Through the Looking Glass

A review of the topsy turvy world of the regulations that are supposed to (but don’t) protect children from online marketing of junk food
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By Malcolm Clark and Charlie Powell
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Children’s Food Campaign
The Children’s Food Campaign wants to improve children’s health and well-being through better food - and food teaching - in schools, and protecting children from junk food marketing. We are supported by over 150 national organisations. The Children’s Food Campaign is co-ordinated by Sustain: The alliance for better food and farming and funded by the British Heart Foundation.
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Welcome to the topsy-turvy world of marketing regulation, where the industry sets its own rules and the regulator prides itself on its mainly reactive approach. It's a world where success is defined as 75% of all non-broadcast complaints not being investigated, and “strict rules” and complaints “taken seriously” can mean anything but.

Into this arena stepped the Children's Food Campaign and other public interest organisations, with concerns about whether advertising needs more rigorous controls to protect children.

In March 2011, the remit of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the Committee of Advertising Practice Code) was extended to include online advertising, with a two year review period.

The Children's Food Campaign wanted to contribute to this two year review, so has tested how well the new system is working. In the first instance, we looked at the marketing techniques used by 100 websites targeted at children and selling products such as biscuits, cakes, confectionary, crisps and savoury snacks, flavoured drinks and cereals.

In February 2012 we climbed ‘through the looking glass’ to more fully understand the workings of the CAP Code and the Advertising Standards Authority (ASA), which apply the Code. We submitted to the ASA a ‘Super Complaint’ of 54 websites that we believed failed to protect children from unhealthy food marketing.

The ASA rejected the entire ‘Super Complaint’. So in April 2012 we submitted 27 detailed complaints against 19 websites that we believed were the worst offenders. The results were that two-thirds were rejected outright; and out of those that were investigated, only two were partially upheld and another two ‘informally resolved’.

Our experience is that the ASA system fails to protect children from online junk food marketing because it allows:

- TV adverts promoting junk food that wouldn't be allowed on children's television;
- child-friendly brand characters;
- advergames that encourage children to eat junk food;
- misleading health or nutrition claims;
- a lax approach to age restrictions.

Our experience ‘down the rabbit-hole’ of the frustrating and time-consuming complaints process also shows that the ASA:

- tends to focus on the letter, not the spirit of the Code and can be inconsistent;
- sometimes operates in secret, so their decisions are ‘informally resolved’ and not open to public scrutiny;
- seems to favour those with the money and time to challenge rulings, which is usually the industry;
- appears not to have expert knowledge or independent advice on what does or doesn’t appeal to children.

This confirms the findings of the 21st Century Gingerbread House, a joint report in 2012 by the Children’s Food Campaign and British Heart Foundation. Food companies are still exploiting the loophole which allows them to advertise junk foods to children online even though they are prevented from doing so by broadcasting regulations. This undermines the point of the broadcasting restrictions, which is to protect children’s health.
We therefore recommend that the UK Government introduces consistent and effective statutory regulations across all broadcast and non-broadcast forms of marketing to protect children under 16 from the marketing of unhealthy food and drink products, as defined by the current FSA/Ofcom nutrient profiling model.

To be effective, these regulations would need to establish a clear means of determining whether a given product or promotion is targeting or influencing children, and be monitored and enforced by a body independent of the advertising industry, such as Ofcom or Trading Standards.

Pending such regulations there should be a radical overhaul of both the ASA’s complaints procedure and the CAP Code so that the system offers at least the same level of protection for children provided by the broadcasting regulations.

We propose that the Advertising Standards Authority:

- Improves its complaints procedures to provide a level playing field between citizens and industry, including by helping individual complainants and by increasing the amount of independent expert advice sought before making a ruling.
- Toughens up its enforcement by using sanctions such as fines, and corrections that are as prominent as the misleading advert, which serve as a deterrent.
- Opens its compliance and informal resolution processes to public scrutiny.
- Regularly convenes a parents’ jury and children’s panel to judge what is and isn’t appropriate; and what appeals to and/or is targeted at children.

We also propose that the Committee of Advertising Practice:

- Strengthens rules governing non-broadcast advertising of unhealthy food to children so that they offer at least the same level of protection provided by the broadcast regulations (BCAP Code).
- Closes the loophole allowing products outlawed from children’s television to be marketed to young people online.
- Introduces the FSA/Ofcom Nutrient Profiling model for health and nutrition claims.
- Changes the composition of the Committees that write and advise on the CAP Code to increase the representation of organisations working in the public interest and which are free from commercial vested interests.
How food marketing influences children’s diets

Food is marketed using many diverse and sophisticated ways to persuade children – and their parents – to purchase particular products. Alongside the more traditional advertising forms such as TV, promotional techniques used to market food products to children include: websites and social media, advergames, in-game advertising, text messaging, sponsorship, product packaging, in-store and ‘point of sale’ promotion, and product design.

It is important that children develop healthy eating habits that they can carry with them into adulthood. But constant exposure to marketing for unhealthy snacks and foods puts these products firmly in the mainstream diet of children. In 2003, the Food Standards Agency (FSA) commissioned an independent systematic review of research on the effects of food promotion to children. This concluded that food promotion not only influences children’s food preferences, purchasing behaviour and consumption, but also acts independently of other factors that may influence diet e.g. parents’ eating habits.

In the years since the FSA systematic review, more research has confirmed not only these results, but also what parents already know: promoting junk food to children undermines efforts to help their children eat healthily. A recent UK Government report on commercialisation recognised that, while parents have the main responsibility to help their children deal with the pressures of growing up, they need help to do this. A growing number of experts are highlighting the need to protect children from junk food marketing. Recommendations endorsed by the 63rd World Health Assembly in 2010 aim to reduce the impact of food marketing on children by reducing both the exposure of children to, and the power of, marketing of unhealthy foods. In 2011, the House of Lords Behaviour Change Inquiry noted that tackling food advertising is “particularly cost effective because of its low cost and broad reach”. In its 2012 ‘Sustainable Food’ report, the House of Commons Environmental Audit Committee also recommended stricter advertising limits across all media.

And earlier this year, the Academy of Medical Royal Colleges came to similar conclusions in its action plan to improve the nation’s health.

Weak regulation of food marketing

In the Children’s Food Campaign 2008 report Protecting Children From Unhealthy Food Marketing we outlined how unhealthy food is heavily promoted to children through a variety of non-broadcast media and promotional techniques. We showed that this marketing was regulated by voluntary codes using self-regulation, funded by advertisers themselves. The codes were weak, as was any enforcement of the codes and the system lacked proper regulatory teeth.

In particular, we showed that the Committee of Advertising Practice (CAP) Code’s remit did not even include most forms of marketing on the internet and other new media - a significant loophole. We also identified that the regulatory system is not designed to protect or promote health; that the language used in the codes is vague; and rule breaches are only investigated following complaints. Our report concluded that the system for regulating non-broadcast marketing was inadequate to protect children.
Extension of the digital remit

After years of lobbying – by the Children’s Food Campaign and many other organisations – and submitting online ‘test’ complaints to see if they would be ruled on (they weren’t), CAP eventually agreed to extend its digital remit. In coming to this decision, CAP noted “that advertisers are increasingly using their own websites and other non-paid-for space online, such as social networking sites, to target their own marketing communications to UK consumers” and conceded that “the social and political concerns relating to this growing and ever-changing sector” were a factor too.10

Published in September 2010, and coming into force on 1 March 2011, the Advertising Standards Authority (ASA) agreed it would regulate advertisers’ own marketing communications on their own websites and in other non-paid-for space online under their control.

Since 1 March 2011, the CAP Code has applied to:

“Advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities.”11

CAP explained that the inclusion of the phrase ‘non-paid-for space online under their [the advertiser’s] control’ “covers, although not exclusively, advertisements and other marketing communications on advertiser-controlled pages on social networking websites. Social networking websites have a significant consumer reach, are popular with children and young people and play an increasing role in public policy debates.”12 The extended remit also included “advergames on own websites or in non-paid-for space online under the advertiser’s control [as these] amount to marketing communications that are directly connected with the supply or transfer of goods, services etc.”13

Review of the digital remit

Buried in the 2010 document is an important paragraph about the process of soliciting feedback about CAP’s new remit and a two-year review of it.

“CAP and the ASA and ASBOF [the Advertising Standards Board of Finance] are committed to an ongoing, quarterly review of the extended digital remit with the intention of carrying out a comprehensive review in quarter two, 2013 (two years after the implementation of the extended remit). This level of review is considered necessary in order to ensure that the UK’s advertising self-regulatory system continues to work in the best interest of consumers and the marketing community in the online and offline world. As part of that commitment, the three parties invite and encourage feedback from stakeholders throughout the review period about any aspect of the remit extension with a pledge to act, as appropriate, on the significant comments that they receive. Feedback should be addressed to the Secretary of CAP and sent to codepolicy@cap.org.uk or the CAP offices.”14

In March 2013 we reached the two year mark and the start of the formal CAP review.

This report is the Children’s Food Campaign’s own review of how the digital extension has been working and also serves as our submission to the CAP review. It examines how effective the ASA has been in responding to complaints about online marketing of unhealthy food to children and concludes that major improvements are needed – both to the Code and its implementation.
How companies market junk food to children online

The starting point for our review was to look at products high in fat, salt or sugar that are not allowed to be advertised during children’s television and see if they are marketed to children online. We focused on types of food and drink products that children are likely to buy themselves as snacks or at lunchtimes, or ask their parents to buy for them. These included biscuits, cakes, confectionary, crisps and savoury snacks, flavoured drinks, cereals and some types of spreads. We identified 100 websites including product sites, brand sites and company web pages, and we examined them in detail.

The resulting report, *The 21st century gingerbread house: How companies are marketing junk food to children online*, was published jointly with the British Heart Foundation. It revealed the manipulative tactics junk food manufacturers use to hook children while they play online, enticing them to eat more fatty, sugary or salty food. The report also highlighted how companies use brand characters, animations, games, competitions, promotions, downloads, ringtones, videos and social networking sites to target and appeal to children.

### In the Dock

**Committee of Advertising Practice (CAP)**
CAP writes and maintains the UK Advertising Codes (broadcast and non-broadcast), which are administered by the Advertising Standards Authority. They “offer the industry authoritative advice and guidance on how to create campaigns that comply with the rules”[15]. The committee is made up of representatives of advertisers, agencies, media owners and other industry groups.[16]

**The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)**
The CAP Code lays down rules for UK advertisers, agencies and media owners to follow. They include general rules that state, for example, that advertising must be responsible, and must not mislead or offend, and also specific rules that cover advertising to children and ads for specific sectors like food, alcohol, gambling, motoring, health and financial products.[17] CAP explains that compliance with its Code is “assessed according to the marketing communication’s probable impact when taken as a whole and in context.”[18]

**Advertising Standards Authority (ASA)**
The ASA is the UK’s self-regulator of advertising across all media and is funded by advertisers through a levy on advertising spending. It applies the Advertising Code written by CAP. Its work includes handling complaints and checking that the media take action against misleading, harmful or offensive advertisements.[19]

The ASA describes its mission as “to ensure that advertising in all media is legal, decent, honest and truthful, to the benefit of consumers, business and society”. It states that it will aim to achieve its mission “by getting better at regulating adverts in all media, and in particular by: making a success of regulating online ads; being an effective part of the response to societal issues shown to be affected by advertising; placing more emphasis on prevention rather than cure; being more efficient and in tune with consumers, business and society.”[20]

**Foods High in Fat, Salt or Sugar (HFSS)**
Any food or drink which is classified as being ‘less healthy’ – i.e. high in fat, salt or sugar, as determined through application of the nutrient profiling mechanism devised by the Food Standards Agency.[21] Ofcom regulations do not allow these products to be shown in advertising scheduled during or around children’s television programmes.
Ministerial challenge and our ‘Super Complaint’

Following publication, we wrote to the Government Minister responsible for overseeing the advertising sector, Ed Vaizey MP, Minister for Culture, Communications and Creative Industries. We expressed our concerns about the lax regulation of marketing of HFSS products to children online.

In Mr Vaizey’s reply he emphasised his confidence in the “strict rules” of the CAP Code, and the efficacy of the ASA in taking seriously any concerns about adverts that people felt broke the rules. The Minister wrote (our emphases):

“The Chief Executive of the ASA has said that the protection of children from harmful or inappropriate advertising is one of their top priorities. The non-broadcast Advertising Code, which covers online promotion, contains strict rules that prohibit food and drink ads from condoning or encouraging poor nutritional habits or an unhealthy lifestyle in children.

The ASA have stated that although complaint levels on this issue are very low, they take seriously any concerns that food adverts are irresponsible. They have said they will note the report findings and will continue to monitor the food and soft drink sector to ensure that their rules are effective.

If anyone believes an advertiser is not sticking to the rules, the ASA have encouraged them to lodge a complaint with the ASA. Of course, the Government continues to keep this area under review and recognises that there are calls for increased restrictions on HFSS food and drink advertising.”

So, given these words from Mr Vaizey, we decided to take up the Minister’s challenge: to test how strict the CAP rules are, and how seriously the ASA takes concerns about irresponsible food advertising. We wanted to be able to report back the true picture, so the Minister could judge the effectiveness of the regulatory regime for himself.

In February 2012 we submitted a ‘Super Complaint’, a package of 54 individual complaints to the Advertising Standards Authority about the online marketing of junk foods to children (see Appendix 1 for a list of websites included in our ‘Super Complaint’). Each of the company websites promoted products which were classified by the FSA/Ofcom nutrient profiling model as “high in fat, salt or sugars” and were clearly targeted at children. All the websites were taken from those analysed in our report, The 21st Century Gingerbread House.
We argued that each of these 54 websites breached section 15.11 of the CAP Code, which states that “marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle in children.” We also wanted to show that this was not an isolated problem, found on only one or two companies’ websites. Our report and ‘Super Complaint’ demonstrated that online marketing is a pervasive marketing technique used across the industry to persuade the younger generation, and their parents, to buy more junk food.

**ASA’s response to our ‘Super Complaint’**

We were dismayed that none of the complaints were investigated by the ASA, who could not find fault with any of the 54 websites and how they marketed their unhealthy products to children.

The ASA did agree with us that “many of the websites did appeal to children”, but considered that this did not constitute a breach, as it explained that companies are permitted to appeal to children under the CAP Code. The Authority cited Swizzels Matlow, Haribo, Cheesestrings and Penguin biscuits websites as being “undoubtedly child-friendly”, but went on to explain (our emphasis) that “as far as we can see, none of them contains references to irresponsible consumption nor do they encourage children to make purchases.” That last sentence seemed rather odd to us, considering that’s what marketing is for!

The ASA also claimed that it is committed to ensure that existing rules are administered “robustly, to ensure ads do not contain anything that is likely to result in a child’s physical, mental or moral harm”. However, it elaborated by saying, “we are not, however, a social engineer and it is not our role to say whether a legally available product or service is ‘good’ or ‘bad’. We are merely responsible for making sure that they are advertised within the rules.”

Finally, the ASA suggested that where we had a problem with the rules themselves, or the disparities between the broadcast and non-broadcast codes, we would need to take that up with CAP. In contrast, if we were concerned about websites which we thought might be breaching the existing rules, we should supply detailed complaints, including screenshots, to the ASA.

We found the ASA’s response deeply concerning, confirming our suspicions that:

- Children are not protected from online marketing of high fat, sugar and salt (HFSS) food and drinks.
- There is a gulf between the reasonable protection for children from broadcast marketing (mainly on TV) of HFSS food and drink and the lack of protection from non-broadcast marketing, including online.
- The ASA, despite its rhetoric, appears to have no intention of improving the level of protection for children from online marketing of HFSS food and drinks.
Chapter 2

The Complaints
CAP Code deficiencies

“Yes, that's it! Said the Hatter with a sigh, it's always tea time” 27

After the unsatisfactory response from the ASA to our ‘Super-Complaint’, the only way to proceed seemed to be to submit detailed complaints on the websites we believed were the worst offenders. So that is what we did. In April 2012 we submitted 27 complaints against 19 websites, and the complaints broadly fell into five areas:

i. Online showing of TV adverts promoting HFSS products that wouldn’t be allowed to be broadcast on children's television.

ii. Using child-friendly brand characters.

iii. The content and messages of advergames.

iv. Misleading health or nutrition claims.

v. Inconsistencies in age guidelines and a lax approach to age restrictions.

We believe these areas expose both the most serious flaws in the CAP Code on marketing unhealthy food to children, and the ASA’s weak interpretation of the Code.

Analysis of the complaints and the ASA’s responses

For each policy area we have listed the complaints submitted, the ASA’s response, the CAP Policy Team’s response, and then our own comments.

Several of the complaints – on Fanta, Twister and Nesquik – led to more complex investigations and correspondence, and these provide more detailed case studies (see Chapter 3 – Down the rabbit hole).

Out of 27 complaints submitted:

• 18 were rejected outright.

• 9 were investigated:
  › 4 investigated complaints were not upheld.
  › 2 investigated claims were informally resolved (see Chapter 3 – Down the rabbit hole), leading to amended website text on nutrition claims.
  › 2 complaints were partially upheld.
  › 1 is still awaiting final ruling (almost a year after the complaint was made), as the manufacturer objected to the initial draft ruling.

“Y es, that's it! Said the Hatter with a sigh, it's always tea time” 27
### TV adverts online

**Question to the ASA**
*Does the ASA allow companies to offer unrestricted online access by children to their TV adverts, even when these adverts would not be allowed to be shown on children's TV and yet the websites are targeted partly at children?*

<table>
<thead>
<tr>
<th>Company</th>
<th>Product</th>
<th>Website</th>
<th>Investigated</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nichols plc</td>
<td>Vimto</td>
<td><a href="http://www.vimto.co.uk">www.vimto.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Cadbury (Kraft Foods)</td>
<td>Creme Egg</td>
<td><a href="http://www.cremeegg.com">www.cremeegg.com</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Cadbury (Kraft Foods)</td>
<td>Cadbury Icecreamland</td>
<td><a href="http://www.cadburyicecreamland.com">www.cadburyicecreamland.com</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Kraft Foods</td>
<td>Oreo</td>
<td><a href="http://www.oreo.co.uk">www.oreo.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Bel Group</td>
<td>Babybel</td>
<td><a href="http://www.babybel.co.uk">www.babybel.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Leaf Italia</td>
<td>Chewits</td>
<td><a href="http://www.chewits.co.uk/adverts">www.chewits.co.uk/adverts</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Beverage Services Ltd</td>
<td>Fanta</td>
<td><a href="http://www.fanta.co.uk/en_GB/pages/landing/index.html">www.fanta.co.uk/en_GB/pages/landing/index.html</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Dunhills (Pontefract) plc</td>
<td>Chewits</td>
<td><a href="http://www.chewits.co.uk/adverts/">www.chewits.co.uk/adverts/</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
</tbody>
</table>
Complaint details
For each of these websites, child-friendly television adverts for the respective products were either directly embedded on the front page of the site, or heavily promoted, with a prominent link to the video clip. None of these adverts could have been shown on children's television.

BCAP 7.2i: Food and soft drink advertising and children - including
Note 2: “the spirit, as well as the letter, of the rules in this section applies to all advertisements that promote, directly or indirectly, a food or soft drink product”.

CAP Code 15.11: Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle.

ASA response
“We shall not be investigating your complaints about the other websites referred to and can explain the rationale when we meet [on 1 February 2013] to respond to the various policy issues raised.”

CAP response
“In 2007 CAP acknowledged concerns that tougher restrictions for TV advertising should be complemented by proportionate restraints on the promotion of food and drinks in non-broadcast media. Mindful of the ‘Principles of Good Regulation’, which require that regulation is transparent, accountable, proportionate, consistent and targeted, CAP considered that it was not proportionate to mirror the TV scheduling rules in non-broadcast given the significant differences between TV and other media, not least the absence of evidence linking non-broadcast food advertising to dietary preferences. In this respect, there is clearly a difference in likely impact between content appearing in a media that requires the user to access and content appearing unannounced during a TV schedule.”

Our comment
Government should close the loophole that allows the food industry to continue to target its television adverts to the same young audience that it is prevented from reaching with TV adverts. In Chapter 4 we provide ample evidence that non-broadcast food advertising, including online, affects dietary preferences. It is also common sense for similar rules to apply, irrespective of the media through which children view an advert.

We can see no justification for CAP’s failure to acknowledge the difference between a child simply coming across an advert via a Google or YouTube search and, by contrast, being vigorously encouraged to watch the advert on a website that is designed to appeal to them.

In addition, almost all the adverts either feature colourful characters and animations or show children happily consuming the product. This is not against the current rules, but it is clear to us that the companies are specifically targeting their marketing to increase children’s consumption of their products.
**Brand characters**

**Question to the ASA**

*Does the ASA allow child-friendly brand characters to promote unhealthy products to children; characters which are often as recognisable to and as trusted by children as licensed characters and celebrities, and which may have higher marketing spend behind their creation and promotion than their licensed counterparts?*

<table>
<thead>
<tr>
<th>Character</th>
<th>Company</th>
<th>Product</th>
<th>Website</th>
<th>Investigated</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Honey Monster</td>
<td>Honey Monster Foods Ltd</td>
<td>Sugar Puffs</td>
<td><a href="http://www.findhoneymonster.co.uk">www.findhoneymonster.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Chewie the Chewitsaurus</td>
<td>Leaf Italia</td>
<td>Chewits</td>
<td><a href="http://www.chewits.co.uk">www.chewits.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Snap! Crackle! and Pop!</td>
<td>Kellogg’s</td>
<td>Rice Krispies</td>
<td><a href="http://www.kelloggs.co.uk/whatson/ricekrispies">www.kelloggs.co.uk/whatson/ricekrispies</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Green, Brown, Red, Yellow</td>
<td>Mars</td>
<td>M&amp;M’s</td>
<td><a href="http://www.uk.mms.com">www.uk.mms.com</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Quicky</td>
<td>Nestlé</td>
<td>Nesquik</td>
<td><a href="http://www.nesquik.co.uk">www.nesquik.co.uk</a></td>
<td>Not investigated</td>
<td>No action taken</td>
</tr>
</tbody>
</table>
CAP response
“CAP created a series of rules to protect primary school and pre-school children, who are regarded as a particularly vulnerable group. Those rules ban the use of celebrities, licensed characters and promotional offers in food or drink advertisements directly targeted at them. The rule does not extend to equity brand characters.31 This mirrors Ofcom’s decision not to prohibit them under the TV restrictions, made on the basis of the available evidence and considerations of the practical impact of such a restriction.”32

Our comment
Getting healthy eating messages across will always be an uphill task when competing with highly effective marketing – such as brand characters – that are promoting unhealthy options. Given that brand characters, like the Honey Monster, are just as well recognised and trusted by children as licensed characters, such as Shrek, we believe they should be treated the same by the regulator.

Complaint details
These websites all featured well-known brand characters whose function – through their images, their personalities, their stories and adventures – is to make the product more appealing to children, especially to younger children.

These complaints were submitted under CAP Code:

• 15.11: Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle.

• 15.15: including “food advertisements that are targeted directly at pre-school or primary school children through their content must not include licensed characters or celebrities popular with children. The prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell”.

ASA response
“We shall not be investigating your complaints about the other websites referred to and can explain rationale when we meet [on 1 February 2013] to respond to the various policy issues raised.”30
Advergames

Question to the ASA
Do you allow online games targeted at children where the aim of the game is the collection of all flavours or varieties of that product; and/or the amassing of many times a child's portion size of that product?

Complaints details
These complaints were submitted under CAP Code:

• 15.14.3 Marketing communications must not encourage children to eat more than they otherwise would.

• 15.11 Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle.

1. Sugar Puffs

Complaint details
The Sugar Puffs cereal website featured the 'Munching Monster' game where the Monster had to eat as many Sugar Puffs as possible. We believe it encourages excessive consumption of the product and poor nutritional habits in children.

Company response
“Free-to-play games are a popular feature of many websites. A 30g portion of Sugar Puffs comprised about 450 individual puffs of cereal. A player would need to be well into level 3 before the Honey Monster consumed that number, which no player had yet come close to achieving. A cup of coffee was shown on the game entry page, which helped position the game as more adult-orientated.”

ASA response
“The nature of the game, which featured the well-known Honey Monster character, made it likely to be of particular appeal to children. We noted that the game had a competitive element, with a number of levels and a leader board displayed at the end of each game, which we considered could give an incentive to players to play the game repeatedly. However, we considered that the consumption of Sugar Puffs had been represented in an abstract way. We therefore considered that players, whether adults or children, were unlikely to associate the Honey Monster’s consumption of the product with their own and we concluded that the advergame had not condoned or encouraged excessive consumption of the product nor poor nutritional habits in children.”
2. Haribo

Complaint details
The website featured a game entitled “Haribo Super Mix Challenge” encouraging players to collect sweets by navigating a cartoon bear through obstacles. There was a counter displaying the number of “Smooth, Squidgy and Soft” sweets collected. A total of the sweets collected was displayed at the end of the game.

Company response
“The objective of the Super Mix Challenge was to inform consumers about the mix of different textures within a bag of Haribo Super Mix. This was done by challenging the user to collect a number of sweets from each of the three texture types. The intention was not to encourage excessive consumption of sweets. The game was developed to be non-competitive, in order to discourage users from returning to it a number of times. There was no winning score, leader board or levels to the game therefore, once the game was completed, there was no incentive to play it again.”

ASA response
“The game was relatively simple and straightforward and therefore likely to appeal to young children. Because the ‘consumption’ of sweets was presented in an abstract manner, we considered it unlikely that children playing the game would be encouraged to replicate the character’s consumption as shown in the game. Furthermore the absence of leader boards or levels to the game presented little encouragement to play it again. We therefore considered that the game neither condoned nor encouraged excessive consumption of the product or poor nutritional habits in children.”

3. Chewits

Complaint details
The ‘Taste Adventure’ game featured on the website implored “Chewie’s hungry! Can you help?” and players had to locate all flavours of Chewit sweets hidden in British landmarks. The game gave a misleading impression of the health benefits of the product, because it suggested to children that eating Chewits was equivalent to eating fruit. The game also encouraged and rewarded images of excessive consumption of the sweets.

Company response
“There was no reward for completing the game, other than the sense of satisfaction of having done so. The game did not show a human consuming the product. The maximum number of Chewits that could be collected was nine and there were ten Chewits in a packet. Should a child do this, they would still only have consumed 17% of their GDA of sugar, less than government guidance would suggest was consumed as snacks in the course of a day.”
ASA response
“The game was clearly set in a fictitious setting, and therefore the consumption of Chewits was represented in an abstract way. Only one sweet of each flavour was shown being consumed by Chewie, and the total number of Chewits that could be collected within the game was less than the number of Chewits found within a standard packet. Information about how to enjoy the product responsibly was available on the website, along with a link to the “Be treatwise” website. We concluded that the advergame did not condone or encourage excessive consumption of the product.”

4. Swizzles Matlow
Complaint details
The website featured a virtual town called “Swizzels Town”, with simple cartoonish design, colours and animations, aimed at pre-school and primary age children. There were a number of basic games featured on the website, promoting the range of sweets the company sold.

Company response
“Swizzels Town contained information about the company and products and was in no way intended to encourage poor nutritional habits or an unhealthy lifestyle in children or excessive consumption of confectionery. The website was designed to reflect the retro brand appeal of individual sweet brands. Many of the products were family orientated, many consumers were adults and the website targeted a family audience.”

ASA response
“The majority of the content in Swizzels Town did not encourage either an increase in consumption of sweets or any other poor nutritional habits. Although sweets understandably featured on the website, especially in the videos and product information content, there was no encouragement in these areas for children to eat more sweets. The interactive games in Swizzels Town included one where the user collected falling sweets into a large bag. The sweets were mostly Rainbow Drops though some larger sweets also featured. However, we considered that the game was not particularly long and therefore the total number of sweets accumulated was not particularly high or likely to encourage or condone poor nutritional habits or an unhealthy lifestyle in children.”

“In the Cola Capers game on the cola bottle section of Swizzels Town the game’s character could collect almost one hundred cola bottle sweets. If the character was caught by the “angry parents” they would lose a life. We considered that the game, which was relatively long in duration, was aimed at young children and condoned eating a large number of sweets whilst hiding this fact from one’s parents. We therefore concluded that the Cola Capers game irresponsibly encouraged poor nutritional habits and an unhealthy lifestyle in children. Because of this section only, we concluded that the ad had breached the Code on this point.”
Our comment (on all these cases)
The ASA appear to be very tolerant of “encouraging excessive consumption of the product and poor nutritional habits in children”. Only the most blatant examples were deemed to be excessive, with the benefit of the doubt often being given to the company’s interpretation. The CAP, when publishing an updated version of its help note on advergames earlier this year[41], did not mention this issue, despite these rulings clarifying what – at least according to the ASA – is deemed to be “excessive” and what isn’t.

Interestingly, Chewits’ response to the ASA ruling was to add large text to the game to say “Chewits are a treat, please enjoy responsibly”. As this was only added the day before the ASA ruling went public, and only to this particular game, it is reasonable to see this as a public relations exercise. Chewits – and other confectionery manufacturers – have not put similar warnings on all their pages aimed at children.

Although CAP Code section 2.1 states that marketing communications must be “obviously identifiable as such”, CAP seems less willing to follow the example of American regulation, where advergames now have to be clearly labelled as marketing communications. While not solving the problem this is at least a small step towards reducing the risk of children mistaking a game’s true purpose.
Health Claims

**Question to the ASA**

*Does the ASA allow companies to make nutritional or health claims which give a misleading impression of the nutritional or health benefit of the product as a whole, or don’t refer to those elements which might have a negative impact on health?*

<table>
<thead>
<tr>
<th>Company</th>
<th>Product</th>
<th>Website</th>
<th>Investigated</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Honey Monster Ltd</td>
<td>Sugar Puffs</td>
<td><a href="http://www.honeymonster.co.uk">www.honeymonster.co.uk</a></td>
<td>Investigated</td>
<td>Informal resolution</td>
</tr>
<tr>
<td>Ferrero UK Ltd</td>
<td>Nutella</td>
<td><a href="http://www.wakeuptonutella.co.uk">www.wakeuptonutella.co.uk</a></td>
<td>Not Investigated</td>
<td>No action taken</td>
</tr>
<tr>
<td>Honey Monster Foods Ltd</td>
<td>Harvest Chewee</td>
<td><a href="http://www.harvestchewee.co.uk">www.harvestchewee.co.uk</a></td>
<td>Investigated</td>
<td>Informal resolution</td>
</tr>
<tr>
<td>Unilever</td>
<td>Walls/Twister</td>
<td><a href="http://www.icecreammakesushappy.co.uk/kids-Homepage.aspx">www.icecreammakesushappy.co.uk/kids-Homepage.aspx</a></td>
<td>Investigated</td>
<td>Not Upheld</td>
</tr>
<tr>
<td>Nesquik</td>
<td>Chocolate Milkshake</td>
<td><a href="http://www.nesquik.co.uk">www.nesquik.co.uk</a></td>
<td>Investigated</td>
<td>Ongoing</td>
</tr>
</tbody>
</table>

**Complaint**

These complaints were submitted under CAP Code:

- 15.17 Marketing communications must not give a misleading impression of the nutritional or health benefit of the product as a whole. Including the accompanying note: “ambiguous wording that could be understood as a nutritional claim should be avoided.”

- 15.11 Marketing communications must not condone or encourage poor nutritional habits or an unhealthy lifestyle.

1. Sugar Puffs

**Complaint details**

The Sugar Puffs website referred to their product as “wholesome goodness”, “packed with natural goodness” and “honey goodness”, yet the product is high in sugar.

**Company response**

When contacted by the ASA about this complaint, the company agreed to remove the challenged claims about natural/wholesome goodness.

As this complaint was informally resolved, the ASA considers that it does not have to give any details about our complaint, nor what action the company took, on its website.
2. Nutella

Complaint details
The site makes a misleading claim about the nutritional benefit of this product. The “balanced breakfast” claim was the subject of a complaint upheld in 2008, but is still repeated here. The nutrition claims which present this product in a healthy light are misleading as the product is high in sugar.

ASA response
“The advert made clear the ‘balanced breakfast’ referred to eating one slice of Nutella on toast along with a bowl of unsweetened cereal or a glass of juice. It did not imply that Nutella on toast in itself was a balanced breakfast and the nutrition table made the sugar content clear. The website as a whole was unlikely to be seen as exaggerating the nutritional benefit of the product or as condoning poor nutritional habits among children.”

3. Harvest Chewee

Complaint details
The advert states that the product is “found in all good lunchboxes”; and encourages parents to “put something good in their lunchbox today”. However, Chewee bars are high in sugar and the nutritional value of the product is misleadingly exaggerated thereby condoning poor nutritional habits among children.

Company response
When contacted by the ASA about this complaint, the company agreed to remove the challenged claims. The misleading statements were amended to “found in tasty lunch boxes” and “put something tasty in their lunchbox today”.

As it was informally resolved, the ASA considers that it does not have to give any details about our complaint, nor what action the company took, on its website.
4. Twister

Complaint details
The text and images of the Twister and mini-Twister product pages gave a misleading impression of the product’s nutritional value and of its fruit content.

Company response
The Twister web pages did not contain images of fruit, nutritional or health statements, apart from standard nutritional information tables. Unilever adhered to Schedule 8 of the Food Labelling Regulations 1996. The use of “fruit ice” complied with its European trade organisation’s Code of Practice for Edible Ices. “Love Fruit” referred to Solero, which contains 30-47% fruit ingredients and the ‘Love fruit’ icon was a link and therefore not part of the page. 43

ASA response
The two Twister pages did not make any nutritional or health claims, and the imagery and text of the ads were appropriate to the products and did not overemphasise the fruit content of the ice creams. The complaint was not upheld. 44

5. Nesquik

Complaint details
In a section on its website marked ‘health and goodness’ and next to an image of Nesquik, the company referred to “wholesome milky goodness for kids every day” and “enjoy a glass of tasty goodness”. The product is also described as “part of a healthy breakfast”, yet the product is high in sugar, contributing 26% of the maximum daily allowance of sugar. The statements also implied that Nesquik is not a treat but for everyday consumption. In addition, Nesquik did not specifically state in its “good to know” and “good to remember” nutritional information that the product is high in sugar. These all gave a misleading impression of the nutritional content of Nesquik, and encouraged poor nutritional habits in children, by suggesting that Nesquik is suitable for daily consumption.

Company and ASA response
As of April 2013, the ASA had still not yet reached its final decision on the complaint. Some of the initial delay in adjudication had been, we were told, due to work pressures in the ASA’s casework team. Another reason was that the ASA wanted to examine the case under EC Regulation 1924/2006 on authorised health claims, which only fully came into force in December 2012.

In January 2013 the ASA gave a draft ruling on the case. Nestlé has challenged this draft ruling, and behind-the-scenes discussions between them and the ASA are presumed to be continuing.
Our comment (on all these cases)
It came as no surprise to us that nutrition and health claims - the one area which is governed by legislation and not voluntary codes - was where we had most success in holding companies to account. The EU regulations on approved health and nutrition claims, while not perfect, at least make it easier for the ASA to judge what is and isn't allowed. Laws, rather than voluntary codes, also limit the 'wiggle room' for companies trying to get around the loose wording of the CAP Code.

The willingness of companies to quickly change their website wording when it was pointed out to them they were in breach of the EU regulations is instructive. It suggested they knew they had been caught red-handed and wanted to avoid the embarrassment of a full ASA investigation and adjudication. Given this, it seems odd that the ASA is not more active in enforcing the rules in this area.
Age restrictions

Question to the ASA
Does the ASA allow companies to give a misleading impression they are acting responsibly by putting their own age guidelines on their websites (e.g. 12 and over), rather than using the accepted CAP code definition for children as “persons below the age of 16”?

Company response
“We take our responsibility for marketing our brands appropriately very seriously. We have a Marketing Code that governs all our promotional activity and states that we only promote our products to people aged 12 and over as this is the age at which we believe that people can make informed choices about sensible snack consumption. We apply our Marketing Code to all our advertising and communications and are committed to providing you and your family with suitable and transparent information about our products.”

CAP response
“Assessments on whether age recommendations are presented in a misleading way are each judged on a case-by-case basis. Although the Code adopts a general definition of a child as someone who is under the age of 16, the rules on children and food create further distinction for children of primary school age. The Code directs more stringent protections at this group, while accepting that marketing may be directed at older children (12-15 year olds) provided it is done responsibly and in accordance with all the other provisions of the code.”

Company Product Website Investigated Result
Mars Maltesers www.maltesers.com Not Investigated No action taken
Mars Mars bars www.marsbar.co.uk Not Investigated No action taken

Complaint details
Websites in the Mars Inc. group are claiming to market responsibly, yet the age restriction mechanism is easily overridden and applies to a different age range than given in the CAP Code in Sections 5 and 15.
Our comment
Whether or not it is challenging to provide technological solutions for effective age restrictions, the one adopted by Mars is weak and can be easily overridden by any child who simply types in a made up date of birth. It was disappointing not to see this picked up by the ASA.

While Mars’ policy on marketing to children is seemingly stricter than many others, a responsible company would tighten up the age gateway (see Spotlight on Kellogg’s below). The statement that its products are “an indulgent treat that can be enjoyed occasionally” should feature more prominently, rather than being confined to the nutrition page of their site.

Spotlight on Kellogg’s
In autumn 2011 we were concerned that a newly launched advergame on the Krave Facebook page – featuring a cereal piece dressed as a superhero – appealed to children and might encourage poor nutritional habits.

However, when we submitted a complaint to the ASA, Kellogg’s responded by explaining how the target audience of the product was young adults and the marketing activity – through late night TV and university giveaways, and online – reflected that. They stated that they took steps to prevent children joining in by placing the game in Facebook, an environment with a built-in age gate. Users needed to be logged into their Facebook account to play the game, and be over 16 according to the age they had given in their Facebook profile.

While Facebook is not fool-proof on age restrictions, with many under 13’s managing to set up a profile, the steps Kellogg’s seemed to have taken in its marketing strategy for this specific product show that a more responsible approach is possible.

The problem is that the company doesn’t apply the same practices across its range. Despite Advertising Association (the industry’s trade association) claims that Kellogg’s has removed gaming from its websites and has no child-targeted adverts or ‘tell a friend’ functions on its websites, these are all present on Kellogg’s Rice Krispies multi-grain website. In addition, through its sponsorship of Netmums, Kellogg’s is heavily promoting some of its most sugary products to the parents of young children.
The complaints process
Down the rabbit hole

“Why, sometimes I’ve believed as many as six impossible things before breakfast.” 49

Compiling and submitting each complaint, then following up and replying to ASA correspondence was a time-consuming and frustrating – albeit instructive – process. Such a forensic approach has, as far as we know, not been done before. Over the full year of the complaints process (which, at time of writing, is still not complete – see Episode 4 below) it became clear that we were repeatedly experiencing similar problems in the ASA complaints system itself, and these were unrelated to the CAP Code. The problems we faced included:

i. Judgements that focused on the letter, not the spirit of the Code.
ii. Secrecy about some decisions.
iii. Lack of money and time to challenge the ASA, compared to industry.
iv. Inconsistent rulings.
v. An apparent lack of expert knowledge or independent advice on what does or doesn't appeal to children.

Come with us down the complaints rabbit hole, as we take you through some of the bizarre twists and turns of the complaints process which we experienced.

Episode 1
The Fanta Bounce

Our complaint – as well as the advert being available to view on a child-friendly website 50, was that the Fanta television advert ‘Bounce’ 51 had specific messaging and imagery that encouraged excessive and/or frequent consumption of an unhealthy product. It also directly appealed to children's desire to be self-confident and popular. 52

The final shots of the cartoon-style advert appear to show the main character (a boy) entering the scene with a new bottle of Fanta for himself, and the simultaneous replenishing of everyone else’s bottles. Since each 330ml bottle contains 26% GDA of sugar, we felt this was encouraging children to have more than half their recommended daily maximum sugar intake in drinks between meals. The strapline at the end of the advert, “More Fanta”, could also be viewed as an explicit encouragement for children to drink more of the product. The description of the video on the webpage, “what happens when his Fanta is gone? Hmmm”, implies this too. The advert also suggests that drinking Fanta will you give you the ‘bounce’ effect, and that effect will make you confident, fun and popular.
The ASA, in their initial draft response, agreed with us and upheld the first part of the complaint, that the advert did indeed encourage excessive consumption.\(^5\) However, Beverage Services (the company behind the marketing of Fanta in the UK) then submitted “some high resolution screenshots” which they said shed additional light on whether the bottles were refilled and this led the ASA to change their mind and not uphold any part of the complaint.\(^4\)

The barriers to a fair process we faced from the ASA were:

- **An inconsistent approach**
  Despite acknowledging concern in its initial draft ruling over the “More Fanta, less serious” slogan, the ASA failed to mention it at all in its final ruling.\(^5\)

- **Ignoring the impact of first impressions**
  Whether or not the video shows the bottles being refilled, the fact that the advert gives the impression that that might be the case should be the decisive factor. Even the ASA believed that the bottles were being refilled in its original judgement and thus consumption of two bottles was being encouraged. We assume that the ASA carefully watched the video many more times, after the company’s response, in order to reach a different conclusion. It seems illogical for the ASA to expect children watching the advert for the first time to come to a different conclusion then they did the first time.

- **David vs Goliath**
  Unlike Fanta, we did not have the specialist software to accurately analyse the advert frame-by-frame and send in that evidence to the ASA. Charitable organisations like ourselves, let alone individual parents, do not have the equipment or the time to react to the industry’s well-funded response.

- **Secrecy**
  As the complainant, we are not allowed to see the evidence presented in response to our complaint. So we have not seen the frame-by-frame high resolution images provided by Beverage Services and have not been able to judge it for ourselves. Nor has it been possible for any external independent digital video assessor to see this new and apparently critical evidence. The Authority’s own Standards of Service state that its “procedures are transparent and open to scrutiny”, but they are clearly not.\(^5\)

What made this case all the more head-scratching for us was that the ASA conceded that the website was targeting under-16s, counter to Fanta’s claims. Indeed, one paragraph of the adjudication reads like a complete vindication of the findings from our 21st Century Gingerbread House\(^5\) report on what makes a child-friendly website:

> “We considered the bright colourful theme of the website, its free downloadable desktop backgrounds and screensavers for computers and mobile phones, a free downloadable ringtone of the upbeat music used in the ad, and a free downloadable game for mobile phones, which could also be played on Facebook, would all have particular appeal to young teenagers. ... We noted that it was likely that teenagers under-16 would personally identify with and aspire to be like the characters [featured in the ad].”\(^5\)
Episode 2
Round the Twist(er)

Our complaint was about the Twister webpage where the Twister / mini-Twister product information was next to a “love fruit” side banner, which showed images of fruit. The impression given was that the “love fruit banner” related to Twister, even though the ice lollies had minimal fruit content. Unilever, the makers of Twister, tried to claim that the two parts of the webpage were completely separate. However, this was completely incorrect: the banner changed to promote the fruit, chocolate or milk content of the product, depending on which of the different ice cream and lollies from their range you selected on the homepage.

In their original draft ruling, the ASA accepted Unilever’s explanation at face value, without seemingly doing any research on the website themselves. We had to push for the complaint to be re-investigated, this time pointing out how the website functioned.

Just as infuriating was the way that the ASA handled the second part of our complaint, about fruit images on the Twister and mini-Twister web pages. There was a little confusion about which specific images and parts of the page we were complaining about. Rather than just seek and accept our clarification, the ASA initially warned us that we would have to start the process from the beginning again and submit an entirely separate complaint. We had to make a series of phone calls and emails until eventually the intended images were investigated.

The ASA’s apparent inability or unwillingness to examine anything beyond the specific wording and hyperlinks of a complaint, is something we repeatedly encountered.
Episode 3

Doritos’ superheroes

Our complaint about the Doritos website concerned its prominent super-hero cartoon strip.61 The ASA dismissed the complaint in February 2012, saying that the website was “targeted at and likely to appeal to adults rather than children”. 62 We repeatedly asked for the reasoning and evidence behind this categorisation, given the subject matter and style of the cartoon strip. Parents of pre-school and primary age children we showed the website to said that it would be likely to appeal to their kids.

The eventual response from the ASA was that the assessment was taken “of the website content as a whole”, which they found to be aimed at over-16s.63 The ASA said this ruling was in keeping with the CAP Code stating that “compliance is assessed according to the communication's probable impact when taken as a whole and in context”.64

However, beyond competition entry terms and conditions and the suitability of prizes, how does the ASA decide on what is – and isn’t – targeted at children and who decides? The ASA do not seem to use panels of children or parents to inform their decisions on a regular basis, or test what is and isn’t appealing to particular age groups. General surveys of attitudes are not the same as hands-on interaction with actual websites and marketing techniques.

Episode 4

Nesquik’s bunny bites back

At the time of writing, the ASA adjudication of our complaint was still in draft form and being challenged by Nestlé. The ASA’s complaints procedure prevents anyone from revealing the full details of the case until the adjudication is published. All we can say at this stage is that this seems to be another ‘David and Goliath’ case. Nestlé appears to be using its legal and marketing might so that it can continue to make health and nutrition claims about a sugary product that is marketed at younger children. As with the Fanta case above, we are not allowed to see any of the additional information that is passing between the ASA and Nestlé, so we are unable to challenge it.
In its 2008 ruling, the ASA was sufficiently concerned that consumers might be confused between Nestlé’s ‘3-a-day’ wholegrain claim and the government’s recommendation to eat ‘5-a-day’ of fruit and vegetables, that it concluded Nestlé’s claim was misleading and shouldn’t be repeated in its current form.68 At the same time, the ASA also ruled that basing a nutrition claim on guidance from the United States Department of Agriculture, as Nestlé had done, rather than EU regulations and official advice, was not acceptable. Yet fast forward four years, and the ASA had changed its mind on both counts, without any explanation.

Our complaint also highlighted, once again, the inconsistency between different media. The ASA would only investigate the wording on the Battle of the Breakfasts website itself, as we couldn’t point to a specific Code breach in the wording or imagery of the television spots, poster sites or print adverts. Yet the entire Battle of the Breakfasts advertising campaign – including on television and in print – was focused on encouraging people to check out the nutritional information contained on the www.battleofthebreakfasts.co.uk website.

In March 2012, we submitted a complaint to the ASA about misleading nutritional claims on Nestlé’s high profile Battle of the Breakfasts website. Part of our complaint related to the claim that “experts recommend that we eat at least three portions of whole grain a day”, which the ASA had already previously rejected as misleading in a similar complaint that it upheld in 2008. What happened next exposed more flaws in the ASA’s compliance process, as well the inconsistent way the CAP Code is applied.

Beyond acknowledging its concern and passing the complaint to its ‘Compliance Team’ to follow up, we heard nothing back from the ASA and could see no action taken. One reason for this lack of communication is that, to quote the ASA, “the compliance team doesn’t report to complainants or publish the details of its work”64. This secrecy is compounded by the way the Authority prefers to work through informal, behind-closed-doors conversations with manufacturers and advertisers, rather than formal public investigations. Eventually, the only way we could get information was by going public ourselves, and issuing a press release.66 Not only is this not satisfactory, it is not an option readily available for an individual parent or concerned citizen.

Nestlé apparently gave a private “assurance that they will work with CAP, and that any changes will be applied across all their advertising” 67. This may have been acceptable to the ASA, but did provide any opportunity for public scrutiny of the wording on the Battle of the Breakfasts website. Moreover, in focusing on the amount of whole grain in Nestlé’s children’s cereals, the ASA failed to address the much higher than average levels of sugar and salt in those cereals.

In Episode 5, we took Nestlé to task for misleading claims about the nutritional value of its cereals and the Battle of the Breakfasts website. Yet the ASA’s reaction, back then and now, shows just how cookie-cutter its regulatory process is.
Chapter 4

Why is it going wrong?
Times have changed but the ASA and the CAP Code have not

"My dear, here we must run as fast as we can, just to stay in place. And if you wish to go anywhere you must run twice as fast as that.”

One week may be a long time in politics, but two years is almost a lifetime in terms of technology. The pace of change is relentless so what may have been considered appropriate in March 2011, when the ASA’s online remit extension came into force, may well now be out of date. Moreover, the thinking behind the extension and the CAP Code rules date back several years earlier – a pre-historic time as far as smart phones, tablets and young people’s media habits are concerned.

The medium has changed

Television has lost its unrivalled primacy at the heart of children’s media activity, with online activity fast catching up. Indeed, 12-15 year olds now spend as much time on the internet as watching television. Using a home computer is almost universal amongst children 8 years old and above, prevalent amongst 5-7 year olds, and even becoming much more commonplace amongst 3-4 year olds.

Mobile phone ownership amongst children has rocketed in recent years. Almost one in ten of 5-7 year olds, just under half of 8-11 year olds and nearly ninety percent of 12-15 year olds now own a mobile phone. These statistics date from 2011, so the proportions are likely to be even higher. The rise of smartphones, with already one in eight children aged 8-11 owning one, makes online access even easier and more attractive.

How we use it has changed

Children's use of home computers had originally centred around school homework and off-line games. But the advent of broadband connections and the range of devices that can link to the web have radically changed this pattern.

• Among 5-7 year olds, games are the most commonly mentioned internet activity, followed closely by researching the web for school work and using avatar sites.

• A third of 8-11 year olds now watch or download music or videos online, and almost half regularly surf the web (as distinct from doing research for school).

• Over three-quarters of 12-15 year olds regularly use social networking sites.

This means that the children’s exposure to commercial content and marketing messages has increased dramatically over the last few years. The trends towards using smartphones and tablets as ‘second screen’ accompaniments to television also has implications for whether existing regulations are sufficient to reflect how children view, share and interact with that commercial content, on- and off-line.

Despite advertisers’ claims to the contrary, age seems no barrier to using social networking sites. A London School of Economics study found that 38% of 9-12 year-old European children had active profiles on sites that had a minimum age restriction of 13 years. Twitter has become an increasingly popular site with 12-15 year olds, and even a small number of 8-11 year olds now have Twitter profiles.
Although still a developing area, there is a growing body of academic evidence about the impact of digital advertising on children. A recent review of research on advergames, commissioned by the Family and Childcare Trust (formerly the Family and Parenting Institute), looked at more than sixty studies in twelve different countries. Most of these studies found that the brain processes advergames differently from traditional advertising. The report concluded that advergames can change children’s behaviour without them being consciously aware of it. This raises significant ethical questions, and offers a challenge to the CAP Code’s rule that “adverts must be obviously identifiable as such”.

The regulator has barely changed

Now more than ever, parents could use a strong helping hand in dealing with the online world and protecting their children from commercial interests. Yet, the ASA seems to be struggling to get to grips with online society and fill this role, apparently always several steps behind the changing technology. Moreover, they seem reluctant to acknowledge that children may see online marketing differently than adults, and thus need extra protection. Even the Prime Minister, following the Bailey Review into the commercialisation of childhood, has asked the ASA whether more should be done to highlight the commercial intent of advergames to young people and parents. However, despite the efforts of the Children’s Food Campaign, the Family and Childcare Trust and others, little seems to have been done.
Widespread concerns about the ASA

“Curiouser and curiouser”

The Children’s Food Campaign is far from alone in having concerns about the effectiveness of the ASA. The following case studies, covering the self-regulation of advertising for baby milks, alcohol and slimming products, provide a summary of just three examples. They show that independent organisations working to promote the health of babies, children and young people and other vulnerable members of the public are also worried about how the ASA operates.

These case studies include criticisms about:

- selective and inconsistent application and interpretation of advertising codes;
- weak monitoring and retrospective assessments;
- lack of transparency;
- and the absence of effective sanctions.

In each case the conclusion is the same: that the ASA is failing in its stated mission to ensure that advertising in all media is “to the benefit of consumers”, and that it will be “an effective part of the response to societal issues shown to be affected by advertising” and it will “place more emphasis on prevention rather than cure”.

Breastmilk substitutes
ASA fails to protect babies and their families

The ASA has ruled repeatedly that the public has been misled by claims made in baby milk advertising, but with no fines and no corrections, the companies are not deterred. Many complaints are not investigated or not upheld, even when the regulations referenced in the Advertising Code are clearly being broken. The ASA’s own claim to ensure advertising is ‘legal’ is itself misleading.

Mike Brady, Campaigns Co-ordinator, Baby Milk Action

Baby Milk Action (BMA) is a not-for-profit organisation which aims to save infant lives and to end the avoidable suffering caused by inappropriate infant feeding. It monitors the baby food industry’s compliance with internationally agreed minimum standards, specifically the International Code of Marketing of Breastmilk Substitutes and subsequent, relevant Resolutions of the World Health Assembly. These measures are minimum standards applying to all countries and aim to protect the right of mothers to accurate, independent information on infant feeding, whether they are breastfeeding or using breastmilk substitutes.
Alarmingly, BMA reports that the ASA ignores the ban on promoting infant formula brand names, even when advertisements link to a website which promotes infant formula as part of the company’s full range of products. Furthermore, BMA notes that the Authority will not investigate complaints about advertising designed to influence health workers (such as nurses and health visitors), even if the adverts concerned use claims similar to those that have already been judged to be misleading in marketing to the public. The ASA puts the onus on editors of professional journals to evaluate advertising.

Baby Milk Action welcomes the fact that the ASA has upheld some complaints brought against misleading advertising. However, it states that even in the most high profile cases where the Authority adjudication shows that parents have been misled, invariably the only sanction is for formula manufacturers to be told that the offending advert “must not appear again in its current form”. BMA is disappointed that in such cases no correction is required and no fines are levied, and that publications that accepted the adverts do not even have to report the ruling. To make things worse, the advertisers generally do not apologise, but typically state disappointment that the ruling has gone against them.

BMA has asked the UK Government to enforce existing laws and to act on the repeated calls from the UN Committee on the Rights of the Child to turn the World Health Assembly marketing requirements into legislation. So far, this has not happened.

The group is particularly critical of the ASA for failing to consider whether or not adverts comply with official Guidance Notes supporting current UK legislation. As a result, it says that in practice the Authority rejects or refuses to investigate complaints for adverts that:

- idealise formula;
- inappropriately promote bottle feeding;
- use brand names to promote a range of formula products.
The Advertising Standards Code (CAP Code) describes the principle for alcohol advertising underpinning its rules by stating that “marketing communications for alcoholic drinks should not be targeted at people under 18 and should not imply, condone or encourage immoderate, irresponsible or anti-social drinking”. It also clearly states that “the spirit as well as the letter of the rule applies” (our emphasis).93

However, in response to concerns that advertising for leading alcohol brands regularly breaches advertising codes, including the rules which prohibit advertising appealing to under-18s, in 2011 Alcohol Concern established the Youth Alcohol Advertising Council (YAAC). This group reviews alcohol advertising from a young person’s perspective to ensure that it complies with both the spirit and the letter of the existing rules.

The YAAC submits complaints to the ASA when it sees breaches of the advertising codes, providing a commentary on the Authority’s adjudications in its regular reports.94 These criticise the regulator for not applying the spirit of the rules and dismissing complaints for adverts that:

- portray young people endorsing alcoholic drinks and containing material likely to appeal to under-18s;
- encourage irresponsible drinking;
- imply that drinking alcohol facilitates or enhances social success and that social occasions are dependent on alcohol;
- associate alcoholic drinks with friendship and loyalty;
- infer that alcohol enhances confidence and performance.

The Institute of Alcohol Studies (IAS) describes teen binge drinking in the UK as both “serious and chronic”,90 and the Government’s own Alcohol Strategy acknowledges the link between alcohol advertising and consumption of alcohol by the under-18s.91 The IAS also reports that evidence shows how even young children are aware of and tend to remember alcohol adverts.92

Tom Smith, Policy Programme Manager, Alcohol Concern

Children and young people should not be relied upon to monitor and moderate the advertising of multi-million pound companies.

Alcoholic drinks
ASA fails to apply the spirit of its Code

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Tom Smith, Policy Programme Manager, Alcohol Concern

Children and young people should not be relied upon to monitor and moderate the advertising of multi-million pound companies.
The Council also criticises the ASA for:

- weak monitoring of ‘below the line’ marketing, through websites and social media, that appeals to audiences under-18;
- not responding to the volume of alcohol marketing communications;
- its voluntary status;
- the retrospective nature of its work (with many thousands of people often seeing offending adverts before any action is taken).

In the few cases where the ASA has upheld a YAAC complaint, removing the content has been the only sanction. The risk of negative publicity is cited as a key driver of compliance, but this is clearly an inadequate deterrent.

The YAAC argues that repeated non-compliance of the rules for alcohol advertising shows the need for more robust regulation to prevent advertisers from creating content that appeals to youth audiences and glamorising drinking amongst under-18s. It calls for more protection from alcohol advertising by full and consistent application of the current rules across traditional and digital media.

Weight loss miracles
ASA fails to curb false hope

Self regulation doesn’t work if it fails to protect consumers and allows misleading and deceptive claims to be made.

Dr Tim Lobstein, Director of Policy and Programmes, The International Association for the Study of Obesity

Diet and slimming pills, patches, liquids, teas, appetite suppressants, fat burners, metabolism boosters, fat and carbohydrate blockers. These are just some of the categories under which thousands of products with ludicrous weight loss claims are marketed and sold to unsuspecting, and often vulnerable, members of the public.

As long ago as 1996, the National Food Alliance (which later became Sustain) published a survey of slimming advertising which found that 88% of advertisements for slimming products or services breached the ASA’s advertising codes. The slimming industry is reported as causing the Authority “great concern” following its own 1998 survey which found that more than half of the sector’s adverts were unacceptable. In 2002, Sustain publicly criticised the ASA for not considering complaints against promotional content appearing on company websites, even when consumers are directed to those sites in print adverts. It took the ASA another nine years before extending its remit to include misleading website content.
Sustain continues to highlight the ineffectiveness of ASA self-regulation, and the need for:

- pre-vetting of all advertisements for weight loss products and services;
- more effective sanctions such as fines for advertisers and publishers, an obligation on advertisers to publish at their expense, equally prominent correction notices, and legal action taken against repeat offenders;
- an annual review of slimming advertising to assess progress with compliance.

As we showed in Chapter 2, the ASA Compliance Team often “informally resolves” complaints behind closed doors which prevents some of the worst examples of misleading marketing from being publicly exposed. This is not acceptable for a body which is supposed to protect the public.

It wasn’t until 2005 that the ASA eventually conducted and published another survey of slimming adverts in magazines and newspapers, finding a compliance rate with the CAP Code that was still less than 50%. The Authority concluded that it “was concerned at the high breach rate and will continue to monitor the slimming sector to ensure an improvement in the compliance rate”.

In a letter to Sustain in July 2011, ASA Chief Executive Guy Parker claimed, “We do take very seriously the problems in this area of advertising and our plan is to carry out a slimming survey later in the year”. But eight years on from its last Compliance Report, no information about ASA monitoring of weight loss advertising has been published.

This is very worrying, not least because in recent years – and contrary to the ASA assurance of compliance improvement – the situation appears to have become a lot worse. There are now dozens of UK-based companies that specialise in the sale of weight loss aids via the internet or by unsolicited email, most of which seem to be highly dubious.

The CAP Code contains rules “designed to ensure that advertisements for weight control and slimming products and services receive the necessary high level of scrutiny”. But in practice, lack of monitoring and enforcement by the ASA means that unsubstantiated and untruthful statements seem almost routine. A cursory glance reveals products that kill appetite, burn fat, guarantee unrealistic weight loss and a host of other equally misleading claims. The weight loss industry continues to develop new products at exorbitant prices, with marketing that often cites research which either does not exist, or which has never been published. This was also the finding of a July 2010 survey of slimming aids by the BBC which concluded, “there is little or no published medical evidence to support weight loss claims”.

The results of a survey of slimming advertising

A National Food Alliance Publication
Chapter 6

Conclusions and recommendations

“You would have to be half mad to dream me up.”

Conclusions

The Advertising Standards Authority claims to be “the UK’s independent regulator of advertising across all media” and its work purports to “include acting on complaints and proactively checking the media to take action against misleading, harmful or offensive advertisements”. This report shows these claims do not withstand public scrutiny.

Despite the ASA’s pretence that it is a completely separate entity from CAP, they are based in the same building and they share staff who have overlapping roles with each organisation. The ASA is wholly funded from levies on UK advertisers and so the public could be forgiven for concluding that the ASA might be unwilling to ‘bite the hand that feeds it’. The Authority states that two thirds of its 13-member Council (“the jury that decides whether advertisements have breached the Advertising Codes”) are independent of the advertising or media sectors. However, the advertising code, against which the ASA Council members assess complaints, is written and owned entirely by industry organisations comprising the Committee of Advertising Practice (CAP). Whatever its make up, the rules by which the ASA ‘jury’ works have been carefully crafted not to upset industry interests.

Indeed, the ASA told us when we met that their whole modus operandi was to sort out problems behind closed doors first. They admitted that, given their regulatory status, they needed to work closely with those they judge, in order to achieve their aims.

In industry after industry – from MPs’ expenses, to phone-hacking and press conduct, to banking and financial services – self-regulation has proven to be a failed model. More of the same is not what we need to protect children’s health or give parents more help to make healthy choices for their family.

In previous reports we have noted how the CAP has stacked the odds in industry’s favour by creating a voluntary non-broadcast advertising code (the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing or CAP Code) that:

- uses vague language that is open to interpretation;
- fails to address the volume of marketing of unhealthy food to children;
- does not distinguish between healthy and unhealthy food and provides no incentives to promote healthy food to children;
- provides inconsistent levels of protection for children of different ages.
Our concerns, and those of many other organisations working in the public interest, are not confined to the rules in the CAP Code, but also extend to the process by which the ASA administers its self-regulatory model. We have shown in this and other reports that the ASA:

- only investigates rule breaches following complaints, putting the onus on members of the public and small organisations, rather than on the major industries generating the advertising;
- will not examine any aspect of a potentially misleading advert which is not specifically mentioned in a complaint;
- often does not enforce both the letter and spirit of the advertising codes;
- is often secretive in how it deals with complaints, allowing more access to the ASA for the industry than for complainants;
- can be inconsistent in its adjudications;
- undertakes very limited monitoring so, unless individuals or organisations complain, people are unwittingly exposed to misleading advertising that is never corrected;
- does little to bring the expertise of children and their parents into their deliberations;
- appears to have no interest in taking action to protect children from the rising volume of non-broadcast marketing of unhealthy food via websites and a growing range of other online and social media.

Confirming the findings of our 21st Century Gingerbread House report, we have once again found that food companies are exploiting online the loopholes that allow them to advertise fatty, sugary and salty foods to children even though they are prevented from doing so by the broadcast regulations. This is despite increasing evidence that online marketing can have as much, if not greater, impact on children than television advertising.

Although there is still much room for improvement, The UK Code of Broadcast Advertising (BCAP Code) has specific and unambiguous rules which offer better protection for children from unhealthy food advertising. The BCAP Code prohibits the advertising of “less healthy” food and drinks during and around children’s television programming, but these rules are not matched by the vague rules in the CAP Code. We found CAP dismissive of any attempts to close these loopholes and the ASA lacking the will to take on these issues.

Even since filing our complaints, the world of technology has moved on. Increasingly, companies are shifting their marketing from websites to Facebook, other social media or mobile apps to attract and engage with their target audience. Given our experiences – of the ASA’s lack of digital expertise, their lax treatment of advergames and prolonged adjudications – it seems likely that the ASA and the CAP Code now lag even further behind technological developments. The growing number of reports of children running up huge bills through in-game and in-app purchases are symptomatic of this problem. Now more than ever, parents need a helping hand so that they can understand and limit the marketing messages their children are exposed to online. The ASA has proved itself unwilling and unable to fulfill this role.
Recommendations

This report clearly shows how the current system of self-regulation is failing. We therefore make the following recommendations:

We call upon the UK Government to introduce consistent and effective statutory regulations across all broadcast and non-broadcast forms of marketing to protect children under 16 from the marketing of unhealthy food and drink products, as defined by the current FSA/Ofcom nutrient profiling model.113

Any new rules must close the loophole allowing products outlawed from children’s television to be marketed to young people online.

To be effective, such regulations would need to:

• Define unhealthy food as any food categorised as “less healthy” by the FSA/Ofcom Nutrient Profiling model.

• Establish a clear means of determining whether a given product or promotion is targeting or influencing children.114

• Be monitored and enforced by a body independent of the advertising industry, such as Ofcom or Trading Standards.

In the absence of new and protective statutory regulations, the Advertising Standards Authority and the Committee of Advertising Practice have a lot to do to protect the public it claims to serve.
We propose that the Advertising Standards Authority:

- Improves its complaints procedures to provide a level playing field between citizens and industry, including by helping individual complainants and by increasing the amount of independent expert advice sought before making a ruling.

- Toughens up its enforcement by using sanctions such as fines, and corrections that are as prominent as the misleading advert, which serve as a deterrent.

- Opens its compliance and informal resolution processes to public scrutiny.

- Regularly convenes a parents’ jury and children’s panel to judge what is and isn’t appropriate; and what appeals to and/or is targeted at children.

We also propose that the Committee of Advertising Practice:

- Strengthens rules governing non-broadcast advertising of unhealthy food to children so that they offer at least the same level of protection provided by the broadcast regulations (BCAP Code).

- Closes the loophole allowing products outlawed from children’s television to be marketed to young people online.

- Introduces the FSA/Ofcom Nutrient Profiling model for health and nutrition claims.

- Changes the composition of the Committees that write and advise on the CAP Code to increase the representation of organisations working in the public interest and which are free from commercial vested interests.
List of websites included in Children's Food Campaign ‘Super Complaint’ to the Advertising Standards Authority on 9 February 2012

*NB there is no significance to the order of the products / websites, except for our own research classification purposes.*

<table>
<thead>
<tr>
<th>Product Name</th>
<th>Website</th>
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References

2. Lewis Carroll (1865), Alice’s Adventures in Wonderland
12. Ibid, p8
13. Ibid, p6
18. Committee of Advertising Practice, About the ASA. www.asa.org.uk/About-ASA.aspx

22. Children’s Food Campaign (2011), The 21stcentury gingerbread house - how companies are marketing junk food to children online Available: www.sustainweb.org/publications/?id=200
23. Letter from Ed Vaizey MP, Department of Culture, Media and Sport, to the British Heart Foundation and the Children’s Food Campaign, 20 December 2011
24. Letter from the Advertising Standards Authority to the Children’s Food Campaign, 23 February 2012
25. Ibid
27. Lewis Carroll (1865), Alice’s Adventures in Wonderland
28. Letter from the Advertising Standards Authority letter to the Children’s Food Campaign, 10 May 2012.
29. Letter from the Committee on Advertising Practice to the Children’s Food Campaign, 10 July 2012
30. Letter from the Advertising Standards Authority letter to the Children’s Food Campaign, 10 May 2012.
31. The CAP Code defines equity brand characters as “those characters that have been created by the advertiser and have no separate identity outside their associated product or brand”. This contrasts with licensed characters, like Disney cartoon characters, that “are borrowed equities and have no historical association with the product”. Cited in CAP Help Note: food and drink product advertisements and children. Available: www.cap.org.uk/-/media/Files/CAP/Help%20notes%20new/food_ads_children.ashx
32. Letter from the Committee on Advertising Practice to the Children’s Food Campaign, 10 July 2012
34. ASA adjudication on Dunhills (Pontefract) plc (22 August 2012), Available: www.asa.org.uk/Rulings/Adjudications/2012/8/Dunhills-(Pontefract)-plc/SHP_ADJ_196051.aspx
35. Ibid
39. Ibid
40. Ibid
42. Letter from the Advertising Standards Authority to the Children’s Food Campaign, 13 June 2012

44. Ibid


46. Letter from the Committee on Advertising Practice to the Children's Food Campaign, 10 July 2012


49. Lewis Carroll (1865), Alice's Adventures in Wonderland


51. Fanta Bounce TV advert, hosted on the Fanta UK website. Available at: www.fanta.co.uk/en_GB/pages/landing/videos.html

52. CFC complained under section 15.11 and 15.16.1 of the CAP Code. The latter states that "Marketing communications must neither try to sell to children by directly appealing to emotions such as pity, fear or self-confidence nor suggest that having the advertised product somehow confers superiority; for example, making a child more confident, clever, popular or successful"

53. Letter from the Advertising Standards Authority to the Children's Food Campaign, 16 July 2012


55. Ibid

56. In addition to stating that their procedures are transparent and open to scrutiny, the ASA's Procedures and Standards of Service also state that it is committed to "Being open about our procedures and our decision making, and accountable for our performance", see: www.asa.org.uk/About-ASA/Our-mission.aspx

57. Children's Food Campaign (2011), The 21stcentury gingerbread house - how companies are marketing junk food to children online Available: www.sustainweb.org/publications/?id=200


60. Ibid

61. Animated comic strip was displayed on Doritos website www.doritosandmax.com/comic1.html [link no longer active]. But images from the comic and the associated marketing campaign can be viewed at The Mill agency website: www.themill.com/work/doritos-amp-pepsi-superpowerful-duo.aspx
83. Conservative Party website, Families, Children and Young People www.conservatives.com/Policy/Where_we_stand/Family.aspx
84. Lewis Carroll (1865), Alice’s Adventures in Wonderland
87. The ASA states its mission as, “to ensure that advertising in all media is legal, decent, honest and truthful, to the benefit of consumers, business and society”, see: www.asa.org.uk/About-ASA/Our-mission.aspx
94. For more information about the Youth Advertising Alcohol Council and links to its reports, see: www.alcoholconcern.org.uk/projects/youth-policy/yaac
95. For example, in June 2012, the ASA upheld YAAC’s complaints against Aston Manor Brewery Company Ltd’s online advertising of Frosty Jack’s cider, the second best selling take home cider brand in the UK. YAAC report that the adverts that appeared on the brand’s YouTube channel (one of which had been viewed over 360,000 times) have since been removed, as has the website. The cider producer, which enjoyed sales growth of 40% in 2011 (at the time of the offending communication), faced no other sanction. See the ASA’s ruling at: www.asa.org.uk/Rulings/Adjudications/2012/6/Aston-Manor-Brewery-Company-Ltd/SHP_ADJ_188705.aspx
103. Lewis Carroll (1865), Alice’s Adventures in Wonderland
104. Committee of Advertising Practice, About the ASA. www.asa.org.uk/About-ASA.aspx
105. For example, according to the ASA and the CAP websites, Shahriar Coupal, the ASA’s Director of Advertising Policy and Practice, also serves as the CAP Secretary
107. Advertising Standards Authority, About the ASA – our team, the ASA Council www.asa.org.uk/About-ASA/Our-team/ASA-Council.aspx
108. These include the Advertising Association, the Incorporated Society of British Advertisers, the Institute of Practitioners in Advertising and the Internet Advertising Bureau, see: www.cap.org.uk/About-CAP/Who-we-are/Our-committees.aspx for full list.
109. Meeting between the Children’s Food Campaign, the British Heart Foundation, CAP and ASA on 1 February 2013.
111. Children’s Food Campaign (2011), The 21st century gingerbread house - how companies are marketing junk food to children online. Available: www.sustainweb.org/publications/?id=200
112. The Children’s Food Campaign calls for the BCAP to include a 9pm watershed for unhealthy food advertising on TV to ensure that current restrictions are extended to include television programmes most watched by children.
113. For information about the FSA/Ofcom nutrient profiling model, see: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_123494
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Through the Looking Glass

A review of the topsy turvy world of the regulations that are supposed to (but don’t) protect children from online marketing of junk food

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By Malcolm Clark and Charlie Powell
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Sustain: The alliance for better food and farming, advocates food and agriculture policies and practices that enhance the health and welfare of people and animals, improve the living and working environment, enrich society and culture, and promote equity. It represents around 100 national public interest organisations working at international, national, regional and local level.

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