Consultation response

CAP and BCAP consultation on the implementation of the "less healthy" food and drink product advertising restrictions

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the voice for brands

Overview

The Brands Group strongly advocates that restrictions on the advertising of less healthy food and drink products should go no further than explicit government policy.

Branding is a powerful and positive force for shoppers and consumers, competition, growth and the effective, efficient operation of markets. Brands are also assets of extreme value to companies, albeit they do not own them[1]. They support their long-term resilience, ability to adapt to changing consumer and market conditions, the efficiency with which they can innovate and grow, and their ability to compete strongly.

To deprive companies of the ability to build brands through advertising, where there is no strong public interest in doing so and is contrary to government policy, risks harmful consequences and represents over-reach. It strikes us as disproportionate, not cognisant of wider beneficial implications and potentially unlawful.

Consultation response

1 **Introduction**

The British Brands Group is a not-for-profit membership organisation of companies with a mission to ensure that the UK enjoys the optimum climate for brands. This delivers choice and value to consumers and is reliant on companies being free to innovate and compete fairly and vigorously. A list of members is available on request.

2 Brands rest in the hearts and minds of each of us[2], shaped by our lifetime experiences of specific products, services and other offers. They shape our rational and emotional responses to these offers, helping us understand them and to determine which we will buy and which avoid.

3 Brands operate at speed, being a reliable and powerful tool to help us all make informed, accurate purchasing decisions in fractions of a second. In markets where shoppers are faced with multiple choices in a sea of products competing for their attention, and where they select products themselves from shelves, fast (System 1) thinking is the predominant decision-making approach. The categories covered by this consultation – food and drink – are predominantly sold in supermarkets where shoppers tend to deploy System 1 thinking, particularly where products are familiar, regularly purchased and carry a relatively low price. Brands are therefore particularly important in this environment, informing shoppers and enabling strong competition.

4 In Annex 3 (para 3.5.7.(i)), the consultation describes “branding” as “encompassing a diverse range of content and techniques used in advertising, such as logos, livery, straplines, fonts, colour schemes, characters, audio cues and jingles”. The examples barely scratch the surface in describing how we all as individuals build brands over our lifetime. Brands are built by a wide range of factors and influences, including experiences, many of which are not under the control of companies and furthermore cannot be regulated. Advertising however is one of the tools that companies **can** control and, accordingly, is of particular value to them.[3]

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[1] Posh Spice and Persil, Jeremy Bullmore, 2001 Brands Lecture, page 2 [Link]
[2] The history and future of brand management, Mark Ritson, 2024, page 8 [Link]
[3] Ibid. Posh Spice and Persil, pages 5-6 [Link]

5 **Brands vs products**

It is clear that brands differ from products, one being ethereal, intangible, continually shifting and changing and indescribable while the other is tangible, fixed, specific and analysable. So it is with brand and product advertising. They are different, serving different purposes:

- Brand advertising focuses on building awareness, reputation and emotional connection. It supports recognition, differentiation (especially where product formulations may be comparable), builds resilience to market fluctuations, prompts loyalty and creates an environment conducive to innovation.
- Product advertising, in contrast, promotes specific features, benefits and price of identified products in order to drive immediate sales.

6 This consultation therefore raises a crucial and fundamental question. Is it the intention of government policy to restrict product advertising and its impact on immediate sales and promotions and/or brand advertising and its impact on consumer understanding, competition and the climate for innovation?

7 As recently as September 2024, government provided an answer, consistent with previous announcements:

> "We repeat here that brand advertising is outside of the restrictions' scope, as previously outlined in our 2021 consultation response"
>
> Department for Culture, Media & Sport and Department of Health & Social Care, consultation outcome on secondary legislation, 12th September 2024.

8 Brand advertising is particularly important in the building of mental availability, the extent to which a brand comes to mind when shoppers are making purchase decisions when seeking and selecting a particular type of product. Building mental availability involves significant long-term investment and, while it drives growth, it also drives many of the key performance metrics so important to businesses and their ability to invest and compete, such as sales, share, market penetration and loyalty[4]. In regulating the advertising of less healthy products therefore, a range of consumer and economic interests need to be balanced. These include public health, shoppers' ability to make fast, accurate decisions, consumer protection, innovation, the climate for investment; business efficiency and profitability and the strength of market competition.

9 **Brand trust**

While product advertising restrictions would constrain the ability to promote a new product that had a less healthy profile, restricting brand advertising would have more significant, wider, more harmful and longer lasting effects, constraining the ability for companies to evolve their brand understanding in response to changing shopper preferences and the competitive landscape. It would have a freezing effect, make the market less agile and responsive.

10 Brand advertising allows companies to communicate the key drivers of trust in terms of both their key competencies (functionality, reliability, quality, financial performance, size) and their key benevolence factors (ethical values, credibility, sincerity, caring, heritage and reputation)[5]. It strikes us as illogical to wish to constrain this function.

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[4] Brands – Falling in love again, Peter Field, 2022, page 3 [Link]

[5] Brands and Consumer Trust Study, Funder Morgan and Vlizade-Funder, 2015, page V [Link]

11 Brand trust is not a 'nice to have' but a critical strategic asset for companies as trust supports superior outcomes in terms of market and advertising efficiency[6]. It is also an important – if not the main – ingredient in the bond between the company and its consumers. At the same time, it strongly supports the ability to introduce and commercialise new innovations, whatever form these may take.

12 **Innovation**

Part of the market efficiency delivered by brand trust relates to innovation efficiency. Brand trust reduces the consumer risk of trying unknown new products and product features, as they have confidence in the company's reputation and know that it is at risk should the new innovation disappoint. That is a cost a branded company would not wish to incur, so a powerful incentive to ensure the innovation delivers.

13 Furthermore, the brand business model drives innovation, partly through the necessity to bring new buyers continually into the category, partly to build and strengthen reputation for delivery of the brand promise (at least maintaining and hopefully exceeding expectations) and partly as a response to continually improving competitive offers and technological developments.

14 A recent study tracking the innovations and innovators in UK grocery underlines the importance of brands and branding in the dynamics of the market. An analysis of new products introduced between 2019 and 2021 found that 57% of all innovations and a significant 87% of all distinctive innovations (i.e. with features completely new to the category) were brought to market by branded companies.[7]

15 Restricting brand advertising will therefore constrain the ability to build brand trust which will in turn reduce innovation efficiency. With reduced ability to innovate, companies will be less able to evolve their reputations and their product formulations, including the introduction of healthier solutions, contrary to policy objectives. Market dynamism will reduce, consumers harmed by having reduced access to more relevant, better products[8] and growth can be expected to slow.

16 **Growth**

Brands drive growth, through the dynamics of trust, better products, greater awareness, higher levels of consumer satisfaction and premiumisation. Restrictions on product advertising can be expected to affect the growth potential of less healthy products, in line with the policy goal, though restricting brand advertising in addition can be expected to have wider harmful effects on growth.

17 The study on innovation in UK grocery[9] found that innovative products tended to be sold at a premium in relation to both the category and to the parent company, whether an everyday or a distinctive innovation, whether a branded or private label product. This finding was particularly marked for distinctive innovations, where the price premium versus the category was consistently above 80%.

18 Restrictions on brand advertising and the consequent impact on innovation efficiency can only harm this source of growth, contrary to government economic policy and with no or negligible impact on public health.

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[6] Are trusted brands important? Chatterjee, S.C. & Chaudhuri, A., 2005. Marketing Management Journal, 15(1), pages 1–16
[7] How innovations drive brand growth, Europanel, 2024 [Link]
[8] The Role of Consumer Trust in the Economics of Brands, Europe Economics, 2015, pages 18-20 [Link]
[9] Ibid. How innovations drive brand growth

19 **Competition**

The draft guidance covers the regulation of branding where a product range and company or master brand are present, as well as where a company may supply both healthy and less healthy products (paragraph 3.5.7.(iv-vi)). These provisions risk distorting competition between two quite different business models that compete vigorously in the regulated categories of food and drink, namely the respective approaches of branded and retailers' private label products. One competes on innovation, quality, reputation and price, requiring long term investment and consistency in order to do so, while the other competes primarily on price.

20 Branded manufacturers are specialists, having a deep understanding of consumer needs in their categories, hence leading on innovation. Retailer private label products meanwhile tend, predominantly, to replicate their branded counterparts, with the retailer parent brand covering many more categories, including non-food and drink categories. Therefore, a branded manufacturer is much more likely to be caught by the proposed restrictions than a retailer, despite both selling products with potentially comparable characteristics and health profiles. The draft guidance is therefore discriminatory.

21 Competition between the two business models is not currently equal, favouring the retail model, and there is no case to distort competition further in favour of retailers:

- Retailers are, at the same time, essential and important trading customers and direct product competitors to branded companies, a dual role that softens competition as branded companies must sustain healthy customer relationships;
- Retailers have near perfect competitive information on all the products competing in the categories they stock. When brand owners share their new product and promotional plans, they do so to win retailer support though at the same time are unintentionally informing a direct competitor;
- Retailers decide what branded products to stock, while their own private label products have ready access to their stores. Furthermore, with their control over listing decisions, retailers are gatekeepers to shoppers, giving them strong market power over their direct, horizontal branded competitor;
- Retailers set the retail price for both their private label products and their branded product competitors in their stores, and the price difference between the two;
- Whether in physical stores or online, the retailer controls the presentation of products, including where on the shelf or webpage the products are featured, their respective prominence, any associated promotions and all associated displays. This influences the rates of sale of their own and their branded competitors' products.

22 It strikes us as disproportionate, unreasonable, unfair and discriminatory that brand advertising for one group of advertisers may be restricted over another, when the products being offered for sale are broadly comparable.

23 **Intellectual property**

Many – even most – of the elements defined as 'branding' in Annex 3, para 3.5.7.(i) (logos, livery, straplines, fonts, colour schemes, characters, audio cues and jingles) will be protected by a range of intellectual property rights. Such rights are granted by the state to ensure consumers are informed and protected, markets work well, innovation is fostered and the incentive is provided to invest in quality, range and reputation. For some of these elements, their predominant use may be in brand advertising, such as slogans and jingles.

24 Indeed, shoppers will use these elements as heuristics, being able to identify, quickly and accurately, the producer and the nature of the products carrying the identifiers.

25 As such, these identifiers are important signallers and assurers of brand trust from which companies derive significant benefits, such as competitive advantage, ability to price at a premium, strong brand equity, stakeholder loyalty and risk reduction.[10]

26 Furthermore, brands, and correspondingly brand trust, represent valuable assets for a company and strong brands increase the valuation of companies. To illustrate this, in the 1950s, the maximum value of a company's intangible assets was about 30% of its total value[11], whereas today it is typically above 60%[12].

27 Brand advertising acts to establish and strengthen these brand identifiers and heuristics. By restricting their use in relation to less healthy products, these intellectual property rights are, in practice, being rendered unusable in this context without due cause and contrary to government policy, without compensation for their value and the significant sums companies will have invested in them over many years and decades. We question the legality of this.

28 **Conclusion**

In relation to the three questions posed by the consultation, we do not consider that the provisions of part 3 as they relate to brand advertising are appropriate and reflect the legislation. Our evidence for this view are the repeated statements by government that brand advertising falls outside the scope of the restrictions relating to the advertising of "less healthy" products. The alternative approach we strongly advocate, for the reasons given above, is for brand advertising to be excluded from the restrictions in all circumstances.

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Director

[10] Ibid. The Role of Consumer Trust in the Economics of brands, pages 10-11
[11] Gerzema, J., 2009. The Brand BUBBLE. Marketing Research, 21, pages 6-11
[12] Prahalad, D., 2011. Why Trust Matters More Than Ever for Brands. Harvard Business Review, pages 14-16