

# CAP and BCAP Consultation

**Annex A:** Proposed revised guidance to accompany the less health product advertising restrictions



## Explanatory notes for Annex A

This annex includes the proposed revised implementation guidance that will support the new less healthy product advertising rules. It should be read in conjunction with the summary in part 4 of the [consultation document](#), as well as part 3, which sets out the reasons why CAP and BCAP are consulting on a revised approach.

A comparison with the version of the guidance [originally consulted](#) on as part of the 2023 consultation is provided in [Annex B](#) for respondent's reference.

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# Advertising Guidance:

## Advertising of less healthy food and drink products

### 1. Introduction

This Guidance supports users of the UK Advertising Codes to understand how the ASA is likely to interpret and apply rules restricting the advertising of “less healthy” food and drink products.

The Guidance uses constructs such as “is likely to” or “is unlikely to” because the ASA Council, as the decision-making body on individual advertisements, is not bound by guidance. Its role is to interpret and apply the rules independently satisfying important regulatory principles such as ‘consistency’ and ‘proportionality’. By setting out the factors that the ASA Council is likely to consider when interpreting and applying these rules, the Guidance aims to provide information to support Code users.

The UK Advertising Codes restrict children’s exposure to certain types of food and drink advertising. They include rules (set out in full at the end of section 1) that reflect specific provisions of the Communications Act 2003 (as amended)<sup>1</sup>, which place restrictions on the advertising of certain types of high fat, salt and sugar (“HFSS”) product – those categorised as “less healthy” food and drink products (“less healthy products”).

These restrictions prohibit:

- Ofcom-licensed television services from including advertising and sponsorship for identifiable less healthy products between 5:30am and 9:00pm<sup>2</sup>;
- Ofcom-regulated on-demand programme services (“ODPS”) from including advertising and sponsorship for identifiable less healthy products between 5:30am and 9:00pm<sup>3</sup>; and
- paid-for advertisements for identifiable less healthy products aimed at people in the UK from being placed in online media at any time<sup>4</sup>.

**The ‘identifiability’ test** – The law states that a less healthy product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product. This definition of “identifiable” is referred to in this document as “the identifiability test”. Also, references in the singular (“product”) should be taken also to include the plural (“products”), and vice versa.

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<sup>1</sup> The Health and Care Act 2022 received Royal Assent in April 2022. This legislation followed an extensive process of consultation summarized in Government’s statement on the outcome, [Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response](#).

<sup>2</sup> Section [321A of the Communications Act 2003](#).

<sup>3</sup> Section [368FA of the Communications Act 2003](#).

<sup>4</sup> Section [368Z14 of the Communications Act 2003](#).

The rules are subject to several exemptions; principally, they do not apply to advertisements for identifiable less healthy products by or on behalf of small or medium enterprises (“food or drink SMEs”).

Ofcom is the statutory authority responsible for the framework underpinning the less healthy product advertising rules. Under the framework, it has appointed the Advertising Standards Authority (“ASA”) as the body responsible for frontline enforcement.

This guidance satisfies the statutory duties set out in the Communications Act 2003 to produce guidance in relation to the ODPS and online media restrictions. Alongside Ofcom-regulated ODPS providers and advertisers placing paid-for advertisements in online media, the guidance is useful for others involved in preparing and publishing these advertisements. It is also relevant for those ensuring compliance with the less healthy product rule for television advertising.

Where the less healthy product rules do not apply, advertisements for HFSS products must comply with the UK Advertising Codes’ rules on HFSS advertising. These restrict the media environments where HFSS advertisements can appear and, where they are allowed, control the content of such advertisements, including by limiting their appeal to children.

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## Less healthy product advertising rules

The rules and supporting information from the relevant sections of the UK Advertising Codes are set out below:

**Television rule** – BCAP Code rule 32.21 states: [Final text of rule to be inserted here]

**ODPS rule** – CAP Code Appendix 2 rule 30.16 states: [Final text of rule to be inserted here]

**Online media rule** – CAP Code rule 15.19 states: [Final text of rule to be inserted here]

### NOTE FOR RESPONDENTS:

The full text of the less healthy product advertising rules will be included at this point in the guidance once they are finalised with the final outcome of CAP and BCAP’s consultation process; see part 2.4 of the [consultation document](#).

Respondents should note the new rules will appropriately reflect the relevant provisions of the Communications Act 2003 (which set out the identifiability test) and the supporting provisions included in The Advertising (Less Healthy Food Definitions and Exemptions) Regulations 2024.

The versions of the rules consulted on in 2023 are available from page 9 in the original consultation.

## 2. Background

### 2.1 Using this guidance

The identifiability test underpins the rules. It requires an assessment of whether persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify an advertisement as being for a less healthy product. The following factors are also relevant to considering whether an advertisement is within the scope of the restrictions:

- the status of the product;
- the nature of the advertiser; and
- the media used.

Part 3 of this guidance helps users to assess each advertisement in a campaign to decide whether it is likely to fall within scope of the restrictions, and to satisfy themselves that the advertisement is likely to be compliant with the applicable rule(s). If a food or drink advertisement is not likely to fall within scope of the less healthy product advertising rules, guidance users must then consider other rules in the UK Advertising Codes, principally rules on HFSS product advertisements, that may apply to their food and drink marketing.

### 2.2 Ofcom's role

Ofcom is the statutory body with responsibility for the less healthy product advertising restrictions as part of its wider role as the UK's communications regulator. Under the relevant parts of the Communications Act 2003, Ofcom has powers to appoint an appropriate regulatory authority as frontline regulator for their enforcement. In July 2023, it [confirmed](#) the co-regulatory arrangements for each of the media covered by the restrictions, including the designation of the ASA as frontline regulator for the online media restrictions.

Under these arrangements, Ofcom retains statutory backstop powers. These may be used, for instance, where a party does not co-operate with the ASA, including by failing to comply with an ASA ruling, or failing to provide information. In such circumstances, the ASA can refer the matter to Ofcom, which has powers to investigate, request information and take enforcement action.

### 2.3 ASA's role

The ASA is the independent body that administers the UK Advertising Codes, which are authored by the Committees of Advertising Practice (CAP and BCAP). It helps to ensure that the self-regulatory system works in the public interest. Rules controlling HFSS advertising have been in effect since 2007.

In accordance with the designation of the ASA as the regulatory authority responsible for frontline enforcement of the less healthy product advertising restrictions, the UK Advertising Codes have been revised to incorporate rules reflecting the relevant provisions of the Communications Act 2003. Under the terms of the designation, the ASA is responsible for producing guidance in relation to the ODPS and online media restrictions. Although these statutory duties relate only to the ODPS and paid online media restrictions, the guidance is relevant also to television advertising. The ASA will apply the less healthy product

advertising rules in a consistent manner across the three media, recognising the importance of a level playing field and that cross-media advertising campaigns are common.

The ASA has asked the Committees of Advertising Practice, as the bodies that author the UK Advertising Codes, to develop this guidance on its behalf, although the ASA retains responsibility for it under the terms of the designation.

## 2.4 Approach to assessment of advertising

Whether or not an advertisement is within scope of the less healthy product rules will depend on the specific circumstances of the advertisement.

In administering the less healthy product rules, the ASA will follow its established [case-handling processes](#) to assess whether advertisements comply with the rules. It will consider advertisements on a case-by-case basis, as and where they appeared at the time of complaint or at the time they were identified through the ASA's self-initiated monitoring. The ASA will assess advertisements in full, taking into account their content and context.

In considering matters relating to *'Products in scope'* (section 3.2), *'Nature of the advertiser'* (section 3.3), and *'Media and scope'* (section 3.4), the ASA will apply the rules set out at the end of section 1 above, which are based on provisions in the legislation (including the detailed criteria in the secondary legislation).

When considering whether persons in any part of the UK could reasonably be expected to be able to identify an advertisement as being for a less healthy product, the ASA will apply an objective test in which it may be helpful in assessing what is "reasonable" to consider relevant advertisements from the perspective of a notional 'average consumer'. This type of test is applied by the ASA in other areas of advertising regulation and is derived from established consumer protection law. This would involve the ASA assessing whether reasonably well-informed and reasonably observant and circumspect persons in the UK could reasonably be expected to be able to identify an advertisement as being for a less healthy product. Readers should note that when considering "person" or "persons" in the guidance below, the ASA will be informed by this approach.

Although certain factors present in an advertisement are likely to result in it being subject to the restrictions, decisions on whether it is restricted cannot be pre-determined without assessment. As such, guidance users should consider broadly all the factors relevant to a particular advertisement from its content (in particular, product depictions and/or references) to wider contextual factors such as a brand's product inventory and likely associations it has with less healthy products. Section 3.5 of the guidance ('Advertisements for "identifiable" less healthy products') provides more detail of relevant factors and the relative weight the ASA may afford them in its decision-making.

The ASA may seek advice from and/or refer relevant cases to Ofcom (for instance, in the case of serious or repeated non-compliance on the part of Ofcom-regulated media or online advertisers).

## 2.5 Status of this guidance

This guidance has been produced to satisfy relevant statutory duties. The Communications Act 2003 requires the appropriate regulatory authority to draw up (and, from time to time, review and revise) guidance setting out its intentions concerning the exercise of its functions in relation to the less healthy product advertising restrictions. This statutory requirement applies to the restrictions for ODPS (section [368C](#)) and in online media (section [368Z18](#)). The appropriate regulatory authority must consult the Secretary of State before drawing up or revising the guidance, and publish it in such a manner so as to bring it to the attention of those likely to be affected by it.

Although it supports compliance with less healthy product advertising rules that reflect legislation, this guidance does not constitute legal advice. It is ultimately the responsibility of regulated parties to ensure that advertising complies with the law. Guidance users should therefore seek their own independent legal advice.

The ASA will have regard to the guidance when considering relevant advertisements, but the guidance does not limit the ASA's (or Ofcom's) discretion to decide whether advertising is compliant with the rules.

### 3. Application of the less healthy product advertising rules

#### 3.1 Overview

Advertisements for identifiable less healthy food or drink products, which are within scope and not otherwise exempted from the restrictions, must comply with the following rules:

- BCAP Code rule 32.21 prohibits such advertisements from being included in [Ofcom-regulated television channels](#) between 5:30am and 9:00pm;
- CAP Code [Appendix 2](#) (Advertising rules for on-demand services regulated by statute) rule 30.16 prohibits such advertisements from being included in [Ofcom-regulated ODPS](#) between 5:30am and 9:00pm; and
- CAP Code rule 15.19 prohibits [paid-for advertisements](#) for such products aimed at people in any part of the UK from being placed in online media at any time.

The less healthy product advertising rules state that a less healthy product is "identifiable", in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product. References in the singular ("product") should be taken also to include the plural ("products"), and vice versa.

The guidance below takes users through various factors that may be relevant to the application of the rules. They are advised to consider each of them carefully as part of their decision over whether individual advertisements within a campaign may fall within the scope of the restrictions.

The rules are subject to several exemptions reflecting the legislation:

- advertising by or on behalf of food or drink SMEs (see section 3.3);
- certain business-to-business advertising in online media (see section 3.4);
- online advertisements which are not intended to be accessed principally by persons in the UK (see section 3.4);
- advertising included in certain online radio and other audio services (see section 3.4); and
- advertisements in certain television services that are provided by means of the internet (see section 3.4).

#### 3.2 Products in scope

"Less healthy" food or drink products are defined by a two-stage test set out in legislation. They are products that:

- fall within one of the categories set out in [The Advertising \(Less Healthy Food Definitions and Exemptions\) Regulations 2024](#); and
- are classified as HFSS, scoring 4 or more points for a food, or 1 or more points for a drink, under the Department of Health and Social Care (DHSC) 2004-05 nutrient profiling model, as detailed in DHSC's [Nutrient profiling technical guidance](#).

Guidance users should note that categories in the schedule should be understood in accordance with Government's definition of what products each category comprises as



opposed to a more general reading. DHSC has published dedicated guidance on this – see [Restricting advertising of less healthy food or drink on TV and online: products in scope](#).

HFSS products are identified through nutrient profiling, which involves apportioning positive and negative scores to different nutritional aspects of a 100g reference amount of a product. HFSS products are those foods scoring 4 or more points, and drinks scoring 1 or more points. DHSC’s [Nutrient Profiling Technical Guidance](#), which accompanies the 2004-2005 nutrient profiling model, provides detail on the nutrient profiling calculation, and includes a range of case studies and examples. Guidance users should note that this model has been in place for the purposes of BCAP’s HFSS rules for television advertising, since 2007, and for CAP’s non-broadcast HFSS rules, since 2017.

Guidance users must have regard to [The Advertising \(Less Healthy Food Definitions and Exemptions\) Regulations 2024](#), the DHSC [guidance](#) on how the categories in secondary legislation should be understood, and the [Nutrient Profiling Technical Guidance](#) to demonstrate the status of their products showing they have made an appropriate assessment. This information should be available for the ASA to assess in the event that it has cause to investigate the advertisement’s compliance with the relevant rules.

### **3.3 Nature of the advertiser**

This section provides an indication of how the nature of the advertiser is relevant to the application of the restrictions.

#### **3.3.1 Small and Medium-sized Enterprise (SME) advertisers**

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Firstly, the television and ODPS restrictions do not apply to advertisements by or on behalf of food or drink SMEs, and the online media restriction does not apply where the person paying for an advertisement to be placed is a food or drink SME. Food or drink SMEs carry on one or more businesses which involve or are associated with the manufacture or sale of food or drink during that financial year, and on the first day of the financial year, employ fewer than 250 people for the purposes of those businesses (this will be assessed on the basis of international staff numbers and franchises will be counted as part of the franchisor business). The full details of the food or drink SME exemption are set out in [The Advertising \(Less Healthy Food Definitions and Exemptions\) Regulations 2024](#). Guidance users should refer to these Regulations in relation to the application of the food or drink SME exemption. This information should be available for the ASA to assess, in the event that it investigates an advertisement’s compliance with the relevant rules. Guidance users are reminded that HFSS food or drink SME advertisements must still comply with the UK Advertising Codes’ HFSS restrictions.

#### **3.3.2 Other advertisers**

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The legislation makes no further distinction between different types of advertiser. As such, the ASA will assess all potentially in-scope advertisements in line with the identifiability test as set out in 2.4 (above) and in section 3.5 (below).

### **3.3.3 Relationship of the advertiser to less healthy products**

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When assessing the wider context of an advertisement, the relationship of the advertiser to less healthy products depicted or referenced in their advertisement is likely to have a bearing on what people are likely to consider an advertisement to be “for” (for the purposes of the identifiability test).

This is intended to give advertisers a steer of their likely compliance risk; it does not establish exemptions for the types of business described in addition to the one applying to SMEs as set out above.

As the restrictions apply to advertisements for identifiable less healthy products, advertisers most likely to be subject to the rules are businesses involved directly in the supply of food or drink products (manufacturers, retailers or outlets like restaurants and takeaways).

### **3.3.4 Co-advertising with a supplier of food or drink**

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Although a case-by-case assessment will be required, advertisements by businesses not directly involved in the supply of food or drink are less likely to be subject to the rules, even if they feature food and drink product-related references or imagery as part of an advertisement creative. Where such advertisers engage in a joint advertisement with an advertiser directly involved in the supply of food or drink, and the inclusion of food or drink-related references or imagery is more than the incidental reference, there is likely to be more risk that the identifiability test is met.

### **3.3.5 Food or drink supply ‘intermediary’ advertisers**

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Particular care should be taken in relation to advertising by intermediaries, such as food and drink delivery services. Although they do not supply their own products, they provide a service to consumers that supplies them with the food and drink products of other companies (such as restaurants). This is likely to influence how intermediary advertisements will be understood by those viewing them.

Advertisements that explicitly depict or directly refer to a less healthy product (as per the criteria set out in 3.5 below) available through an intermediary’s service are likely to be within scope of the restrictions. Where intermediaries’ advertisements include generic imagery and representations of products to illustrate the types of product that can be bought through the service, the ASA is less likely to consider that the advertisement is for an identifiable less healthy product under the identifiability test. Inclusion of branding relating to products, ranges or companies will be assessed under the criteria set out in 3.5 below; in particular, section 3.5.7.

### **3.3.6 Regulated media accountabilities**

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Ofcom-regulated television broadcasters and ODPS providers are responsible for compliance with the less healthy product advertising rules applying to their respective media. They should satisfy themselves that advertisements on their services comply with the applicable rules. Advertisers are responsible for ensuring their own compliance with the rule relating to online media (this includes food or drink SMEs ensuring that they hold necessary information to demonstrate their exempt status as summarised above).

## 3.4 Media and scope

This section details each of the media covered by the less healthy product advertising rules.

### 3.4.1 Television rule

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BCAP Code rule 32.21 applies to advertisements for identifiable less healthy products included in Ofcom-licensed television services between 5:30am and 9:00pm. The rule will be applied in line with the BCAP Code, which sets out its remit over advertisements in Ofcom-licensed television services in the Code's ['Introduction'](#) (see (a)). Rule 32.21 does not apply to commercial references in editorial content.

The restriction, as set out in the underlying legislation, also applies to advertisements under a sponsorship agreement, and anything else under a sponsorship agreement that is included in a television service, for example, programme sponsorship credits. These are regulated by Ofcom under [Section Nine](#) of Ofcom's Broadcasting Code (*'Commercial references on TV'*), which requires that sponsorship credits comply with the content and scheduling rules that apply to television advertising (as set out in the BCAP Code). The ASA will refer complaints concerning sponsorship credits to Ofcom.

### 3.4.2 ODPS rule

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CAP Code [Appendix 2](#) (Advertising rules for on-demand services regulated by statute) rule 30.16 applies to advertisements for identifiable less healthy products included in Ofcom-regulated ODPS between 5:30am and 9:00pm. Advertising "included" in a regulated on-demand service is defined as advertising that can be viewed by a user of the service as a result of the user selecting a programme to view. Advertisements for an identifiable less healthy product that appear on the service, but not as a result of the user selecting a programme to view, are not in scope of the ODPS rule, but are likely to be subject to the online media rule (see immediately below).

ODPS that are subject to the rules contained in Appendix 2 must ensure compliance with the less healthy product rule. The ASA will enforce the ODPS rule against media service providers.

The restriction, as set out in the underlying legislation, also applies to sponsorship announcements included in Ofcom-regulated ODPS. These are regulated by Ofcom under its [ODPS Rules and Guidance](#), which includes provisions reflecting the legislation. The ASA will refer complaints about sponsorship announcements to Ofcom.

### 3.4.3 Online media rule

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CAP Code rule 15.19 applies to paid-for advertisements for identifiable less healthy products placed in online media where the advertisement is directed at people in the UK. "Paying" includes providing any consideration whether monetary or non-monetary. "Placed" includes advertisements that continue to be placed and paying under a sponsorship agreement that results in an advertisement being placed.

**i) Exemptions** – There are several exemptions from the scope of the less healthy product advertising rule for online media reflecting the legislation. Guidance users should refer to the relevant sections of the Communications Act 2003 and [The Advertising \(Less Healthy Food Definitions and Exemptions\) Regulations 2024](#). In summary, the exemptions cover:

- advertisements directed solely at persons who are engaged in, or employed by, a business which involves or is associated with the manufacture or sale of food or drink;
- advertisements on the internet which are not intended to be accessed principally by persons in the UK;
- advertising in services connected to regulated radio services, where visual advertisements for less healthy products included in the connected service are not to be treated as part of that service, and where the connected service is:
  - provided by means of the internet; and
  - corresponds to a service broadcast by a relevant radio service (i.e. the majority of the audio items included in the connected service are broadcast on the relevant radio service at the same time as they are provided by the connected service; a relevant radio service is a radio service regulated by Ofcom);
- advertisements included in other online audio services that are not visual advertisements;
- advertisements in a television licensable content service, which is a regulated television service;
- advertisements included in an unregulated television licensable content service, which:
  - is provided by means of the internet; and
  - corresponds to a regulated television service (i.e. all the programmes, including advertisements, provided by the regulated television service are provided at the same time on both services); and
- advertisements in regulated ODPS (these are subject to rule 30.16 in Appendix 2 of the CAP Code, as detailed immediately above).

**ii) Payment for placement of an advertisement in online media** – Legislation does not provide a definition of the types of online media where payment for the placement of an identifiable less healthy product advertisement would bring a communication within scope of rule 15.19 (the online media rule).

The '[Scope of the Code](#)' sets out a list of media to which the CAP Code applies: the online media listed in I (d) and I (h) are mainly (but not entirely) distinguished by whether they are paid-for communications or not. When considering scope issues for the online less healthy product restriction, the ASA will have regard to whether payment has resulted in placement of what can reasonably be considered an advertisement by or on behalf of the party paying. The ASA does not regard media owners or intermediaries paying for advertising space (such as agencies), acting on behalf of the originating advertiser, as advertisers when applying the CAP Code.

Guidance users are cautioned that the Scope of the CAP Code is not an exhaustive list of all online media where the less healthy product restrictions apply. The ASA will assess instances where the remit under the CAP Code is uncertain on a case-by-case basis liaising with Ofcom as the statutory co-regulator.

Because the legislation applies only to instances where payment results in the placement of an advertisement, rule 15.19 is unlikely to apply to advertisers' marketing communications appearing on their own websites (for example, online groceries platforms, customer service sites, loyalty scheme portals, or corporate and social responsibility sites), or in other non-paid-for space online under their control such as marketers' own social media channels or apps where no payment for the placement of an advertisement is involved. However, there are circumstances where certain content appearing in such spaces could be within scope. For example:

- Product listings – Listings such as those on retail sites or delivery apps are ordinarily out of scope as they are communications in an advertiser's own media space. However, different considerations apply where the underlying commercial relationship (involving payment or a reciprocal arrangement) with the manufacturer or supplier (relating to the supply of products for sale) includes a requirement for the placement of a product listing that could reasonably be considered an advertisement involving a manufacturer or supplier. This could be because, as a result of the commercial relationship, the listing is afforded enhanced prominence on the site, app or in search results. The ASA will consider the terms of the commercial relationship and, in particular, whether a listing has been placed in a manner different to ordinary, organic product listings.
- Social media – Posts by companies from their own social media accounts are likely to be outside scope provided payment is not involved in the placement of posts. Paid-for 'promoted' or 'boosted' posts could be within scope, where people could reasonably be expected to be able to identify an advertisement as being for a less healthy product.
- Influencer marketing – Influencer posts in their own social media spaces, where people could reasonably be expected to be able to identify an advertisement as being for a less healthy product, are likely to be within scope where an advertiser has paid for the content or entered into a reciprocal arrangement with the influencer. This includes where they have gifted a product or other incentive on condition that content will be created and placed promoting an identifiable less healthy product.

The ASA may have regard to underlying contractual arrangements between the party paying for an advertisement and others involved in its preparation and publication to assess whether an advertiser has paid to place an advertisement for an identifiable less healthy product.

**iii) Jurisdiction** – In terms of jurisdiction, the legislation underpinning the less healthy product rules does not bring within scope advertisements that are not intended to be accessed principally by persons in any part of the UK. This is broadly consistent with the [approach](#) taken by the CAP Code (see '[Scope of the Code](#)' II (c)). Marketing communications on websites, apps and cross-border platforms (for example, social media platforms or retail platforms) are outside the Code's remit unless they meet at least one of the following criteria:

- Non-paid-for marketing communications from or by marketers with a UK registered company address.
- Marketing communications appearing on websites with a “.uk” top-level domain.
- Paid-for marketing communications from or by marketers targeting people in the UK.

The ASA may also have regard to underlying contractual arrangements between the party paying for an advertisement and others involved in its preparation and publication to assess the intent behind a communication as it may be relevant to deciding whether an advertiser has paid to place an advertisement for an identifiable less healthy product.

### 3.5 Advertisements for “identifiable” less healthy products

**i) ‘Identifiability’ test** – The restrictions apply to advertisements for an identifiable less healthy food or drink product. A product is identifiable, in relation to advertisements, if persons in any part of the UK could reasonably be expected to be able to identify the advertisement as being for that product. References in the singular (“product”) should be taken also to include the plural (“products”), and vice versa.

**ii) Focus on advertising content** – The ASA is likely to have primary regard to the content of an advertisement in assessing how people perceive it. Obviously, a clear and prominent inclusion of a less healthy product as a focus of the advertisement’s promotional message is highly likely to result in the advertisement being restricted.

Although it is possible in some circumstances to include imagery or references relating to less healthy products, where an advertisement is more open to interpretation because there are no explicit product inclusions, the ASA will to balance the promotional message of the advertisement against wider contextual factors relating to the advertiser and its commercial identity/offering in deciding what persons in the UK are likely to consider that advertisement is for.

**iii) “Specific” less healthy products** – The wording of the law and the use of the 2004-2005 nutrient profiling model (as summarised in 3.2 above) to determine whether a product is within scope means the restrictions will apply to advertisements for a specific identifiable less healthy product.

This should be understood as a single food or drink item for presentation to the final consumer, either in its packaging or without it, which can be purchased by a consumer.<sup>5</sup> It does not include a food or drink item that is not available for sale, such as the ingredients of a finished product, or a finished item that results from following a recipe involving one or more specific less healthy products. It is also distinct from representations of generic products (for instance, a non-specific cake, biscuit or burger). However, general depictions or references of this sort, when considered in combination with the rest of the content of an advertisement, may still have the result that people could reasonably be expected to be able to identify the advertisement as being for an identifiable less healthy product.

**iv) Prominence of product references** – Another consideration in applying the identifiability test is the prominence of product-related imagery, references or other factors. Where those result in people being able to recognise that product, the ASA is much more likely to apply the restrictions.

In assessing prominence, the ASA will consider factors such as the positioning of product references within an advertisement (in the foreground or background, for example), the duration of their appearance, and how people’s attention is drawn to them. For example, could people reasonably be expected to notice factors such as brand names, logos and

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<sup>5</sup> Stock keeping unit (“SKU”) codes or similar are useful for guidance users because of their associated nutritional information. SKU codes are unique codes assigned to each product, including different variants, pack sizes and formats within a range of products.

other distinguishing characteristics likely to lead them to identify that the advertisement is for a specific less healthy product?

**v) Application to ‘brand advertising’** – Guidance users should note the restrictions can also apply to advertising that does not explicitly depict or directly refer to a specific less healthy product, if people in the UK could reasonably be expected to identify the advertisement as being for an identifiable less healthy product. The ASA will apply the identifiability test to all potentially in-scope advertisements, including those that only include branding (see 3.5.7 below on the approach to ‘brand advertising’ for more detail).

**vi) Relevance of advertiser intent** – The ASA will not assess an advertisement based on the advertiser’s likely or expressed intent. It will objectively assess the advertisement’s content and context, and how it is likely to be perceived. Advertisements that focus on matters other than food or drink products, for example, by promoting customer service experience or loyalty schemes, are likely to be within scope of the restrictions, if the advertisement includes a sufficiently distinct reference to or representation of an identifiable less healthy product, which has the effect that people could reasonably be expected to be able to identify the advertisement as being for that product.

**vii) Assessment summary** – Guidance users are cautioned that decisions on whether an advertisement is likely to be restricted cannot be pre-determined without assessment. As such, they should consider broadly all the factors relevant to a particular advertisement from its content (in particular, product depictions and references) to wider contextual factors including the nature of the advertiser and its commercial offering.

Guidance users are strongly cautioned that factors included in an advertisement that are ordinarily outside the scope of the rules when considered in isolation, may result in an advertisement being deemed within scope when considered in combination with other factors (this consideration is mainly relevant to the scenarios set out in 3.5.4 onward below; and, in particular, 3.5.7 on the approach to ‘brand advertising’). Whether or not an advertisement is within scope of the rules will therefore depend on the specific circumstances of each case, from the full content of the advertisement to the wider context of the advertiser placing it.

The rest of this guidance discusses factors commonly found in advertising, expanding on the principles and advice set out in this section. It provides an indication of how different factors are likely to be assessed by the ASA against the identifiability test.



### 3.5.1 Advertisements that explicitly include a specific product

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#### Summary

*Advertisements that explicitly depict or directly refer to a specific less healthy product are **very likely to be within scope of the rules**. This may include text and audio references, imagery of products in their packaging, and distinctive characteristics of specific products.*

Most straightforwardly, advertisements that explicitly depict or directly refer to a specific less healthy product are very likely to be restricted. This includes:

- Text or audio references: Advertisements that feature text or audio references that include the name of a specific less healthy product, or elements of the product's name that distinguish a specific product from others. The name could be included in text as part of a simple headline, strapline or wider claim, or in audio content like jingles, music or other audio cues.
- Products in their packaging: Advertisements that feature imagery or other sufficiently distinct representations of a specific less healthy product in its packaging with the effect that people could reasonably be expected to be able to identify the advertisement as being for that product. An advertisement featuring a less healthy product shown in its packaging is likely to be straightforwardly an advertisement for that product through the visibility of the product's name and potentially other identifying features.
- Characteristics particular to specific products: Advertisements that feature imagery or other sufficiently distinct representations of a less healthy product, which although it is not featured in its packaging, features clear characteristics of that product, like a distinctive product shape, marks, or other design features, that mean people could reasonably be expected to be able to identify the advertisement as being for that product. This includes distinctive parts of that product, such as a distinctive piece of a chocolate bar.

Advertisements whose content only promotes non-less healthy products through explicit inclusions of those products are unlikely to be restricted, where people could not reasonably be expected to identify such advertisements as being for less healthy products, in line with the identifiability test.

### 3.5.2 Advertisements that feature less explicit references to a specific product

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#### Summary

*Advertisements that depict or refer to a specific less healthy product less explicitly are **likely to be within scope of the rules**. This may include background imagery, scenes contextualising the promoted product, and stylised representations such as cartoons.*

Advertisements that feature or refer to a specific less healthy product, in ways set out below, are also likely to be restricted.

This includes:

- Background, contextual etc. references: Background imagery identifying, or other sufficiently prominent representations of, a specific less healthy product. For example, the product might be included as a graphical background or wallpaper to a creative, in a table scene intended to contextualize the main product promoted, or as part of a creative promoting a serving suggestion.
- Stylised presentations: Stylised representations of products, for example a cartoon or animated representation, where there are sufficiently distinct characteristics that people could reasonably be expected to be able to identify the advertisement as being for that product.

### 3.5.3 Advertisements referencing multiple products

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#### Summary

*Advertisements that depict or refer to a specific less healthy product among multiple products are **very likely to be within scope of the rules**. For example, advertisements promoting a product range with less healthy and non-less healthy variants, or advertisements promoting the price/value advantages of a representative 'basket of goods'.*

References to, or imagery or other sufficiently distinct representations of, one or more specific less healthy products in an advertisement that includes multiple products, even if the other products depicted are not categorised as less healthy, are also very likely to be restricted as with the following examples.

- Range of products with less healthy and non-less healthy product variants: an advertisement that promotes a range of products with less healthy and non-less healthy variants, which includes a clear reference to or imagery of a less healthy product; or
- 'Basket of goods' comparisons: such as a price comparison advertisement by, for instance, a retailer that promotes its price/value advantages, and includes a clear reference to or imagery of a less healthy product.

### 3.5.4 Advertisements making generic references to products

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#### Summary

*Advertisements that feature generic representations of less healthy products, when used in combination with other factors, **may be within scope of the rules**. This will depend on an assessment of the full content and context of the advertisement, including the effect of this kind of content in combination with other factors.*

Use of generic product imagery or other generic product representations do not inherently include sufficient information (for example, product identifiers like logos and other branding, flavour information, distinctive marks etc.) for people to identify the advertisement as being for an identifiable less healthy product (i.e. one that can be nutrient profiled as summarised in 3.2 above). However, the use of generic imagery or other representations, in combination with other factors in an advertisement, may result in the advertisement being restricted.

- Incidental references to a generic product: An advertisement that features a generic food or soft drink product shown incidentally as part of a serving suggestion or to provide context to the promotion of an out-of-scope product (for example, a non-less healthy product) is, depending on the content and context of the ad, unlikely to be restricted.
- Unbranded food or drink product: An advertisement for an alcohol product that features an unbranded soft drink shown as a mixer is – depending on the content and context of the advertisement – unlikely to be restricted.
- Generic imagery related to a range of exclusively less healthy products: An advertisement that features generic imagery of a food outlet’s core range of exclusively less healthy products (for instance, animated imagery of a generic pizza) would be likely to be restricted.

It follows, then, that advertisements that feature only generic product imagery or other generic product representations – potentially, including descriptors of categories of food or drink products like “biscuits”, “burgers”, “milkshakes”, “fried chicken”, or “curry” – could be restricted. Where the advertiser is strongly associated by persons in the UK with the manufacture or sale of a less healthy product or a range of less healthy products, the use in an advertisement of a generic representation of that product or products in a way that is likely to bring to mind that product(s) would increase the probability of the advertisement being restricted.

### 3.5.5 Indirect references to and suggestions of food or drink products

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#### Summary

*Advertisements that feature indirect references to and suggestions of food or drink products are **unlikely to be restricted**, subject to an assessment of the full content and context of the advertisement, including the effect of this kind of content in combination with other factors. For example, allusions in sound or vision to the presence of a less healthy product that is not otherwise depicted in the advertisement and links to the advertiser's own website or social media channels which may include information about less healthy products.*

The following advertisement scenarios are unlikely to be restricted.

- Visual or audio references to products: Creative approaches that refer indirectly and incidentally to the presence of a product without depicting it directly. For example, depictions of a person chewing, or giving a product wrapped as a gift. This also applies to audio content such as the sound of a wrapper or a drinks can being opened.
- Links to own websites, social media channels etc.: Links included in an advertisement to an advertiser's own website or other space online under their control (like marketers' own apps or social media accounts), where identifiable less healthy products and related information are included, provided no specific references or depictions of less healthy products are included in the advertisement and it complies with other parts of this guidance, in particular, 3.5.7 below on the use of branding. For instance, the advertisement might include a QR Code or a simple URL, such as [www.brandX.co.uk/Deal](http://www.brandX.co.uk/Deal), which does not include the name of a specific less healthy product. This may be relevant for advertisements featuring recipes that promote the purchase of recipe ingredients from an online retailer's own website.

### 3.5.6 Fleeting references to food or drink products

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#### Summary

*Advertisements that feature fleeting references to less healthy products, where those references are of such brief duration as to be, to all intents and purposes, non-discernible, are **unlikely to be restricted**. This will depend on an assessment of the full content and context of the advertisement, including the effect of this kind of content in combination with other factors.*

Depictions of less healthy products that people are unlikely to be able to recognise when viewing an advertisement in real time are unlikely to be restricted. This could be because the product is shown very briefly in the advertisement, or because it is in the background of an advertisement resulting in it not being discernible. For example, advertisements that

include fleeting references to less healthy products in the context of general imagery of supermarket shelves, or food or drink products on tables in a restaurant.

### **3.5.7 ‘Brand Advertisements’ that do not explicitly feature or refer to a product**

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#### **Summary**

*Advertisements that convey commercial messages through branding, without explicitly depicting or directly referring to a specific less healthy product, **may be restricted**, where people could reasonably be expected to be able to identify the advertisement as being for such a product. This will depend on an assessment of the full content and context of the advertisement, taking into account the combined effect of various factors, as well as contextual information including a brand’s product inventory and the likely associations it has with less healthy products.*

The end of this section includes a graphic summary of the way different factors relating to ‘brand advertising are likely to be considered by the ASA in relevant cases.

**i) Understanding “branding”** – This term should be understood in a broad sense encompassing a diverse range of content and techniques used in advertising, such as logos, livery, straplines, fonts, colour schemes, characters, audio cues and jingles. Branding is used in all advertising, but this section covers advertisements that do not feature products directly.

**ii) Applying the identifiability test** – An advertisement that does not directly refer to or depict a less healthy product may still be within scope of the restrictions, if the content of the advertisement includes branding closely associated with a specific less healthy product or products.<sup>6</sup>

**iii) Combinations of factors appearing in a creative** – This section of the guidance centres mainly on the use of branding in isolation. Users are cautioned that the ASA will consider advertisements in the round, including the full content of the advertisement and the wider context of the particular advertiser.

The combined effect of various factors included in an advertisement is a particularly important consideration in relation to the use of branding. Branding associated with a range of less healthy and non-less healthy products combined in an advertisement with generic imagery or other representations of a less healthy product is likely to influence the way the

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<sup>6</sup> Guidance users should also note that, separately, use of branding may still be subject to the UK Advertising Codes’ rules for HFSS product advertising. These rules have a broader scope when considering how branding might have the effect of promoting an HFSS product. Advertisers satisfied that their advertisements are not covered by the Codes’ less healthy product rules should then assess their advertisements against the relevant guidance, [Identifying brand advertising that has the effect of promoting an HFSS product](#).

messaging of the advertisement is perceived (for example, the company's logo combined with a generic image of a burger).

**iv) Branding related to a product or product range** – An advertisement that features branding, for example a logo, used only to identify a specific less healthy product or range of entirely less healthy products is likely to be restricted. Where a piece of branding featured in an advertisement relates to a mixed range of less healthy and non-healthy products, the ASA will consider the proportion of less healthy products within that range, and whether – within that range – there is a core range of products or any dominant products that are less healthy.

**v) Branding related to a company or master brand** – The ASA will give particular weight to the content of the advertisement and how people are likely to perceive what the advertisement is “for” under the identifiability test.

The ASA is likely to consider an advertisement ought to be restricted where, for example:

- **Single less healthy product:** the advertisement features elements of branding that are associated exclusively with a single less healthy product (because the entity that owns the brand does not manufacture and/or sell any other products); or
- **A range of less healthy products:** the advertisement features elements of branding that are associated exclusively with a range of less healthy products (because the entity that owns the brand does not manufacture and/or sell any non-less healthy products).

Guidance users should exercise very strong caution when considering advertising that falls under the two scenarios presented above. The acceptability of these types of advertisements is likely to depend on the extent to which it is possible for the content of the advertisement to focus on attributes of the brand that are not product-related to such an extent that people in the UK could not reasonably be expected to be able to identify the advertisement as being for a less healthy product.

**vi) Suppliers of both less healthy and non-less healthy products** – Where the advertiser manufactures and/or sells a mix of less healthy and non-less healthy products, an advertisement that does not explicitly depict or directly refer to a less healthy product is less likely to be restricted.

In its assessment, the ASA is likely to consider the nature of the brand's commercial offering. This would likely include an assessment of the proportion of less healthy products under the brand and whether it includes a core range of products or any dominant products that are less healthy. The ASA will also have regard to the wider context of a brand's identity from the likely perspective of people viewing an advertisement. A widely held perception associating a brand with less healthy products is unlikely on its own to be sufficient to bring the advertisement within scope of the restrictions, if that perception does not reflect the nature of the brand's product inventory.

Brands with mixed inventories have the option of advertising non-less healthy products, or highlighting non-product-related aspects of their business. For instance, an advertisement for a restaurant or outlet employing a creative emphasising the benefits of its customer

experience. However, the ASA will consider such advertisements in the round, with reference to other parts of the guidance including consideration of product inventory and the existence of a core range or dominant less healthy product, along with a more general appreciation of non-product attributes associated with the brand.

**vii) Branding relating to a wider commercial entity** – Company or corporate branding is less likely to be within scope because it relates to a business unit or wider group entity. Advertisements may aim to promote non-product attributes like a company’s commitments to sustainability or social responsibility. However, guidance users are cautioned that advertisements including this type of branding will be assessed in line with the identifiability test.

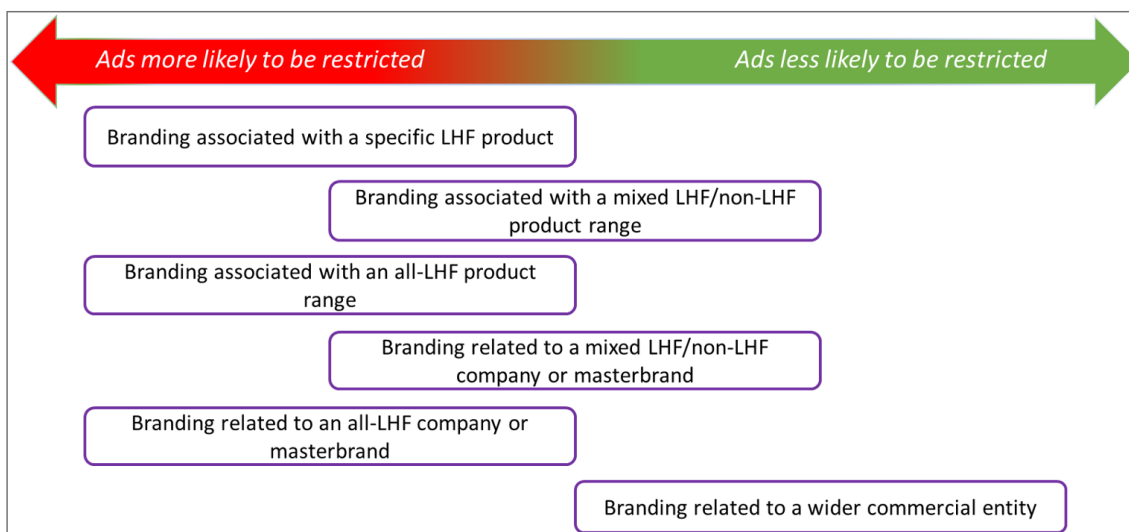
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## Summary guide accompanying section 3.5.7

Figure 1 summarises the types of 'brand advertisement' that are more or less likely to be restricted, depending on the associations with the branding included in the advertisement.

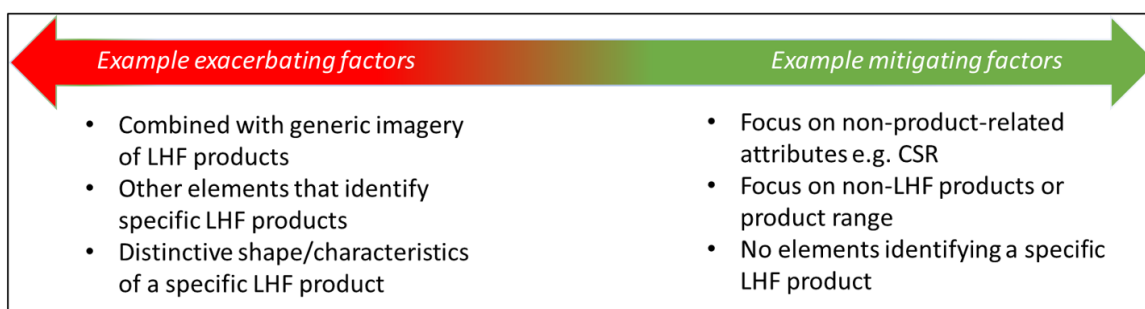
Where those associations make it more likely that the advertisement is restricted, advertisers should consider the potential impact of other factors, having particular regard to those summarised in Figure 2.

**Figure 1**



As noted above, decisions as to whether a 'brand advertisement' is within scope of the restrictions will depend on an assessment of the full content and context of the advertisement. A non-exhaustive list of factors 'more' or 'less' likely to bring an advertisement within scope of the restrictions, is set out in Figure 2.

**Figure 2**




In all cases, the ASA Council will consider the cumulative effect of all the information conveyed by an advertisement to determine whether it is for an identifiable less healthy product, in line with the identifiability test.



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