we understand, provide an exemption to the pre-9pm restrictions for HFSS products that fall within a defined scoring threshold in the nutrient profiling model (NPM). Much depends on where Government sets the threshold and the nature of the exemption from the overarching timing restriction afforded to qualifying products⁵⁰. Our observations on this option include:

- The present NPM does not include an intermediate category of lower scoring HFSS products. It is important therefore to reassure stakeholders of the

⁴⁶ Noting Impact Assessment paragraphs 61 and 68.

⁴⁷ See Annex A section 28.

⁴⁸ Noting Impact Assessment paragraph 70.

⁴⁹ Ross et al (2013), [Do time restrictions on alcohol advertising reduce youth exposure?](#)

⁵⁰ Noting Consultation Document section 5, pages 18-19.

scientific basis for such a proposal and how it accords with the present model and the revised version being developed by PHE.

- In deciding on the mechanism for granting an exemption to qualifying products, many of the considerations set out in section 17 above also apply. Timing restrictions do not take account of the audience composition for different programmes, appearing at different times and on different channels in the way that the existing TV scheduling restrictions presently do by banning HFSS ads around programmes that include a disproportionately high child audiences while allowing them to be scheduled around programmes that do not.

19. Timing-based restrictions in online media

We note the consultation takes as a starting point that an online watershed should apply to all types of online advertising⁵¹. This raises significant issues around proportionality and practicality.

The CAP Code, which covers paid-for and non-paid-for ads in online media, does not include timing-based restrictions. Rather, it prevents HFSS ads and other age-restricted ads from being targeted at children through the selection of media or context in which they appear; in other words, where more than 25% of the audience is under 16. Also, HFSS ads that are targeted on the basis of known and/or inferred data about an audience group must be targeted away from children. These restrictions apply throughout the course of a 24 hour day. By convention, timing restrictions apply in media with a linear schedule, primarily TV, where viewers are subject to a programming schedule as opposed to, in effect, creating their own schedule through means of self-selection at a time that suits them. Online content is rarely made available by linear means, where programming content follows a fixed schedule.

Online ads and other marketing communications tend to fall into two broad types:

- static communications (for example ads on websites, in emails or advergames) that are accessed by users at any time; and
- dynamically served advertising (for example programmatic display, native content in social media or video pre-roll), typically served to an audience group based on known and/or inferred information about internet users.

The consultation recognises that a timing-based approach is not viable for many online media types⁵². For example, while advertising posts on social media platforms can be posted at a particular time in line with a restriction, the post would remain accessible from that point onward and can be shared at any time by other users. Moreover, even where technically possible, the consequences are potentially

⁵¹ Noting Impact Assessment paragraph 108.

⁵² Noting Consultation Document section 5, page 21.

disproportionate and even perverse. For example, websites selling groceries online would not be able to advertise HFSS product offerings between 5:30am and 9pm.

As the consultation acknowledges, online media present new opportunities for advertisers to target advertising to defined groups of web users based on known and/or inferred information held by advertising networks, including social media providers, about those web users⁵³. This ability to positively select some audience types, and positive de-select other audience types (including by actual or inferred age) provides the most obvious and ready-made means to exclude children from dynamically-served HFSS ads online. Accordingly, this is an approach that CAP has taken to ensure HFSS ads are targeted away from children.

20. Developing existing targeting restrictions

The consultation document cites four concerns over dynamic targeting:

- shared usage between adults and children;
- communal viewing of content;
- false reporting of users' ages; and
- predictive inaccuracy in using interest-based factors and other behavioural data as a proxy for age⁵⁴.

Findings from the recently published [ASA Monitoring Report on Online HFSS Ads](#) and information in the Government's consultation suggest that the use of targeting restrictions is, in large part, effective in limiting children's exposure to age-restricted ads online. It should be noted that the existing rules prevent the targeting of age-restricted ads to child audiences on shared devices⁵⁵. Additionally, CAP guidance on [Children & Age-restricted Ads Online](#) states that advertisers and the ASA should not rely on self-declared ages where other known and/or inferred data strongly suggest self-declared dates of birth are false. This guidance is not optional; a number of ASA rulings have cited failure to comply with the guidance provisions as a breach of the rule that prohibits the inappropriate targeting of HFSS ads to children.

Following its consideration of the ASA Report on Online HFSS Ads, CAP will review and potentially revise its guidance on [Children & Age-restricted Ads Online](#) irrespective of the outcome of Government's consultation. The guidance applies to all age-restricted ads and not simply HFSS ads. Section 28 below elaborates on CAP's response to these issues.

Regarding online ads that are targeted through the selection of media or context in which they appear, the consultation raises concerns about the lack of consistent audience measurement resources⁵⁶. CAP's guidance, [Media placement restrictions:](#)

⁵³ Noting Impact Assessment paragraph 36

⁵⁴ Noting Impact Assessment paragraph 76.

⁵⁵ The ASA ruled on a supermarket alcohol ad that appeared ([Wm Morrison Supermarkets plc t/a Morrisons](#)) during a YouTube video of children's fairy tales. It considered that the YouTube video in question was very unlikely to be viewed by an adult unless they were watching with a young child and found the ad in breach of the alcohol placement restriction, which are analogous to those for HFSS.

⁵⁶ Noting Impact Assessment paragraph 77.

[protecting children and young people](#), makes clear to advertisers the most appropriate way to provide robust online audience composition measures. Under the guidance, HFSS advertisers must ensure they can demonstrate that they have complied with the requirement that no more than 25% of the audience for a media title or content around which the ad is placed is under 16.

Where more robust data sources are not available, CAP's guidance makes clear advertisers should adopt a cautious approach. If ads are placed without a satisfactory understanding of the likely audience composition, the ASA is likely to find the advertiser in breach of the Code if it considers there to be a reasonable risk of there being a significant child audience⁵⁷.

The consultation proposes to change the threshold from 25% to 10%⁵⁸. For all age-restricted ads, including alcohol and gambling ads, CAP considers it is appropriate for the purpose of limiting children's exposure, to ban these ads in media where children make up 25% or more of the audience⁵⁹. Like BCAP, CAP seeks to balance the protection of children against the interests of adult audience members. Through the application of the 25% rule, CAP considers it is justified to deny HFSS ads and other age-restricted ads to an otherwise legitimate adult audience, where adults make up 7.5 out of every 10 audience members. Government now proposes to ban HFSS ads in media where adults make up 9 out of every 10 audience members. As the consultation itself notes, the evidence around the potential benefits of reduced adult exposure to HFSS ads is, at best, unclear⁶⁰. Existing HFSS ad restrictions have been designed to reduce and appropriately limit children's exposure to HFSS ads while avoiding unnecessary intrusion into adult TV viewing and adult engagement with non-broadcast media. Applying this policy constraint helped to meet the test of proportionality underpinning the existing HFSS ad restrictions.

If Government considers it is now a less valid constraint, we would welcome knowing why as the explanation may have implications for other aspects of advertising regulatory policy that attempt to balance the necessary protection of children alongside the legitimate interests of the adult audience, advertisers and media owners.

21. Mixed option

The consultation refers to the commonalities between audio-visual advertising in various online ad formats⁶¹. CAP took the same considerations into account in its reasoning for introducing HFSS ad restrictions online⁶².

The proposal to impose a timing restriction on HFSS ads in such media must take into account the fact that significant amounts of advertising appearing in and around

⁵⁷ Noting Consultation Document section 5, page 21-22.

⁵⁸ Noting Consultation Document section 5, page 22

⁵⁹ Annex A section 47 includes examples from ASA casework that bear out the application of the placement restriction in a variety of scenarios. The policy in general is set out in Annex A section 34.

⁶⁰ Noting Impact Assessment paragraphs 57-60.

⁶¹ Noting Impact Assessment paragraph 39.

⁶² See footnote 29.

content in on-demand video services or video sharing platforms is served in much the same way as programmatic display advertising. In some cases, user account data on age, held by the platform, will add to the robustness of the targeting. Many of the same considerations set out in section 20 above apply to this option.

Another concern is that audio-visual advertising content can also be found in other online types, principally, display advertising or outstream video. It is unclear, given the commonalities, why a restriction would apply to certain platforms involving audio-visual content and not others. Through additional consideration of the evidence-base and a greater understanding of the modelled impact, we would invite clearer criteria for distinguishing types of online media.

22. Products within scope of new restrictions

The consultation document focuses on the “least healthy” foods through the use of the SDIL and PHE reformulation categories to narrow the scope of the restriction from HFSS food and drink as a whole to that subset of products⁶³. Significantly tougher scheduling and placement restrictions will impact on products that are very unlikely to appeal to children (for example condiments or key components of meals), and channels, programming and other editorial/creative content that are not commissioned for or watched by a high proportion by children unless finer distinctions are made in order to better target the likely harm, for example ads for products that children are likely to want, which can therefore play a role in their diet. The categories of foods in Annex B of the consultation document are still quite extensive and include a variety of products that advertisers and other stakeholders might argue are unlikely to form a significant part of children’s diets or influence their dietary choices through advertising.

It is acknowledged that the present NPM represents a compromise; balancing the inherent and significant complexities of identifying ‘less healthy’ products upon which to place additional restrictions and ease of use for advertisers and regulators. The existing NPM was designed for use as part of a framework of restrictions that did not seek to eliminate exposure during certain time periods. Thus, the impact on HFSS products that are not of likely interest to children is very considerably mitigated: for example, a supermarket ad promoting key components of a family meal, at least one of which is HFSS, can currently be shown during a programme that is popular with children, but not one in which their audience share is over-represented. A timing restriction would not allow for this scheduling. The present framework allows advertisers of HFSS products to reach audiences prior to 9pm but not around children’s programming or programmes where that group is over-represented.

If Government is to adopt the proposed timing based restrictions, we would advise it to adopt categorisations of food and soft drinks that focus on products (and therefore their advertising) most likely to contribute to children’s actual food preferences, whether moderated or not by parents or guardians.

⁶³ Noting Consultation Document section 4, page 15 and Impact Assessment paragraphs 6 and 14.

Enforcement implications and other practical considerations

23. Overview

The following sections provide our observations on practical considerations associated with the potential implementation of the proposed new restrictions.

24. Remit and scope of new restrictions

Annex A sections 10-14 set out the remit of the UK Advertising Codes in detail providing examples of scenarios falling within and outside scope of the Codes that are relevant to the proposals under consideration. We would invite consideration of that information, especially with regard to these specific points:

- The consultation does not explain whether programme sponsorship, which is regulated by Ofcom using its Broadcasting Code and the BCAP Code (for the purpose of restricting the scheduling and creative content of sponsorship bumpers), is within scope of the proposed restrictions. The present HFSS ad rules apply to programme sponsorship, as they do to spot advertising. Because the consultation is silent on this issue, and because it does not include an assessment of the likely impact of a decision to apply the restrictions to programme sponsorship bumpers, we assume the proposed rules are not intended to cover programme sponsorship. While it would ultimately be a matter for Ofcom and not BCAP, Ofcom would need to consider the implications of any decision to apply the proposed timing restrictions to spot ads and not programme sponsorship, given the underlying rationale for additional HFSS ad restrictions and the concern to ensure consistency, where necessary.
- CAP invites clarification of the scope of any new restrictions online. The consultation document adopts a definition of advertising⁶⁴ that differs from online advertising, paid-for and not paid-for, as it is defined in the CAP Code. In focusing on content “commissioned” by an advertiser the Government’s definition would potentially encompass content such as public relations material and content paid for but not controlled by a marketer. These are not within the scope of the CAP Code.

25. PHE reformulation: new categories of product

⁶⁴ Noting Consultation Document section 4, page 13.

We note the PHE reformulation categories, which are summarised in Annex B of the consultation document⁶⁵. The document indicates that these categories remain subject to informal consultation with industry. A definite understanding of what these categories are is essential to ensure that those with a role in applying the rules know the scope and impact of any additional restrictions that may apply to these categories. Additional guidance may be necessary to assist stakeholders and avoid ambiguity regarding which specific products would be subject to any new HFSS rules.

26. Low child audience exemption in TV

Due to the way audiences are distributed across TV channels, there will be many instances of channels and programmes that have little or no child audience rendering the regulatory benefits of a timing restriction negligible while the intrusion into adult viewing time remains significant.

The consultation asks whether a 1% (circa 90,000 child viewers) exemption to a pre-9pm ban on HFSS ads is merited and, if so, whether it would be most effective when applied at a channel or programme level⁶⁶. As noted at the outset, CAP and BCAP consider the current evidence base, in and of itself, does not present a significantly different picture to the one considered by Ofcom in 2006 and CAP in 2016⁶⁷: HFSS ads are still likely to have at least a modest, direct influence on children's food preferences. If advertising's impact and its contribution to harm are now considered to be greater or different (justifying additional HFSS ad restrictions), and/or the public policy context in which they are viewed has now changed, it is important to explain how and to what extent, and equally important to understand how the existing restrictions fall short in addressing the harm.

Should Government consider a 1% exemption to a timing restriction is necessary, we would advise Government to take into account the importance of 'consistency' – a better regulation principle – in judging whether the policy underpinning a restriction around a programme applies equally to a channel, and any practical implications of applying the restriction to both: restrictions should be straightforward to understand and straightforward to apply.

From a practical perspective, the proposal for an exemption raises issues around measurement and enforcement:

- BARB data is a robust measure in most scenarios. However, for small audience programming or channels, small sample sizes make it less reliable. The ASA has dealt with this issue when enforcing the present rules in cases involving music channels, which typically involve long-form programming

⁶⁵ Noting Consultation Document section 4, page 16.

⁶⁶ Noting Impact Assessment paragraph 107.

⁶⁷ See Annex A sections 26 and 40 for summaries of Ofcom's and CAP's respective considerations of the evidence base. See also our comments in response section 6 above on the importance of having regard to existing interventions and how they were developed.

where the audience composition can change as it progresses. ASA rulings⁶⁸ illustrate the complexity involved in accurately assessing small audiences and making decisions under BCAP's scheduling rules. They also show the extent to which the regulator must go to assess those decisions against the requirements of the Code. Should Government consider an exemption to a potential timing restriction is merited, it may need to consider whether any small audience exemption is at a level high enough to allow objective measurement of the audience composition.

- Another issue is how the audience limitation will be applied by broadcasters operationally. BCAP's scheduling restrictions are based on trends over time, requiring broadcasters to carry out an ongoing process of predicting the audience for all of their programmes. A key requirement is to identify programmes where the audience composition changes in such a way as to require the imposition of scheduling restrictions in line with the BCAP Code. Annex A section 21 links to BCAP's technical guidance on scheduling. It is important to have regard to the guidance as an established process in order to manage the practical impact on broadcasters of imposing this restriction.

27. NPM 'ladder'

The laddered option would, we understand, afford greater freedom to restricted HFSS products within a lower range of NPM scores. It raises several practical concerns⁶⁹.

The present NPM does not include an intermediate category of lower scoring HFSS products. It is important therefore to reassure stakeholders of the scientific basis for such a proposal and how it accords with the present model and the revised version being developed by PHE. We note the consultation proposal to raise the nutrient profile threshold over time. We would ask for clarity on this process; what criteria would be applied to guide such a move and which body would be responsible for it.

⁶⁸ For example, the ASA's ruling, [Box Television Ltd t/a Box TV](#), related to the scheduling of alcohol advertisements; the scheduling rule for that product category is analogous to that for HFSS.

⁶⁹ Noting Consultation Document section 5, page 18.

Next steps

28. Continuing commitments on HFSS advertising

In the event Government introduces new HFSS ad restrictions, CAP and BCAP would need to take stock of them with a view to considering how they impact on the existing HFSS rules and guidance, which will remain in place for TV and online. We may need to propose changes to existing rules and guidance to accommodate the introduction of any new restrictions. In this respect, additional consultation would be necessary, for example on whether the HFSS ad restrictions should continue to apply to ads meeting the existing definition of HFSS before and after 9pm.

Although CAP and BCAP are not persuaded that the available evidence indicates that advertising has a greater impact on children's food preferences than previously thought, that is not say we take a 'do nothing' approach to our regulation.

- Evidence cited in Government's consultation and in response to BCAP's call for evidence suggests there are potential issues involving the use of equity brand characters and other aspects of branding that might, subject to further inquiry, not be adequately addressed by the existing rules or guidance. A review of these points and, potentially, other points relating to the content of HFSS ads is likely merited depending on the outcome of Government's consultation.
- The ASA's avatar-based, online monitoring and enforcement work identified areas of non-compliance in the targeting and placement of HFSS ads, which CAP considers merit further inspection. In response, CAP commits to reviewing and potentially revising its provisions on the responsible targeting of online ads, targeted on the basis of known or inferred information about an audience group. These provisions ensure children's exposure to online ads for HFSS products, alcohol, gambling products and so on is appropriately limited. Subsequently, CAP will roll out advice and training to advertisers and media owners to clarify requirements in relation to the responsible targeting of age-restricted ads online.
- The ASA will re-run its online avatar-based monitoring and enforcement projects at appropriate points to ensure the areas of non-compliance identified in its first report are being adequately addressed by regulated parties.

CAP, BCAP and the ASA remain committed to evidence-based, proportionate regulation that prioritises the protection of the audience, particularly children and other groups in society whose circumstances put them in need of special protection.

If, following its consideration of consultation responses, Government is inclined to consider alternative adjustments to the current framework of restrictions, we think there is an opportunity for it to work with all parties to identify a wider range of options that may better address any harms that are not adequately addressed by the current restrictions, which continue to be effective. We are committed to being a constructive partner in any such consideration.