

Total restriction of online advertising for products high in fat, sugar and salt

BDA Consultation Response

BDA draft response, created with input from Obesity, Paediatric and Public Health Specialist Groups.

1. Do you support the proposal to introduce a total online HFSS advertising restriction?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

The BDA is broadly in favour of restricting online advertising of High Fat, Sugar and Salt foods, especially to children. We agree with the government's assessment that it is important that advertising regulations recognise the changing advertising landscape, and in particular children's media consumption habits. The relatively recent example of the emerging success of Government intervention regarding the sugar content of soft drinks, supports how appropriate Government intervention can assist consumers in making healthier choices.

Current regulations for online advertising of HFSS foods are failing to provide adequate protection. There are significant loopholes opened up via the 25% audience threshold exemption that continue to expose children. In June-September 2020, surveillance of just 50 websites likely to be visited by children conducted by the Advertising Standards Authority (ASA) found 102 HFSS food advertisements from 35 different companies, including on 24 children's websites. The ASA's research using child mimicking avatars also provides strong evidence that the targeting methods designed to prevent children seeing such adverts is not effective¹ (1).

However, we also recognise that this is a much more complex landscape than broadcast, print or other more conventional forms of advertising. Determining who is viewing any given piece of advertising, how many and when they are doing so is more difficult. Social media encourages the sharing of content which means that the audience for something that may be defined as advertising is outside the control of those who originally created it.

Equally, the low cost of entry and self-directed nature of online advertising means that there will be far more actors in this environment, who may not have the necessary skills, time or resources to undertake the necessary evaluation or understand the scale of regulation compared to larger companies more used to dealing with the complexity of broadcast advertising for example. As the BDA has stipulated in responses to other consultations on areas such as Front of Pack Nutrition Labelling² (2), guidance on sourcing and presenting nutrition information for industry and especially the online sector is sorely needed.

The BDA does not believe there is value in putting in place a regulatory framework that is either unenforceable or is not enforced consistently. As we cover in later questions, this system must have teeth.

¹ <https://www.asa.org.uk/uploads/assets/uploaded/14be798d-bd30-49d6-bcfbc9ed7e66e565.pdf>

² <https://www.bda.uk.com/resource/front-of-pack-nutrition-labelling-in-the-uk.html>

Scope

2. We propose that the restrictions apply to all online marketing communications that are either intended or likely to come to the attention of UK children and which have the effect of promoting identifiable HFSS products, while excluding from scope:

- marketing communications in online media targeted exclusively at business-to-business. We do not seek to limit advertisers' capacity to promote their products and services to other companies or other operators in the supply chain
- factual claims about products and services
- communications with the principal purpose of facilitating an online transaction

Do you agree with this definition?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

We agree that this should prioritise content intended for or likely to be seen by children. As the consultation document recognises, it will be important to consider what material falls into this category, given that many children and others will access online content either under a false age or via a parent's/adult's account/access. However, with regard to the rest of the definition we have a number of key questions or concerns to raise.

- *It seems "factual claims" may represent a significant loophole for advertisers, with materials that look very much like an advert still containing only factual information. Who will determine what constitutes a factual claim? Who will arbitrate this? Will guidance be provided?*
- *Determining what constitutes a communication with the principal purpose of facilitating an online purchase will also need to be precisely defined. Would a communication that gives the individual the opportunity to purchase direct from the communication count? Who is going to arbitrate this? Will guidance be provided?*
- *It is not clear how these restrictions will work in relation to content shared by others. If someone shares an image of a product, linking to a company but this is not paid for, would this count as advertising? Would companies still be able to encourage their followers to share content or entice them to do so via a competition or similar? Given the scale of the "influencer" market as a means of advertising, this is an important clarification.*
- *What social media channel would be regarded as a platform whose principal function is the buying or selling products? By definition we would argue anything that could be defined as a social media channel will not primarily be a platform for the buying or selling of products. We cannot think of an example of a social media channel to which this definition would apply.*
- *There are exceptions for where content has been agreed to, but it is clear that marketers may not be able to ascertain whether content is being sent to an adult or child. Should a marketer not need to ensure their "email, text or push notifications directed to customers who have chosen to opt-in to these communications," are not being sent to a child?*

3. Do you foresee any difficulties with the proposed approach on types of advertising in scope?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

In practice this is a complex matter and the proposed approach lacks adequate detail to confirm if it will necessarily be suitable for addressing the issues, or achievable in terms of monitoring and enforcement:

A particular area of concern is the formats that are in scope. The range of digital platforms that would be relevant to this are huge, and there will be complexities caused by the differences between them in terms of applying these rules consistently. It will be important to avoid loopholes and to ensure a level playing field to include the broadest possible definition of digital advertising.

Some examples of potential gaps:

- *There is no specific mention of digital radio, podcasting or other online audio. At what point would these be governed by these rules or broadcast regulations?*
- *How would this apply to "influencers" paid (or not) to promote food products? Already this is a poorly regulated market where it is not always clear that something constitutes advertising. Such influencers are often role models to children in particular and there is emerging evidence that this will impact on food choices³.*
- *Exceptions are made where people choose to receive advertising, deliberately follow an advertiser etc. which seems to be an obvious flaw. How well is it understood, and what means do internet companies have to evidence that they both know who is giving approval (in terms of age) and that consumers fully understand what they are giving permission for?*

5. Do you agree that for the purpose of a total online advertising restriction for HFSS products, the term 'advertiser' should be defined as a natural or legal person, or organisation that advertises a product or service?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

Clarity is needed here for consumers to make the distinction between the advertising agent and the organisation for whom they are doing the advertising. This may be the same organisation or person, but for larger organisations it is likely to be contracted out to an agency and even for SME's external advertisers may be employed. The initiator should carry the main responsibility, but advertising agents/agencies also need to be made responsible for the consequences of supporting inappropriate advertising and should take proportionate responsibility.

It should also be ensured that this is applicable to all eventualities from a sole trader to a multinational company, with meaningful penalties appropriately scaled (e.g., scaled according to annual turnover).

6. Do you agree that for the purpose of appropriate measures, the term "online service providers" should include all internet services that supply services or tools which allow, enable or facilitate the dissemination of advertising content?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

This seems the most sensible approach.

7. Our proposed exemption for factual claims about products and services would include content on an advertiser's social media. Do you agree with this approach?

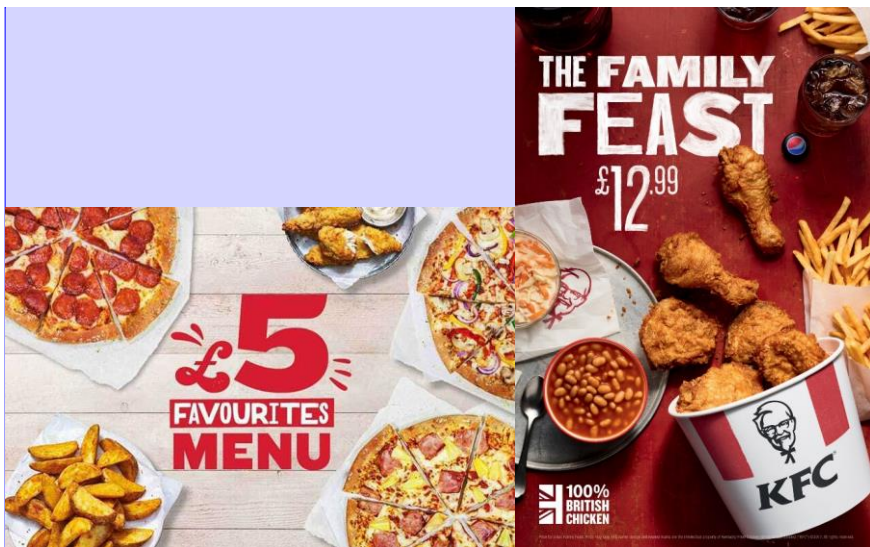
Yes/No/I don't know

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6967733/>

Please explain your answer and provide relevant evidence

More clarity is needed. Broadly speaking being able to provide basic information about products is important, including from a safety perspective. In an increasingly online world this information will need to be deliverable online. Social media may be a key means of delivering this information for some companies, especially SMEs who may not have a conventional website.

However, the definition of "factual information" is extremely broad. Based just on those claims that are included in the proposed list in the consultation document, content that is very clearly advertising could pass. For example:



Commented [TE1]: I will find a way to include these in the final submission. There are a great many more that we could reference!

Indeed, these adverts could go further to include sales data and ingredients and still be considered "factual". Would the regulations specify the sorts of phrases or imagery that would push these factual

claims over into promotional activity? This is rather a grey area and should ideally be kept as simple but as effective as possible for compliance and enforcement purposes.

Also, worth consideration is the fact that larger companies have existing accounts with large numbers of followers generated through online advertising and other paid-for initiatives. They will not lose these and will therefore be able to continue directing content towards them.

8. We propose that any advertisers which sell or promote an identifiable HFSS product or which operate a brand considered by the regulator to be synonymous with HFSS products should be required to set controls which ensure that their posts regarding HFSS products can only be found by users actively seeking them on the advertisers own social media page. This could be achieved, for example, by ensuring that the privacy settings on their social media channels are set so that their content appears on that page only. Do you think this would successfully limit the number of children who view this content?

Yes/No/ **I don't know**

Please explain your answer and provide relevant evidence

The proposal that HFSS producers have to make their accounts private or otherwise protect their messaging would on some platforms render activity pointless for new entrants to the marketplace (which may be the point). Conversely, in other areas it still would not stop others from sharing the content if they wished to. Social media platforms and content are constantly evolving and developing, with new platforms and tools appearing, and any proposals to allow limited information will need to be tightly monitored in terms of platforms' ability to provide age verification, privacy settings and more.

Enforcement and liability

13. What sanctions or powers will help enforce any breaches of the restriction or of the appropriate measures requirements by those in scope of this provision?

Please explain your answer and provide relevant evidence

- Regular and proactive monitoring conducted independently, rather than a reactive complaints-based approach to compliance.
- Effective remediation processes, including powers to make businesses remove any content in breach of regulations.
- A more effective "naming and shaming" procedure that is likely to have a serious impact on bigger companies.
- Fines imposed for companies in breach of the restrictions at a level that would create an effective deterrent, including fines levied in proportion to the size of company/investment in advertising and marketing spend.

14. Should the statutory "backstop" regulator for HFSS marketing material be:

- a) a new public body
- b) an existing public body
- c) **I don't know**

Please explain your answer and provide relevant evidence.

Making use of an existing public body would minimise cost to the public purse, reinforce recognition and trust by the public and utilise existing appropriate expertise. It would also presumably more rapidly be ready to take on the role.

Commented [TE2]: We can comment here but I am not sure we know which would clearly be more effective. Our concern is not with the who but the how.

Conversely, any existing body may struggle to cope with significant extra workload that will be created by these new rules, and may lack the specific expertise to enforce any breaches.

Whichever approach is taken, it will be vital for the organisation to efficient liaison with other public bodies would most likely be advisable (e.g. NHS, PHE, DEFRA, FSA, ONS)

Should the final proposals lead to the creation of new central government arm's length bodies, then the usual, separate government approval process would apply for such entities. This equally applies to proposals elsewhere in this document.

15. If answered b, which body or bodies should it be?

Please explain your answer and provide relevant evidence

There are some existing options:

- Ofcom. The regulator have recently been given the responsibility for regulating online content and protecting people from harmful content online. This includes powers to fine or otherwise take action against internet companies.
- Local Trading Standards are currently the existing public bodies that act as the statutory backstop to the work of the ASA. However, it is our view that they do not currently have the resources to meaningfully support the work at their current scale and resourcing. They are able to support specific pieces of work where it is paid for at the national level. This may be necessary for such a significant new responsibility as this.

In either case, the addition of online advertising regulation would almost certainly require significant additional resourcing.

16. Do you agree that the ASA should be responsible for the day-to-day regulation of a total online HFSS advertising restriction?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

ASA lacks a regulatory footing and is already unable to manage the scale on online advertising effectively.

We have already seen a number of occasions on which the ASA has sought to punish or otherwise highlight issues with advertising content and either been ignored or been unsuccessful in changing that content. Even where it is withdrawn, the advertiser in question had already been successful in getting out their message as intended. This is particularly true of small online operators who may be impossible to trace.

We would argue that the ASA is perhaps better geared towards regulating broadcast advertising, where monitoring is easier, advertisers are larger and better established and more likely to respond to threats of public embarrassment.

Based on complaints submitted to the ASA by colleagues in at the Obesity Health Alliance and Children's Food Campaign, it is clear that there is insufficient transparency about the decisions made, and an incomplete public record of complaints.

ASA are also funded by the advertising industry, which brings into question their independence and impartiality in the enforcing of advertising regulations. This conflict of interest could fatally undermine public trust in this system.

17. Do you agree with our proposal that advertisers are liable for compliance with a total online HFSS advertising restriction.

Yes/No/I don't know

Please explain your answer and provide relevant evidence.

We agree that advertisers should be liable for compliance but not exclusively advertisers. Instigators should also bear responsibility, as should any actor who displays the advertising on their forum/format, where they have a reasonable opportunity to determine or vet such advertising (as suggested within the consultation document).

We specifically believe that advertisers should be responsible for ensuring any nutrition information or claims (but not only protected claims) made about an advertised product are accurate if it is to be claimed as a "factual statement". This should extend to accurate information akin to Front Of Pack Nutrition Labelling.

In the case of advertisers from outside of the UK, it is likely that we will need to make those that benefit from advertising, even if they are not the advertiser themselves.

18. Do you consider that online service providers should be prohibited from running advertising that breaches the restriction or should be subject to a requirement to apply appropriate measures?

- a) Prohibited
- b) Subject to appropriate measures
- c) Neither
- d) I don't know

Please explain your answer and provide relevant evidence.

Ideally online service providers should be prohibited from running advertising that breaches restrictions. But we accept under current models this is likely to be highly unrealistic, especially from an international perspective.

However, ISP should as a minimum be subject to appropriate measures as they would for any other online material regarding as causing harm. They could be encouraged to include rules that if any breaches come to their attention or are reported to them, they have a responsibility to remove the offending material and issue warnings to anyone uploading content that breaches the rules using the services, to even include banning or removing that user.

20. Do you consider that the sanctions available (voluntary cooperation and civil fines in instances of repeated or severe breaches) are sufficient to apply and enforce compliance with a total online HFSS advertising restriction?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

Ideally online service providers should be prohibited from running advertising that breaches restrictions. But we accept under current models this is likely to be highly unrealistic, especially from an international perspective.

However, ISP should as a minimum be subject to appropriate measures as they would for any other online material regarding as causing harm. They could be encouraged to include rules that if any breaches come to their attention or are reported to them, they have a responsibility to remove the

Commented [TE3]: We have covered the answer to question 19 in question 18

offending material and issue warnings to anyone uploading content that breaches the rules using the services, to even include banning or removing that user.

21. Do you consider that the imposition of civil fines by the statutory regulator is sufficient to enforce compliance with the appropriate measures requirements?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

As mentioned before, it depends on how likely civil fines are to be imposed and at what level. For some, small fines, infrequently applied may not act as a deterrent and may just become a cost of business.

We strongly believe that the public shaming of those that breach the rules can be an effective deterrent for larger companies. This is meant to be the approach of the ASA but it is currently proving to be insufficiently effective because of its limited scale. There should also be a public record of offences and offenders to discredit those who repeatedly offend if this becomes an issue, but also a wider campaign to publicly highlight those that routinely break the rules online.

22. Would a total restriction on HFSS advertising online have impacts specifically for start-ups and/or SMEs?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

Small scale digital advertising may well be some SME's sole or certainly main means of advertising to consumers. The low cost of digital advertising means this is a market that SMEs can enter easily in comparison to broadcast or even print advertising. A high proportion of SME, especially in the food sector, report using social media for marketing⁴, and SMEs make up a high proportion of digital ad spend⁵. It is therefore if anything more important that these rules apply to SMEs.

It is also likely that many small businesses will not know or have the information to determine whether their products are classified as HFSS for the purposes of advertising, without incurring significant cost. They may also have a harder time understanding and complying with advertising regulations, which until now have been more focused on the broadcast space. Therefore, it is absolutely vital that the government provides support and guidance to these SMEs to enable them to meet their new obligations.

23. What, if any, advice or support could the regulator provide to help businesses, particularly start-ups and SMEs, comply with the regulatory framework?

Please explain your answer and provide relevant evidence

At a basic level, SMEs who only advertise online may need support to understand which of their products would qualify as HFSS and would therefore be subject to restrictions. This may be particularly challenging for out of home where recipes may change on a regular basis. Therefore, it will be vital for an independent regulator to provide easy-to-use calculation tools which can be used online to determine if a product classifies as HFSS under the Nutrient Profiling Model.

Similarly, it will be important to recognise that SMEs may not employ experienced advertising or marketing professionals and therefore may struggle to understand complex restrictions on online advertising, especially where it applies to social media platforms and other areas where advertising is

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<https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/ecommerceandictactivity/2018#social-networks-have-become-increasingly-popular-with-businesses>

⁵ <https://www.warc.com/newsandopinion/news/uk-smes-use-digital-advertising--but-they-need-more-help-to-understand-it/43719>

cheap and simple to instigate. Regulators should therefore be required to proactively engage SMEs with plain English guidance on the new rules, and offer online training and explainers. They should work with social media platforms and other advertising providers likely to cater to SMEs to ensure maximum reach for this support.

24. We note the challenges of applying statutory regulation to overseas persons. It is our intention to restrict the HFSS adverts seen by children in the UK. From your sector or from your perspective do you think any methods could be used to apply the restriction to non-UK online marketing communications served to children in the UK?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

It is vital that this is an approach that takes account of overseas persons. While it will be difficult to impose restrictions on those audiences, effort must be made to do so, or risk undermining the entire system and placing UK companies at a disadvantage.

As we see it, the key here will be linking any advertising to the UK seller – any food item, even if advertised from outside the UK will no doubt have to actually be sold and distributed by a local representative (or more likely the UK arm of that company). They must be made responsible for any advertising made “in their name” and from which they directly benefit. This builds on the point we make in our response to question five.

Brexit and related trade negotiations add additional complexity to this and it is not clear what impact this may have on enforcing these rules against non-UK online marketing communications or whether government will consider these matters as part of trade negotiations.

25. Do you see any particular difficulties with extending the scope to non-UK online marketing communications as well as UK communications?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

We know from recent trade negotiations and longtime policy that nations such as the US actively oppose any action that they regard as a non-tariff trade barrier⁶. Other nations will have similar ambitions and significant less restrictive regulations in place domestically. Advertisers based in these countries may feel it necessary to only follow their domestic rules. This is made harder to counter in a space such as digital advertising where actors are not restricted by physical boundaries and where individuals and entities can in effect be “from” wherever it suits them to be from. Again Brexit and trade negotiations will add to this complexity.

However, any limitations that can be put in place will have impact and the fact that a small number of non-UK operators will be able to get around or ignore regulations by advertising and selling from outside of the UK should not stop us pursuing this course. More of a concern will be ensuring that UK based companies, who sell the vast majority of food and drink items consumed in the UK, cannot simply move their advertising “off shore” in order to get around regulation. The regulations should be worded to target advertising of foods intended for the UK market.

26. Do you see any difficulties with the proposed approach in terms of enforcement against non-UK based online marketing communications as opposed to UK based ones?

Yes/No/I don't know

⁶ https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

Please explain your answer and provide relevant evidence

It is already clear that companies from outside of the UK advertise to UK consumers in a way that would break existing advertising regulations and are able to do so with impunity. The ASA seeks to work with non-UK partners to address this but with limited success. Where we have in the past highlighted poor practice for example in relation to health claims or nutrition claims, which are already protected under EU law, but if the product originates from the US, the ASA is powerless to do anything.

It may be impossible to enforce against a non-UK advertiser, but you can enforce against those that specifically benefit from the advertising in the UK. At least for the vast majority of food items this will be sufficient because such items will be sold domestically, even if they are not sourced domestically.

DRAFT

Public sector equality duty

Socio-economic impact

30. Do you think that the proposals in this consultation could impact on people from more deprived backgrounds?

Yes/No/I don't know

Please explain your answer and provide relevant evidence

NDNS evidence consistently shows that intakes of HFSS foods and diets characterized by consumption of less healthy foods are higher in more deprived individuals. Similarly, many of the non-communicable diseases for which poor diet is a risk factor (e.g., obesity, type 2 diabetes, some types of cancer) are socially patterned, with higher prevalence in those most disadvantaged. PHE has shown that fast food outlets are more prevalent in less deprived areas, and the UK has very high purchasing behaviours in response to BOGOF and similar offers; clearly price and availability are important determinants of HFSS consumption. It is therefore likely that advertisements increase consumption, and from a pragmatic perspective, industry would not use these channels to advertise their products if they were not effective (even if they are low cost, they are not no-cost). Therefore, it is our view that those who are more deprived may disproportionately benefit from such action, although any changes in NCD incidence will not occur quickly and should not be expected to do so. We also note that NCDs are multi-factorial and these restrictions should not be viewed as an end-result, but part of a jigsaw of responses within a whole systems approach.

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