

## **ASA system submission to the Welsh Government consultation on proposals to make the food environment healthier**

### **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 over 60 years and the Broadcast Advertising Code (written and maintained by BCAP) for 19, 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 the UK’s independent frontline regulator of ads by legitimate businesses and other organisations in all media, including online. Our work includes undertaking proactive projects and acting on complaints to tackle misleading, harmful or offensive advertisements. We are committed to evidence-based regulation, and we continually review new evidence to ensure the rules and our application of them remain fit-for-purpose.
- 1.4.** We work closely with a network of partner regulators including Ofcom, the Gambling Commission, the Information Commissioner’s Office, the Medicines and Healthcare products Regulatory Agency, the Financial Conduct Authority and the Competition and Markets Authority. Our frontline ad regulation often complements their activities, or even frees them up entirely to concentrate on their other duties. Through the sharing of information, joined-up enforcement action and referral processes, our partners bolster our regulation and assist us, where necessary, to bring non-compliant advertisers into line.
- 1.5.** We also bring together the ad industry and media owners to set, maintain and police high standards. The UK Advertising Codes are drafted and maintained by the industry committees of CAP and BCAP, supported by experts in our Regulatory Policy team. This means businesses have a direct stake and an enlightened self-interest in adhering to the standards they set and creating a level-playing field amongst them.
- 1.6.** There are multiple checks and balances in place to ensure the committees’ development of rules and guidance is transparent, open to scrutiny and adheres to the principles of good regulation. These include calls for evidence and public consultations; mandatory regard to the advice of an expert independent consumer panel; Ofcom signing off on BCAP rule changes; the ASA System’s processes being open to judicial review and more besides. All to ensure the system is wholly accountable to everyone with a stake in advertising.

- 1.7.** We call our model of partnering with businesses and other regulators ‘collective ad regulation.’ Our independence and the buy-in and support we receive through collective ad regulation delivers faster, more flexible, more joined-up and proportionate regulation.
- 1.8.** The UK Advertising Codes include rules reflecting specific legal provisions and rules developed through separate regulatory process, which in combination ensure ads don’t mislead, harm, or seriously offend their audience. The inclusion of the rules in the UK Advertising Codes has enormous benefits for responsible businesses and for consumers, who benefit from the protection the rules afford.
- 1.9.** 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 a million pieces of advice and training in 2023.
- 1.10.** The ASA system is providing this written submission in response to the Welsh Government’s consultation on Proposals to make the food environment healthier.
- 1.11.** We are responding only to the questions most relevant to our regulation. For Part 1 of the consultation, we are not responsible for location restrictions, volume price promotion restrictions or free refill promotion restrictions. For Part 2 of the consultation, we are only responsible for the marketing of energy drinks.
- 1.12.** We would not advocate for or against specific changes to the law, so our response is confined to highlighting how our regulation and the proposed changes to legislation might overlap.
- 1.13.** We are happy to assist with any follow-up questions.

## **2. Consultation Response (Part 1)**

- 2.1.** The consultation proposals involve a variety of scenarios that are within the remit of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). We want to ensure that the Welsh Government is aware of this and to outline how the ASA will address any issues arising in our work that fall under the new restrictions on the use of promotions.
- 2.2.** The CAP Code covers both traditional advertising appearing in paid-for space and marketing communications that appear in marketers’ own space online (both websites and social media). Additionally, the Code sets rules for promotional marketing, which apply to promotions in all non-broadcast media including at point-of-sale in-store and on-pack.

- 2.3.** In addition to the wide range of intelligence we gather from other regulators, media reports and published research, there are two general areas where the ASA might be made aware of a promotion relevant to the Welsh Government’s consultation through its complaint handling or through the course of its proactive monitoring activities. These are:
- Promotional marketing (e.g. leaflets or promotional displays) present at the point-of-sale (i.e. in-store, proximate to the checkout facilities); and
  - Marketing communications on marketers’ own websites (including e-tail platforms, online grocery sites etc.).
- 2.4.** The Welsh Government’s proposals include restrictions on particular kinds of commercial activity and are similar to proposals made by the UK Government on promotions in England, and former proposals made by the Welsh Government on promotions in Wales. The ASA has responded to the proposals that apply to [England](#) and [Wales](#).
- 2.5.** The proposals concern business practices in areas not wholly covered by the remit of the CAP Code. They may also be regarded as highly complex in terms of the tests to be applied in order to identify commercial practices that are in scope. As such, our general position has been that it would not be effective to attempt to reflect the restrictions in the CAP Code. We will however work to ensure that the protections we maintain in this area are highly effective. Whilst we think compliance with our rules is highly unlikely, in practice, to lead marketers to undertake promotions prohibited by the new legal restrictions, we will of course remain responsive to any intelligence of this occurring. (see paragraph 2.11).
- 2.6.** The ASA remains ready to play a part in supporting the compliance work of Trading Standards Officers in Wales. It is a principle of the CAP Code that advertising must be lawful (rule 1.10). If we identify instances of promotions likely to be in breach of any new legislation, we will of course refer them to the relevant authorities for action. This will include any cases found as a result of our proactive monitoring work.
- 2.7.** This is in line with the CAP Code’s approach to enforcement where there are underlying statutory frameworks governing advertising. The Scope of the Code IV(l) states:
- “In relevant cases the ASA will have regard to existing statutory enforcement bodies. The ASA reserves the right to refer complainants to the relevant statutory regulator in cases where a complaint about a marketing communication relates to a Code rule that reflects a legal provision for a regulated product.”
- 2.8.** In practice, the number of referrals is likely to be limited. Our experience tells us that the number of complaints from members of the public are likely to be low. Those such as campaigning organisations with more knowledge of the regulatory regime than members of the public are likely to be aware that local authorities are the relevant enforcement bodies.

- 2.9.** In 2023, we received in total 39,034 complaints related to 25,041 cases. Of these, 56 complaints were related to HFSS advertising. In 2023, we referred 4 advertisers to Trading Standards, none of which were related to HFSS advertising.
- 2.10.** Recognising the statutory prohibition of the promotions covered by the envisaged regulations, the ASA will assess the complaints it receives – irrespective of the issue raised by the complainant – and, where it is able to, it will seek to identify matters that appear to fall under the new regulations.
- 2.11.** The ASA will also consider the potential to work with Trading Standards colleagues in Wales to provide or disseminate advice or guidance to marketers so they're aware of the new restrictions and any part the ASA might play in dealing with cases that arise.

### **3. Consultation Response (Part 2)**

- 3.1.** 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.
- 3.2.** Against a background of concern about childhood obesity rates, these rules respond, in large part, to evidence that consistently shows that advertising has no more than a modest influence on children's food preferences. Parents and schools continue to have the greatest and most direct impact on children's food preferences.
- 3.3.** Energy drinks that have high sugar content come within our rules restricting advertising of food and soft drinks high in fat, sugar or salt to children, covering both broadcast and non- broadcast media.
- 3.4.** Advertisers must stick to our rules when advertising energy drinks where the content makes it a HFSS product and, therefore, cannot be targeted in children's media or in media where children make up more than 25% of the audience. Moreover, advertisers must take care when making health claims about energy drinks and by making sure they are authorised on the GB Register.
- 3.5.** The Codes also contain general rules that require ads to be socially responsible, which provides the ASA with latitude to take action against ads that have the potential to cause harm. For example, in 2013, the ASA banned a poster ad for the energy drink, Pussy, on the grounds that the dual meaning of the word "pussy" would be understood by some older children to be intended as an offensive or sexually explicit reference and was therefore unsuitable to be directed at them.
- 3.6.** We have, and will continue, to look into any complaints on these grounds and we have the power to ban ads which break these rules

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