



## **RESPONSE TO THE UK GOVERNMENT'S CONSULTATION ON THE TOTAL RESTRICTION OF ONLINE ADVERTISING FOR PRODUCTS HIGH IN FAT, SUGAR AND SALT (HFSS)**

Alcohol Focus Scotland (AFS) is the national charity working to prevent and reduce alcohol harm. We want to see fewer people have their health damaged or lives cut short due to alcohol, fewer children and families suffering as a result of other people's drinking, and communities free from alcohol-related crime and violence. AFS welcomes the opportunity to respond to the UK Government's consultation on the total restriction of online advertising for products high in fat, sugar and salt (HFSS).

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

Yes.

AFS strongly supports a total restriction on online advertising of HFSS products in order to improve public health and particularly to protect the health of children and young people in Scotland. This is in keeping with the international evidence that whole population measures that influence the environment are most effective at reducing consumption and associated harm. (1) This includes increasing the price, reducing availability and restricting marketing of the harmful product.

Advertising is a significant driver of behaviour, and existing controls which seek to limit HFSS food advertising aimed at children do not go far enough. AFS believes that self-regulation has limited impact on reducing the amount of marketing children see, or its appeal, for both alcohol and foods high in fat, sugar and salt. Research from various countries suggests that alcohol industry self-regulatory advertising codes are subject to under-interpretation and under-enforcement.(2) The current regulations on junk food advertising to children, including the revised CAP code, have been similarly criticised, with the Food Foundation highlighting the Advertising Standards Authority's (ASA) "conservative monitoring, enforcement and adoption of the codes" as one of the many weaknesses of the system.(3) A number of other common weaknesses of the current regulatory systems for both alcohol and junk food advertising include that restrictions only apply when it can be shown that children make up at least 25% of the audience. (3)(4) In practice this means that thousands of children can be exposed to such advertising.

As indicated in our *Promoting Good Health from Childhood* report, comprehensive restrictions on alcohol marketing are urgently required in order to protect children and young people from the impact of exposure to alcohol marketing, which has been found to appeal to them, encourages their drinking, and influences their attitudes.(4) High levels of awareness of alcohol brands and marketing among children of all ages (4) (5) shows that the current system of voluntary regulation is not working. We would therefore welcome a consistent approach to ensuring effective advertising restrictions across HFSS food and alcohol.

Restrictions on marketing of both alcohol and foods high in fat, sugar and salt are required in order to realise a number of children's human rights. For example, Article 17(e) of the UN Convention on the Rights of the Child (UNCRC) encourages the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.

A total ban would provide comprehensive protection to children across multiple online channels. A 9pm watershed would likely only apply to 'paid' media as they are targeted and can be switched on and off at certain times of the day. In contrast, there is a lack of control over what time content can be viewed in relation to 'earned' and 'owned' media that are shared on social media, appear as content recommendations and appear in search engine results. It seems unlikely, therefore, that a watershed could be applied to the sharing of content by users themselves.

The online marketing environment is fast-paced and innovative with new formats and marketing techniques developing all the time. It will be challenging for the Government to effectively future proof this policy by identifying all types of marketing that may be developed in coming years. Therefore, it is vital that the regulation has a regular two-yearly review mechanism, where the scope can be adjusted to capture new marketing techniques that have since emerged.

Adults are also impacted by online advertising of unhealthy commodities and the high volume of alcohol and HFSS adverts online is likely to be particularly unhelpful when adults are making weight loss attempts or trying to cut down their alcohol use. We therefore consider that a total restriction would also bring significant benefits to adults' health.

(1) E.g. Babor, T. et al. (2010). *Alcohol: No Ordinary Commodity: Research and Public Policy, Second edition*. Oxford: Oxford University Press.

(2) Noel, J. K., Babor, T. F., & Robaina, K. (2017). Industry self-regulation of alcohol marketing: a systematic review of content and exposure research. *Addiction*, 112(S1), 28-50; Noel, J. K., & Babor, T. F. (2017). Does industry self-regulation protect young people from exposure to alcohol marketing? A review of compliance and complaint studies. *Addiction*, 112(S1), 51-56; Noel, J., Lazzarini, Z., Robaina, K., & Vendrame, A. (2017). Alcohol industry self-regulation: who is it really protecting? *Addiction*, 112(S1), 57-63.

(3) Food Foundation (2017). *UK'S Restrictions on Junk Food Advertising to Children*. London: Food Foundation

(4) Alcohol Focus Scotland (2017). *Promoting good health from childhood: reducing the impact of alcohol marketing on children in Scotland*. Glasgow: Alcohol Focus Scotland.

(5) Gordon, R et al (2010) The impact of alcohol marketing on youth drinking behaviour: a two-stage cohort study. *Alcohol and Alcoholism*, 45 (5), 470-480.

**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?**

No.

To deliver the stated objective of a total online ban, the scope needs to be wider than that proposed. The exclusions would significantly undermine the effectiveness of the restrictions.

The consultation notes the inability of dynamically served (targeted) advertising to effectively prevent the exposure of children to HFSS product advertising online. We would welcome confirmation that this means that all HFSS online advertising content is 'likely to come to the attention of UK children', and therefore comes under the proposed restrictions. Clarity is required on the definition of this term, and in turn, the scope of the restrictions. Definitions of what is and is not included within the scope of this restriction must be regularly reviewed to ensure they are up to date and comprehensive.

We particularly welcome the intention to include influencer marketing as within scope of the restrictions, as this is now a well-established and particularly effective promotional tool. Whilst reports vary on influencer marketing budgets within the UK, one 2018 study found 20 percent of UK PR and marketing professionals planned to spend between £10,000 and £100,000 on influencer marketing over the next 12 months.<sup>(4)</sup> According to YouGov/IAB, 50% of brands believe in influencer marketing's ability to drive success.<sup>(5)</sup> One in four complaints about online advertising submitted to the UK's Advertising Standards Authority (ASA) in 2019 took issue with sponsored influencer posts, equating to 4,000 complaints.<sup>(6)</sup> In addition, YouGov reported 73% of brand executives describing the influencer marketing industry as "murky".<sup>(7)</sup> We are concerned that influencer marketing could become a significant loophole in the policy where brands continue to work with influencers, but the financial relationship becomes even less transparent, 'gifted' with an expectation of exposure in return. We recommend that the legislation explicitly restricts HFSS brand owners from providing free products to online influencers and celebrities.

We would like to see the scope broadened to include digital outdoor advertising. Outdoor marketing is commonly used by food brands and according to Outsmart, is the most efficient medium for those brands in terms of return on investment; it has such a wide reach that 98% of people are exposed to some form of outdoor marketing daily (8). Current CAP rules provide extremely limited protection to children with a suggestion that HFSS advertising should not be placed within 100m of a primary school. This guideline is regularly breached (9).

Some of the exclusions need to be reconsidered or considered in more detail. We are concerned about the proposed exemptions for the following reasons:

#### Business-to-business communications

We are concerned that advertisers may use this exclusion to circumvent the restrictions, such as by 'tagging' other companies in social media posts.

#### Factual Claims

Allowing advertisers to feature factual information about their products on their own websites or other non-paid-for digital space under their control (such as their social media channels) creates a major loophole that would considerably undermine the ability of the proposed 'total ban' to achieve its desired objectives.

As stated in the consultation document, it is incredibly difficult to distinguish between factual and promotional claims. Certain factual claims may be highly influential promotional statements. Factual claims about products and services could cover anything from companies using public polling data highlighting that consumers prefer their product, to companies extensively posting content on social media and other platforms to say they've won an award for their products.

The consultation document suggests that controls would be set to ensure that social media posts “can only be found by users actively seeking them on the advertiser’s own social media page.” If ‘liking’ a social media page or channel is considered to be ‘actively seeking’ the content, this exclusion defeats the objective of the advertising ban due to the significant reach achieved through such channels and the “inherently shareable and engaging” nature of social media content. Despite changes made by social platforms to limit the reach of organic posts, brands on Facebook can still expect their posts to be seen by 5.5% of their followers, which often number in the millions.<sup>(1)</sup> For illustration, a major spirit brand’s UK Facebook page has over 18 million followers, meaning that each post could be reaching almost 1 million people.<sup>(2)</sup>

We accept the need to provide factual information on these channels but that information must be only available to those who seek it out and must not be able to be shared beyond the channels under their control.

#### Facilitating online transactions

This exclusion provides another significant loophole to the proposed restrictions. Advertising and purchasing are becoming increasingly integrated in the digital sphere. A simple ‘buy now’ button added to any social media post could comply. Companies already provide purchasing links on their social media content, such as Instagram’s ‘swipe up’ function, which leads viewers of a video or advert to external websites. E-commerce software enables integration between promotion and sale on social media <sup>(3)</sup> which reduces friction and may increase impulse purchase. We would suggest that the use of digital content to promote or sell a product will shortly become a distinction without a difference.

Algorithms on social media can create a feedback loop displaying content similar to that previously interacted with. This will likely target high purchasers of HFSS products who may be more vulnerable to its influence.

A simple circumvention in the first instance would be for companies to create additional social media pages, or rename existing pages, to suggest that the principle purchase is to sell their products. Another concern is that producers would partner with retailers, such as supermarkets and Amazon, to promote their products. This could have the opposite effect to that intended, potentially increasing sales and consumption.

Clarity is also required on whether this exemption would apply in relation to influencer marketing. Would including a link to sales platforms in their content exclude them from the restrictions?

It is therefore vital that a clear definition of ‘communications with a principal aim of facilitating an online sale’ is drawn up, aiming to minimise grey areas and providing examples of the type of advertising that would be exempt. Academic and non-governmental organisations should contribute to its development and it should be included in the legislation.

(1) Cooper, P. (27 January 2020). How the Facebook Algorithm Works in 2020 and How to Make it Work for You. *Hootsuite* accessed 15/12/20 from <https://blog.hootsuite.com/facebook-algorithm/#:~:text=As%20of%20late%202019%2C%20average,can%20expect%20even%20lower%20averages>.

(2) Jack Daniel’s. See Carruthers, N. (18 June 2019). Top 10 spirits brands on social media. *The Spirits Business* accessed 15/12/2020 from <https://www.thespiritsbusiness.com/2019/06/top-10-spirits-brands-on-social-media-4/11/>

(3) For example, <https://www.mikmak.com/>

- (4) Statista (2019). Planned influencer marketing spending in the United Kingdom (UK) 2018. *Statista*. <https://www.statista.com/statistics/869362/influencer-marketing-planned-spend-in-the-united-kingdom-uk/>
- (5) IAB.UK (August 2019). *Influencer Survey: Marketer Perception and Attitudes*. [https://www.iabuk.com/sites/default/files/user\\_attached\\_file/Influencer%20Marketing%20Marketers%20Survey\\_0.pdf](https://www.iabuk.com/sites/default/files/user_attached_file/Influencer%20Marketing%20Marketers%20Survey_0.pdf)
- (6) Stewart, R. (3 June 2020). Influencer posts dominate online complaints to UK ad watchdog. *The Drum*. Accessed 15/12/20 from <https://www.thedrum.com/news/2020/06/03/influencer-posts-dominate-online-complaints-uk-ad-watchdog>
- (7) YouGov (11 May 2020). Influencer marketing spend drops as trust in influencer marketing fluctuates. *YouGov* accessed 15/12/2020 from <https://yougov.co.uk/topics/resources/articles-reports/2020/05/11/influencer-marketing-spend-drops-trust-influencer->
- (8) Outsmart (N.D.) Why OOH works. *Outsmart* accessed 17/12/20 from <https://www.outsmart.org.uk/why-oo-h-works>
- (9) Sustainweb (21 November 2018). Time to close loopholes in ASA junk food advertising rules. *Sustain* accessed 17/12/20 from [https://www.sustainweb.org/news/nov18\\_asarulings/](https://www.sustainweb.org/news/nov18_asarulings/)

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

Yes.

As described above we are concerned that the scope and exemptions could undermine the principle of a total ban. As the online marketing environment continues to progress and innovate, Government must identify all marketing techniques, communications and platforms likely to be used in order to future-proof the current policy. AFS believes that a built-in regular (2-yearly) review mechanism should be included where scope of the restrictions can be amended to capture emerging innovative techniques that may currently be exempt.

#### If answered yes, please can you give an overview of what these difficulties are?

As described above we are concerned that the scope and exemptions could undermine the principle of a total ban. Please see our answers to questions 2 and 3.

### 4. 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

As a major portion of food and drink advertising online is delivered by organisations selling food on behalf of brand owners, it is imperative that the definition of 'advertiser' be broader than the food or drink brand owner themselves, including food delivery platforms such as Just Eat, Deliveroo and Uber Eats along with larger retailers. Numerous smaller retailers also sell branded HFSS food products as part of hampers or gifts, so all players should be captured by the definition to create a level playing field and ensure that brand owners do not displace their advertising to third party organisations.

### 5. 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.

### 6. 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?

No.

We are concerned that factual claims made on an advertiser's social media channel could still have significant reach and it is not clear if the requirement to set social media channels to private would solve this. Allowing advertisers to feature factual information about their products on their social media could create a major loophole in the restrictions, significantly undermining the ability of the proposed 'total ban' to achieve its desired objectives.

As stated in the consultation document, it is incredibly difficult to distinguish between factual and promotional claims. Factual claims about products and services could cover anything from companies using public polling data highlighting that consumers prefer their product, to companies extensively posting content on social media and other platforms to highlight their product's status as award-winning.

The consultation document suggests that controls would be set to ensure that social media posts "can only be found by users actively seeking them on the advertiser's own social media page." If 'liking' a social media page or channel is considered 'actively seeking' the content, this exclusion defeats the objective of the advertising ban due to the significant reach achieved through such channels and 'inherently shareable and engaging' nature of social media content. Despite changes made by social platforms to limit the reach of organic posts, brands on Facebook brands can still expect their posts to be seen by 5.5% of their followers.<sup>(1)</sup> For illustration, a major spirit brand's UK Facebook page has over 18 million followers, meaning that each post could be reaching almost 1 million people.<sup>(2)</sup>

As outlined in our response to question 2, the feasibility of defining 'factual' content raises concern. If Government proceeds with this exemption, it is vital that a comprehensive definition of 'factual content' is legally set and this is not left to the regulator to issue guidance or reactively judge on a case by case basis. HFSS brands may invest in producing engaging, shareable 'factual' content for their own social media and marketing techniques would become focused on encouraging users to follow them on social media to maximise their 'owned' audience. As we know, brands have no reliable way to know the age of their followers, therefore, this presents inherent challenges for protecting children from HFSS advertising.

**7. 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?**

No.

Different social media channels have different approaches to privacy settings. The sharing of content by followers of a social media page will, in some cases, enable the content to be viewed by others (friends or followers of the user) who are not followers of that page, or in other words, have not actively sought out the content.

One of the main challenges of the proposed approach is that even with private profiles, the administrator would have to rely on age information provided by the user to know whether a new member or follower is over 16. There are clear challenges associated with age restrictions, as outlined by the Government in the current consultation document.



A further concern related to this approach is the algorithm approach used by social media platforms. If a social media user follows an HFSS food profile (e.g. a fast food company), they will not only see the majority of content created by that profile, but the media platform will identify them as a user with an affinity for fast food and serve them related content. This is particularly concerning as it means that if a child has liked or engaged with HFSS related content once, they could continue to be targeted with other HFSS content.

It is positive that the restrictions recognise the potential use of indirect advertising to circumvent restrictions on the promotion of specific products. This longstanding tactic used by tobacco, HFSS food and alcohol companies highlights the need for careful drafting of the legislation to take into account contemporary marketing practices and to avoid the exploitation of any legislative loopholes. The UK Government can look to UK tobacco legislation for precedence, which restricted some indirect advertising through its brandsharing regulations.

The existing guidance from the Advertising Standards Authority (ASA) is vague and lists scenarios rather than providing an objective definition of an HFSS brand and allows for the ASA to make decisions on a 'case-by-case basis.' (1) It is unrealistic to determine the application of restrictions on a case-by-case basis, simply due to the significant number of brands that exist. Additionally, as an industry-funded regulator, the ability of the ASA to make an objective judgement on whether a brand should be defined as 'synonymous with HFSS' must be questioned. The definition of 'brands synonymous with HFSS' must be independently developed by experts, not left to the regulator.

It remains unclear if the described social media settings would prevent onwards sharing. We must ensure that the implemented controls are adequate to achieve the aim of a total online ban.

(1) Advertising Standards Authority (2017). *Identifying brand advertising that has the effect of promoting an HFSS product. Advertising Guidance*. London: Committee of Advertising Practice  
<https://www.asa.org.uk/asset/6B42B9F3-96EC-4A66-A9B50F0E21D845BF/>

## **10. 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?**

A governance mechanism to provide the necessary scrutiny of compliance to these restrictions is vital. The current system of regulatory oversight relies primarily on public complaints. With the exception of television adverts, regulatory controls apply retrospectively, after advertisements have already been shown. This can result in large numbers of children seeing inappropriate advertising before action is taken. There is also a lack of statutory powers of enforcement, meaning there is little deterrent from misapplying the codes.

Monitoring and evaluation should ideally be done proactively and transparently, with breaches published and pursued to act as a deterrent to others. The existing approach to 'enforcement' of the CAP rules by the ASA is weak and does not act as a deterrent for repeat offenders. For example, repeated engagement by the ASA with Mondelez to 'informally resolve' likely breaches, has not resulted in changes to their advertising practices. To prevent significant non-compliance, financial penalties are needed as a meaningful deterrent.

## **11. 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**

b) an existing body

In light of evidence from the regulation of alcohol marketing that voluntary and self-regulation is not sufficiently protective of children, (1) it is essential that regulation is put on a statutory footing. In the short term, OfCom is best placed to act as a backstop regulator. However, in the longer term a new independent authority is needed, reporting directly to Parliament with cross-party buy-in and no political or industry interference. This should form part of a comprehensive approach to regulation of all types of harmful marketing, including alcohol marketing.

(1) Noel, J. K., Babor, T. F., & Robaina, K. (2017). Industry self-regulation of alcohol marketing: a systematic review of content and exposure research. *Addiction*, 112, 28-50; Noel, J. K., & Babor, T. F. (2017). Does industry self-regulation protect young people from exposure to alcohol marketing? A review of compliance and complaint studies. *Addiction*, 112, 51-56; Noel, J., Lazzarini, Z., Robaina, K., & Vendrame, A. (2017). Alcohol industry self-regulation: who is it really protecting?. *Addiction*, 112, 57-63.

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

No

The evidence of harm caused to children and young people through exposure to both alcohol and HFSS food marketing, and the failure of the current regulatory regime to adequately protect children from such exposure, clearly points to the need to improve the regulatory approach. Regulation should be independent of the food and advertising industries, to ensure its effectiveness and to avoid conflicts of interest.

In relation to the marketing of food to children, the World Health Organization has recommended that governments be the key stakeholders in the development of policy and provide leadership for implementation, monitoring and evaluation whilst protecting the public interest and avoiding conflict of interest.(1) A preference for the regulatory frameworks for alcohol marketing to be supported by legislation was outlined in WHO's Global strategy to reduce the harmful effects of alcohol. A stronger legislative footing is therefore necessary. (2)

The Advertising Standards Authority is not independent of industry, creating a clear conflict of interest; it is funded by a levy on advertising, but payment of the levy is voluntary. The current system of oversight has several weaknesses, with implications for the protection of children. The reliance on public complaints limits effectiveness as the majority of the public will be unfamiliar with advertising rules or how to complain.(3) Furthermore, regulatory controls regarding compliance with the codes apply retrospectively, after advertisements have already been shown (with the exception of TV adverts). This reactive and slow regulation can result in large numbers of children seeing inappropriate advertising before action is taken. In relation to social media, the problem is even more acute, as alcohol marketing content can appear and disappear rapidly, reducing the time frame in which content can be assessed and regulated. (4) The lack of meaningful penalties or deterrents by the ASA means there is little to fear from misapplying the codes of practice.

The regulator is also out of step with public opinion. The way the codes are written leaves a lot of room for interpretation, and with regard to enforcement there appears to be stark differences of view between the ASA and the general public over what constitutes proscribed content. In a study assessing the extent to which members of the UK general public perceived television alcohol adverts to comply with the regulatory code, 75% of participants rated the adverts as breaching at least one rule.(5)



All regulatory functions, from the day-to-day regulation to enforcement, should be carried out by the statutory regulator to avoid conflict of interest and ensure effectiveness of the restrictions.

(1) World Health Organization (2010). *Set of recommendations on the marketing of foods and non-alcoholic beverages to children*. Geneva: WHO.

[https://apps.who.int/iris/bitstream/handle/10665/44416/9789241500210\\_eng.pdf;jsessionid=04473C68CA6459246C4CD780788C48F4?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/44416/9789241500210_eng.pdf;jsessionid=04473C68CA6459246C4CD780788C48F4?sequence=1)

(2) World Health Organization (2010). *Global strategy to reduce harmful use of alcohol*. Geneva: WHO.

[https://www.who.int/substance\\_abuse/activities/gsrhua/en/](https://www.who.int/substance_abuse/activities/gsrhua/en/)

(3) Alcohol Concern (2013). *Stick to the facts: Alcohol advertising regulation that balances commercial and public interest*. London: Alcohol Concern.

(4) Nicholls, J. (2012). Everyday, everywhere: alcohol marketing and social media—current trends. *Alcohol and alcoholism*, 47(4), 486-493; Atkinson, A.M., et al. (2014). *Constructing alcohol identities: The role of social networking sites in young people's drinking cultures*. Liverpool John Moores University.

(5) Searle, R., Alston, D., & French, D. P. (2014). Do UK television alcohol advertisements abide by the code of broadcast advertising rules regarding the portrayal of alcohol?. *Alcohol and alcoholism*, 49(4), 472-478.

### **23. Do you think that a total restriction on HFSS advertising online is likely to have an impact on people on the basis of their age, sex, race, religion, sexual orientation, pregnancy and maternity, disability, gender reassignment and marriage/civil partnership?**

Yes.

The United Nations Convention on the Rights of the Child came into force in the UK in 1992. The Convention is a recognition that children need special protections, and that adults and governments must work to ensure these. Restrictions on HFSS marketing will have a significant positive impact on child health.