

PPA response to CAP/BCAP further consultation on the implementation of new rules on ads for “less healthy” food and drink products

Introduction

The Potato Processors' Association Ltd (PPA) is the trade association for UK manufacturers of frozen and chilled chips/French fries and potato products, potato crisps, potato-based snack products and dehydrated potatoes. PPA incorporates both the Frozen and Chilled Potato Processors' Association (FCPPA) and the Snack, Nut and Crisp Manufacturers' Association (SNACMA).

Collectively PPA members are the largest customer for GB potatoes, purchasing around 1.47 million tonnes annuallyⁱ (approximately 46% of the estimated GB potato volume in 2022ⁱⁱ), and accounting for circa 94% of all potatoes processed into frozen chips and potato products, potato crisps and snacks within the UK.

Over 13,000 people are directly employed by the potato processing sector and other dependent jobs, including those in the farming sector, more than double this total.

The sector also makes a significant contribution to the country's manufacturing base. The value of the UK processed and prepared potatoes market was estimated at more than £2.7 billion (not including food service), and the sliced potato crisps market was estimated to be worth an additional £1.47 billion in 2022ⁱⁱⁱ. Furthermore, the value of the entire savoury snacks sector (which in addition to potato crisps includes cereal, nut, popcorn and meat-based snacks) was estimated to have a combined retail value of £4.05 billion in 2023^{iv}.

Please see below our response to the further CAP/BCAP consultation on the implementation of new rules on ads for 'less healthy' food (LHF) and drink products. We are grateful for the opportunity to respond to the Committee on Advertising Practice (CAP) consultation on revised guidance, but we must register our strong disagreement with the revised approach. In the absence of timely guidance, our members have been preparing for the advertising restrictions based on discussions with the government and information shared so far, including the outcome to the consultation in 2021. Any changes in interpretation at this point are likely to have catastrophic consequences, both economically, and by undermining the government's aim to improve health by disincentivising reformulation. Businesses have put in extensive effort to reformulate their products to support promotion and sales, only to now face uncertainty over whether these reformulated products can even be advertised.

We acknowledge the difficult position that the ASA and CAP have been put in and support the role of the ASA as the frontline regulator of the upcoming restrictions, but equally regret that the guidance, in its current format, does not provide the expected clarity needed at this point, when in 7 months' time the legislation comes into force. On the contrary, it raises further questions and concerns and does not accurately reflect the wording of the legislation nor the final policy intent, shared by the previous government in 2021 and repeated in the outcome of the current government's response to the consultation on the secondary legislation published in September 2024.

Therefore, we urge the ASA to continue discussions with the government and legislators, to ensure that the policy intent is correctly reflected in the legislation and final guidance.

Consultation questions

Question (i) –Do you agree that the position set out in part 3 above in relation to advertisements for an identifiable less healthy product appropriately reflects the relevant provisions of the Communications Act 2003?

If not, please state explain why, with reference to the relevant legislative provisions.

No. It has been clear throughout the consultation process, from all discussions with government bodies involved in the development of the policy (primarily the Department of Health and Social Care – DHSC), that any future advertising restrictions of LHF products should be entirely based on an ‘identifiable’ product, and to consider entire brands would be counter-intuitive and go against the intent of the policy. Therefore, we call for the legislative text be amended to eliminate any ambiguity and to explicitly confirm that brand advertising is outside the scope of the upcoming LHF advertising restrictions.

Brands have been tirelessly reformulating their products—not only to meet legislative requirements and government initiatives, such as UK-wide HFSS promotion restrictions and sugar and salt targets, but also to provide consumers with more and better choices for healthier options. Our members have embraced this challenge, developing new non-HFSS products alongside their core ranges. Through the strength of their brands and advertising, they can promote these healthier alternatives, supporting consumers in making better choices. However, if a savoury snack brand is prevented from advertising its healthier products due to an association with LHF products, it undermines the policy’s objective. As stated in the 2021 Government statement, the policy aims to:

- reduce children's exposure to HFSS advertising;
- reduce their overconsumption of HFSS products;
- **drive reformulation of products by brands.**

Firstly, the legislation will prevent brands and manufacturers from expanding their ranges to include healthier products, as they will be unable to promote them due to their association with other products. Under this approach, a brand/manufacturer would never be able to transition from being predominantly LHF/HFSS-led to a non-LHF/HFSS brand, stifling innovation and hindering growth. Secondly, brands and manufacturers have the ability to encourage consumers towards healthier choices, but this influence will be lost if the current interpretation of the legislation remains unchanged.

Despite our requests for changes to the Health and Care Bill, we have been repeatedly assured since 2021 that brand advertising would be excluded from the policy and that no amendments to the legislative text were necessary (e.g. 17th sitting – Committee Stage House of Commons Health and Care Bill and Report Stage House of Commons Health and Care Bill, both from 2021) as the Regulations would, by exclusion, only prohibit the advertising of “an identifiable less healthy food or drink product”. The **final policy intent** has been reiterated in the 2021 government response^v and the 2024 government response to the consultation on the secondary legislation^{vi}:

From 2021 response: “brand advertising (online and 9pm TV watershed), provided there are no identifiable HFSS products in the adverts, brands can continue to advertise. This is to ensure that brands are not pigeonholed as synonymous with HFSS products and have the freedom to reformulate and move towards offering healthier products”

From 2024 response: “We repeat here that brand advertising is outside of the restrictions’ scope, as previously outlined in our 2021 consultation response. The general prohibitions (as outlined in sections 321A(1), 368FA(1) and 368Z14(1) of the Communications Act 2003 can only apply to advertisements for an identifiable less healthy product. The regulations do not require an exemption or any other changes.”

In the absence of implementation guidance, our members have been preparing for the LHF advertising restrictions on that premise. It is alarming that 7 months before the implementation date, such an impactful decision has been made, which would have devastating consequences, both from financial and a health policy perspectives.

Question (ii) – Do you agree that the proposed revisions to the guidance in Annex A responding to the legal interpretation matter explained in part 3 above, and summarised in 4.2 above are clear and accurately reflect the relevant legislation?

If not, please state why, including details of any alternative approach you consider more effective.

We do not agree with many elements of the revised guidance. Please see below our comments on the specific sub-sections of section 3.5 of the proposed guidance (Annex A):

3.5 – Advertisements for “identifiable” less healthy products (pg. 15-16)

The legislation will prevent brands from expanding their ranges to include healthier products, as their ability to promote them will be restricted by product associations. This approach effectively locks brands into their historical composition, making it impossible for them to transition from being predominantly LHF/HFSS-led to non-LHF/HFSS, thereby stifling innovation and growth. Additionally, brands play a crucial role in guiding consumers toward healthier choices, but this influence will be lost if the current interpretation of the legislation remains unchanged.

3.5.1 Advertisements that explicitly include a specific product (pg. 17)

We agree that when an ad explicitly depicts or directly refers to a specific LHF product, it is in scope of the legislation. This is in line with the wording in the legislation and in accordance with the final policy intent.

3.5.2 Advertisements that feature less explicit references to a specific product (pg. 18)

Again, we have no objections with this, provided any such references are clearly related to an ‘identifiable’ LHF product, in line with the final policy intent.

3.5.3 Advertisements referencing multiple products (pg. 18)

If an advertisement for multiple products includes an identifiable LHF product, we agree it should be restricted. However, if only non-LHF products are featured, the brand’s composition or nature of the brand or manufacturer are irrelevant, and such ads should be permitted. Any restrictions should apply solely to the specific ad, not the broader brand or manufacturer. The current guidance is unclear and may unintentionally hinder the advertising of non-LHF products, contradicting the final policy’s intent to encourage product reformulation.

3.5.4 Advertisements making generic references to products (pg. 19)

Although we welcome the guidance on the use of generic imagery in ads, such as when included in serving suggestions, we strongly disagree with the guidance stating that generic imagery would fall under restrictions if 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....". As per our previous comments, the nature of the advertiser, brand or manufacturer should be irrelevant in these circumstances. What matters is whether the identifiable product is LHF or not. Brands and manufacturers are free (and encouraged) to improve the health credentials of their products, which they should be able to advertise freely (provided not LHF), in line with the final policy intent.

3.5.5 Indirect references to and suggestions of food or drink products (pg. 20)

We have no objections to this section and support the proposed guidance.

3.5.6 Fleeting references to food or drink products (pg. 20-21)

We have no objections to this section and support the proposed guidance.

3.5.7 'Brand Advertisements' that do not explicitly feature or refer to a product (pg. 21-23)

We believe this approach not only expands the scope of the legislation and creates uncertainty on how companies can ensure compliance, but also hinders brands' efforts to improve the nutritional profile of their products, impacts the ability of brands to nudge consumers towards better/healthier products through advertising and, ultimately, goes against the final policy intent. In particular:

- Subsection i) provides a definition of 'branding', which includes, amongst others, colour schemes. This is particularly concerning for snacks manufacturers where colours are used to differentiate product flavours, e.g. red for salted, blue/green for salt & vinegar. Savoury snacks are generally regarded as LHF products, but manufacturers have been working hard to reformulate products and offer consumer healthier variants (non-LHF) of well-known products, which carry the same colour as their LHF equivalent. By following this logic, savoury snacks manufacturers will no longer be able to advertise their non-LHF products due to association with the LHF products/brands, which would go against the final policy intent.
- Subsection iv) states that "...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" when determining if brand advertising falls foul of the legislation. We strongly disagree with this approach as this concept does not appear in the legislation and would ultimately have a negative impact on reformulation efforts. It also gives rise to many questions, including a) what constitutes a range? b) what threshold would be used? c) what weight would be given to the brand vs. other elements of the ad? d) how would this assessment be enforced in practice? e) what is meant by 'dominant product'? How is this measured (e.g. number of SKUs, sales volume, etc)?
- Subsection vi) outlines how advertisements will be assessed for companies offering both LHF and non-LHF products. Similarly to subsection iv), this assessment considers the proportion of LHF products manufactured/sold by a company. Therefore, the same questions apply. Moreover, considering the previously referred to restrictions, it is unclear how brands/manufacturers of both LHF and non-LHF products could advertise 'non-product-related' aspects of their businesses if by association a brand cannot advertise.

Question (iii) – Do you have any further comments on the clarity or accuracy of other parts of the guidance document not affected by the issues that are subject of question (ii)?

Please provide details including any suggestions for changes to the document.

Whilst we appreciate the difficulty in developing such guidance, based on largely subjective principles, the proposed guidance leaves companies uncertain about the extent to which the perception of the 'average consumer' will influence regulatory decisions. Having read through the entire guidance, it is unclear what actually constitutes the 'identifiability test', e.g. how the assessment will be carried out, what weight will be given to the different elements, etc, and we vehemently disagree with the reference under '2.4 Approach to assessment of advertising' to it being an 'objective test'. Therefore, it would be helpful to have a flow chart or orderly list of elements to be considered as part of the assessment, and the weighting of each element, including 'content' and 'context'. Furthermore, the guidance contains some contradictory elements which need to be reconsidered:

- 3.4.3. Online media rule: Under subsection iii) ('Payment for placement of an advertisement (in online media)'), the guidance makes reference to 'product listings', such as on retailers' websites, and instances in which these would be included in the LHF advertising restrictions if payment or other underlying commercial relationships are involved. We understand that such breaches would be in scope of the HFSS promotion restrictions regulations (already applicable in England, and soon to be applicable in Wales and potentially other parts of the UK), and not the LHF advertising restrictions. This needs to be clarified by DHSC before it is included in guidance as the lines are blurred.

- 3.5 Advertisements for “identifiable” less healthy products: Under subsection vi) (‘Relevance of advertiser intent’) the guidance states that “The ASA will not assess an advertisement based on the advertiser’s likely or expressed intent.”, however, subsection iii (Jurisdiction) of section 3.4.3 (Online media rule) states that "The ASA may also have regard to underlying contractual arrangements (...) to assess the intent behind a communication...". This appears contradictory and will need to be addressed and rectified accordingly in the final guidance.

Furthermore, the revised guidance does not seem to align with the outcome of the consultation on the application of the advertising restrictions to internet protocol television (IPTV) services published in December 2024. For instance, in the introduction (pg. 3), the bullet points outlining the restrictions do not explicitly state that Ofcom-regulated IPTV services will be subject to the 9pm watershed. Additionally, the guidance does not seem to address the status of online restrictions for unregulated services.

In sum, the guidance lacks the clarity that is needed by advertisers to confidently know their advertisements are compliant with the upcoming restrictions and, unfortunately, relies on a contentious and ambiguous interpretation on the applicability to brand advertising. Therefore, we call for the legislation to be revised to correctly and unambiguously reflect the final policy intent without delay, and for the implementation guidance to be amended accordingly (more in line with the previously consulted text) as soon as possible.

ⁱ Source: PPA own data, collected from members annually. Latest data May 2022. Covers period 1/06/21 -31/05/22.

ⁱⁱ Source: Calculation based on PPA own data (above) and Defra. Agriculture in the United Kingdom 2022. Chapter 7 Data set, which includes “Table 7.11a Potatoes; production, value, supply and use (a)” and “Table 7.11b Potatoes”. <https://www.gov.uk/government/statistical-data-sets/agriculture-in-the-united-kingdom>

ⁱⁱⁱ Source: Kantar 52 w/e 22 January 2023.

^{iv} Source: Nielsen 52 w/e 20 May 2023.

^v DHSC, 2021: Consultation outcome: Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response (last updated 24 June 2021)

^{vi} DHSC, 2024: Consultation outcome: Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: government response to consultation on secondary legislation (last updated 12 September 2024)