

**UK Government consultation on Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: consultation on secondary legislation**

**Response from Obesity Action Scotland  
Closing date: 31 March 2023**

This response is supported and endorsed by the Royal College of Physicians and Surgeons of Glasgow.

**Question 1 – Do you agree or disagree that regulation 3 makes it clear how businesses and regulators can determine if a food or drink product is in the scope of the advertising restrictions?**

- **Agree, it is clear**

The definitions provided are clear. It is clear that a product is 'less healthy food and drink', and therefore within the scope of the restrictions, if it falls within one of the categories defined in the Schedule (narrow set within the Calorie and Sugar Reduction Programmes, and the Soft Drinks Industry Levy (SDIL)); scores 4 or more (if not a drink) and 1 or more (if a drink) according to the nutrient profile model (NPM); and if the product is sold for consumption at home or elsewhere.

We are pleased the government will issue further guidance to complement the regulations and will again be in line with guidance set out in support of promotion and placement restrictions.

**Question 2 – Do you agree or disagree that regulation 3 clearly describes standards for determining the nutrient profile model score for a product, including accessing the technical guidance document?**

- **Agree, it is clear**

The Nutrient Profiling Technical Guidance provides clear guidance on how to generate a nutrient profile score, using the Nutrient Profile Model (NPM) to score products, and is an evidence-based tool that is already well understood and easily used in practice to define products that can be advertised to children and where products can be located in retail environments.

The Nutrient Profile Model (NPM) used to classify food and drinks as HFSS is an established and evidence-based tool which is currently widely used and well understood by the food industry. Originally developed in 2004/5 by the Food Standards Agency, it uses a scoring system to balance the contribution made by 'beneficial' components/nutrients of food and drink to a child's overall diet alongside the negative contributions from nutrients where children's intakes are higher than recommended. A food or drink product is given a score which equates to a 'healthier' or 'less healthy' status.

As the NPM was originally devised as a mechanism by which to identify food and drink products which are suitable to be advertised to children, we feel it continues to be an effective and evidence-based tool to extend the restrictions to all television and online adverts viewed/consumed by children. Using the full NPM is also the simplest process for industry and regulators.

The 04/05 NPM is already accepted and used by the food and drink industry for advertising purposes across all 4 UK nations, without issue. From an implementation perspective, it makes sense to use an established tool.

The recent case of an unsuccessful legal challenge by Kellogg's<sup>1</sup> against the Department for Health and Social Care determined the NPM to be an effective model/tool and importantly set a precedent for the NPM to apply to food and drink product regulations and to the categories set out in the Schedule, as defined in the Food (Promotions and Placement) (England) Regulations 2021. The court ruling stated "... the role of the NPM in this context is merely to distinguish those breakfast cereals which are HFSS from those which are not. As is quite apparent, it is a tool to differentiate products according to the nutritional composition, rather than to identify how they're eaten or to assess them, or their impact on this basis"<sup>2</sup>. This clearly demonstrates the effectiveness of the NPM in determining a product's nutritional composition and therefore if it complies with the regulations.

The responsibility for ensuring products shown in advertising content should be with the brand owner. The restrictions should apply to all HFSS food and drink shown in the advertising. The restrictions should also apply to delivery services who deliver foods on behalf of other companies (such as Deliveroo and Just Eat). If they feature an item of food in their advertising, they must be able to demonstrate its NPM score.

We note the NPM underwent a further review in 2018 with the recommendations to bring the tool in line with latest dietary advice (particularly relating to daily upper limits of free sugars consumption) published in a consultation to stakeholders. The updated NPM is yet to be published.

It is important that a review process/mechanism is built into the regulations, to ensure they can be formally reviewed and revised on a regular basis and definitions are in line with latest scientific evidence.

**Question 3 – Do you agree or disagree that the text in the Schedule clearly and accurately describes which products fall into each category?**

- **Agree, it is clear**

The Schedule is clear – it clearly describes what products are included and which are excluded. However, some clarity is needed with regards to specific product types:

- Children and toddler snacks, purees and drinks
- On-the-go breakfast drinks
- Processed fruit snacks

Where there is uncertainty or where it is unclear whether a product is subject to the regulations, the relevant business(es) should consult with appropriate enforcement authorities for confirmation to determine whether specific products are within or out with the scope of the regulations. Sufficient resource should be made available for this to ensure it can be undertaken in a timely manner.

It is welcome that there are no exemptions for seasonal products/temporary foods, or any other general exemptions. Evidence shows, including from the Transport for London HFSS advertising restrictions<sup>3</sup>, that to be effective regulations should be as comprehensive as possible, and any further exemptions are confusing, difficult to justify, and do not provide a level playing field/parity across the sector.

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<sup>1</sup> <https://foodfoundation.org.uk/news/our-reaction-kelloggs-losing-its-court-case-over-high-sugar-cereal-rules>

<sup>2</sup> <https://www.judiciary.uk/wp-content/uploads/2022/07/Kellogg-v-SSHSC-judgment-040722.pdf>

<sup>3</sup> Yau, A et al (2022) *Changes in household food and drink purchases following restrictions on the advertisement of high fat, salt, and sugar products across the Transport for London network: A controlled interrupted time series analysis*. PLOS Medicine; <https://doi.org/10.1371/journal.pmed.1003915>

Additionally, we note that whilst the definitions provided are clear, they are not comprehensive. With the narrow focus on a limited set of categories with the SDIL, Sugar and Calorie Reduction categories that are the biggest contributors to children's sugar and calorie intakes, a substantial number of HFSS products are omitted which currently sit under the sugar, calories and salt reformulation programmes. The categories identified in the programmes are based on robust evidence from the National Diet and Nutrition Survey. Additionally, there may be other products that are considered unhealthy due to their high levels of processing, and which should not be advertised to children.

We can accept the proposal to apply the NPM to food and drink categories included in the Office of Health Improvement and Disparities soft drinks, sugar and calorie reduction programmes to be an initial pragmatic approach which will restrict the less healthy products that contribute the most sugar and calories to children's diets in the first instance.

If the Government chooses to go ahead with this approach, they should commit to reviewing this programme after a maximum of three years with a view to extending it to cover all products classed as HFSS. Products are continually adapted and developed over time, and so the regulations need to keep pace with this. Whilst it is clear at present which products fall into each category, the regulations cannot and should not be static. It is important that the regulations include a mechanism for the scope of restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

Whilst it is clear that the regulations will only apply to 'identifiable product' advertising, and not to 'brand' advertising in general, this is significant loophole that will be exploited by companies who do not want to adhere to the spirit, if not the letter, of the regulations. We will comment on this in response to question 16.

**Question 4 – Do you agree or disagree that the text in regulation 3 makes it clear all categories apply to both retail and out-of-home drink products?**

- **Agree, it is clear**

Regulation 3 makes it clear all categories in the schedule apply to both retail and out of home food and drink products that are 'less healthy as defined by the NPM'.

We strongly support the Government's proposals to introduce legislation that covers less healthy food sold both in retail and out-of-home (OOH) settings. The OOH sector is a significant source of calories in diets in the Scottish population. Data from Food Standards Scotland shows that in 2021, 96% of people in Scotland visited the OOH sector at least once, which equates to an average of 2.9 OOH trips per person per week<sup>4</sup>. Discretionary HFSS products are commonplace in the OOH sector, and the sector accounts for a quarter (25%) of all calories consumed<sup>5</sup>. Among the top ten categories of food sold out of home are regular carbonated drinks, confectionary, and biscuits and cakes. The value of the OOH market/sector in Scotland in 2021 was £3.6 billion, with an average of 152 trips in 2021<sup>4</sup>. Therefore, including the OOH sector accurately reflects the prominence of the sector in food system/shopping environment in Scotland, and is essential for creating a healthier food environment for everyone. It is essential there is a level-playing field between the retail and OOH sectors, and including both retail and OOH sectors in the scope of the regulations helps to deliver this.

Furthermore, some OOH businesses already provide calorie information on their menus and so they would be required to have adequate knowledge of ingredients in the products they sell to be able to calculate calories, and could therefore calculate the NPM score of these products. Therefore, it is

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<sup>4</sup> Food Standards Scotland (2022) The Out of Home Environment in Scotland 2021 <https://www.foodstandards.gov.scot/publications-and-research/publications/out-of-home-scotland-2021>

<sup>5</sup> <https://www.foodstandards.gov.scot/publications-and-research/nutrition-research/the-out-of-home-environment#:~:text=The%20food%20and%20drink%20we,of%20the%20calories%20we%20consume>.

reasonable to expect them to be aware and be able to work out if they would be required to comply with the regulations. We therefore agree with the definitions outlined to include ‘consumption at home or elsewhere’, as this more accurately reflects the structure of Scotland/UK shopping environment and is a move in the right direction in shaping a healthier food environment for everyone.

It is welcome that the regulations will apply to businesses selling takeaway food through third party apps and websites. The takeaway market in Scotland has seen strong growth in recent years, which was further accelerated by the pandemic, and in 2021 was used by 83.7% of consumers. In 2021, more than a third (35%) of all OOH trips were takeaway trips. Food technology, in particular the use of third-party apps and websites, has driven this growth in the OOH sector and continues to grow<sup>4</sup>. Takeaway dishes are also more likely to be unhealthy, with research finding that takeaways were highlighted for excessive portion sizes, energy content, macronutrients and salt<sup>6</sup>. This is supported by the latest OOH sales data in Scotland from Food Standards Scotland which shows that the most commonly purchased meals OOH in 2021 were burgers, chicken meals, Chinese and pizza<sup>4</sup>.

**Question 5 – Do you agree or disagree that the definition in regulation 4 accurately and clearly describes what businesses will be classified as ‘food and drink SMEs’?**

- Agree, it is clear

It is clear what businesses will be classified as ‘food and drink SMEs’. We recognise that smaller businesses may find it more burdensome to implement.

However, whilst it is clear what businesses will be classified as ‘food and drink SMEs’, we do not believe the regulations go far enough. It is disappointing that the regulations are not going to be applied to SMEs. SMEs make up a significant proportion of OOH businesses in Scotland, and account for a large proportion of OOH visits. Data from the Food Hygiene Register in Scotland for 2019, shows that there are 41,297 food businesses registered in Scotland<sup>7</sup>. Another source of data is the Scottish Government Businesses in Scotland report and this data reports that in 2019, there were 19,465 accommodation and food service businesses registered in Scotland. Of these, 19,300 (equivalent to just over 99% of these businesses) were considered to be micro, small and medium sized, employing no more than 249 staff. The former figure includes both retail and OOH premises<sup>8</sup>. Additionally, data from the Office for National Statistics, reported by the Scottish Parliament Information Centre, shows that in 2018 there was an equivalent to 65 takeaways per 100,000 of the population in Scotland, highlighting the significant reach of these types of businesses<sup>9</sup>. These figures demonstrate the significant reach and prevalence of SMEs in the retail and OOH sectors in Scotland. In our response to the Scottish Government’s consultation on introducing mandatory calorie labelling in the OOH sector, we called for businesses of all sizes, including SMEs to be covered by the regulations, to reflect the prominence of SMEs in the OOH sector in Scotland<sup>10</sup>. We therefore do not agree that the regulations go far enough and would like to see SMEs included.

**Question 6 – Do you agree or disagree that the definition in regulation 4 accurately and clearly describes how do define employees of a business?**

- Agree, it is clear

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<sup>6</sup> Jaworowska A, et al. (2014) Nutritional composition of takeaway food in the UK, Nutrition & Food Science

<sup>7</sup> Figure taken from Scottish Government June 2022 consultation paper on Mandatory Calorie Labelling in the Out of Home (OOH) Sector <https://consult.gov.scot/population-health/mandatory-calorie-labelling/>

<sup>8</sup> Scottish Government (2019) Businesses in Scotland 2019

<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2019/11/businesses-in-scotland-2019/documents/businesses-in-scotland-2019-pdf/businesses-in-scotland-2019-pdf/govscot%3Adocument/Businesses%2Bin%2BScotland%2B-%2B2019%2B-%2Bpdf.pdf>

<sup>9</sup> <https://spice-spotlight.scot/2019/08/07/fast-food-booming-a-cause-for-concern/>

<sup>10</sup> <https://www.obesityactionsotland.org/media/1832/oas-response-sg-mandatory-calorie-labelling-final.pdf>

The definition in regulation 4 accurately and clearly describes how to define employees of a business as one that employs fewer than 250 people. This definition has undergone extensive recent consultation and now applies in The Food (Promotions and Placement) (England) Regulations 2021 and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021 for the purposes of those businesses (in the UK or internationally). However, as outlined in response to the previous question, we do not believe the regulations go far enough and should include SMEs.

We note section 4 b) in the food and drink section SMEs section of the regulation states that the classification of a business as either an SME or not is undertaken on the first day of the financial year<sup>11</sup>. We regard this to be a potential loophole in the regulations, as businesses could simply ensure they have fewer than 250 employees on the first day of the financial year and significantly increase their total headcount for the rest of the year to subvert the regulations. The number of employees in a business should be reviewed continually throughout the year to assess whether they are within the scope of the restrictions and to reflect the dynamic and changing nature of the business landscape.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

**Question 7 – Do you agree or disagree that regulation 4 clearly describes what features of a business would constitute a franchise?**

- Agree, it is clear

The definition in regulation 4 accurately and clearly describes what features of a business would constitute a franchise.

This definition has undergone extensive recent consultation and already applies in The Food (Promotions and Placement) (England) Regulations 2021 and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021. It is vital that a level playing field is provided for all food and drink SMEs both in and out of the home.

The consultation states the intention of the policy is to: *preclude large multinationals from exploiting loopholes by, for example, setting up a smaller UK company separate to the large corporation. Therefore, we intend for a company's number of employees internationally to count towards their total number of employees.* We support this aim of the policy, as it will help to close a potential loophole in the regulations by preventing large multinationals from redistributing their workforce overseas.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

**Question 8 – Do you agree or disagree that regulation 4 clearly describes what would constitute a franchise agreement?**

- Agree, it is clear

Overall the definition is clear, but a point of clarification is required.

Section (5) in the food and drink SMEs section of the regulations states that paragraph (4) on franchise rules/definition does not apply to a franchise business if the franchise agreement is limited to the alcoholic drinks provided in the franchise business and the franchisee is free to determine what other food or drink is provided. It is unclear what this means in practice. For example, could

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<sup>11</sup> UK Government Statutory Instruments (2022) Advertising (Less Healthy Food Definitions and Exemptions) Regulations [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1122769/draft-advertising-less-healthy-food-definitions-and-exemptions-regulations-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122769/draft-advertising-less-healthy-food-definitions-and-exemptions-regulations-2022.pdf)

this mean a business, such as a pub or local shop, can apply for a franchise limited to alcoholic drinks only and then decide to serve or sell food (of its choosing), which wouldn't be subject to the regulations on advertising? This is currently very unclear and needs to be clarified, as this is a potential loophole which could be exploited.

**Question 9 – Do you agree or disagree that regulation 4 clearly describes the total number of employees in a business includes those employed outside of the UK or by franchises?**

- **Agree, it is clear**

The definition is clear and it is welcome that this includes those employed outside of the UK. This is important as it will help to close a potential loophole in the regulations by preventing large multinationals from redistributing their workforce overseas. It is vital to provide parity and create a level playing field for all food and drink businesses, whether inside or outside of the UK.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

**Question 10 – Do you agree or disagree that the definitions in regulation 4 provide sufficient overall clarity on the definition of an SME?**

- **Agree, it is clear**

The definition of an SME is clear. Excluding SMEs from the scope of the regulations excludes a large number of OOH and retail premises.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

**Question 11 – Are there any unintended consequences that the government should consider regarding the definition of an SME?**

It is important that the definitions used to define what is in the scope of the regulations are comprehensive. Providing comprehensive definitions would help to ensure that no particular business or sector is likely to have a competitive advantage. However, as the online environment is a fast-moving, innovative space, it is important that a regular review process is built into the regulations so the scope and application of the regulations can be monitored. This review and update process should be written into the legislation.

This policy will likely have a more positive effect on people from lower socio-economic groups, who are more likely to be living with overweight and obesity. Latest findings from the primary 1 (children aged around 5) BMI data in Scotland show children from the most deprived communities are more than twice as likely to be at risk of obesity than their least deprived counterparts<sup>12</sup>.

Additionally, research has found that teenagers from the most deprived backgrounds were 40% more likely to remember seeing advertisements for junk food everyday than their peers from least deprived backgrounds<sup>13</sup>. A recently conducted systematic review found children from the most deprived backgrounds and from minority groups are disproportionately exposed to unhealthy food advertising, increasing their exposure<sup>14</sup>. With this heightened exposure and their already recognised greater risk of unhealthy outcomes, this suggests children from the most disadvantaged

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<sup>12</sup> Public Health Scotland (2022) Primary 1 Body Mass Index (BMI) statistics Scotland. School Year 2021/22 <https://publichealthscotland.scot/media/16960/2022-12-13-p1-bmi-statistics-publication-report.pdf>

<sup>13</sup> Cancer Research UK (2018). A Prime Time for Action. [https://www.cancerresearchuk.org/sites/default/files/executive\\_summary\\_-\\_a\\_prime\\_time\\_for\\_action\\_.pdf](https://www.cancerresearchuk.org/sites/default/files/executive_summary_-_a_prime_time_for_action_.pdf)

<sup>14</sup> Backholer, K, Gupta, A, Zorbas, C, et al. (2020) Differential exposure to, and potential impact of, unhealthy advertising to children by socio-economic and ethnic groups: A systematic review of the evidence. *Obesity Reviews*; 1– 20



backgrounds would potentially have the most to gain from regulations designed to reduce exposure to unhealthy food advertising.

Furthermore, a recently published report examining four UK government obesity prevention interventions, including the regulations on introducing a 9pm watershed for HFSS advertising on TV and a complete ban on paid-for online advertising, highlighted significant net benefits to the UK economy and outlines, that over a 25-year period, the combined net benefit of these policies is estimated to be over £76 billion<sup>15</sup>. This is supported by findings from an Australian modelling study, which sought to estimate the cost effectiveness of legislation to restrict HFSS TV advertising before 9.30pm, and examine the health benefits and healthcare costs savings by socio-economic status (SES). The study showed that legislation to restrict HFSS TV advertising is likely to be cost-effective, with greater health benefits and healthcare cost-savings for children (aged 5-15) in low SES groups<sup>16</sup>. Another similar study in the UK, modelling the impact of a 9pm watershed, estimated that the intervention would be more effective at reducing overweight and obesity in children from social grade DE than those from social grade AB<sup>17</sup>. All of this evidence highlights that the regulations could have a positive impact in helping to reduce inequalities, by more strongly benefitting those from more deprived backgrounds.

It is important to note that regulations do not ban companies from advertising their products. Companies who wish to continue advertising their brands have many options open to them, including reformulating their products, shifting their advertising to post 9pm, or advertising alternative non-HFSS products in their portfolio.

Research by Cancer Research UK found that over half (54%) of brands advertising HFSS products on TV between 6pm and 9pm had an alternative non-HFSS product which could be advertised instead. This figure does not include companies promoting a service or a message rather than a product, such as Deliveroo or Just Eat, who could easily feature non-HFSS products in their adverts. When including brands whose parents company own a non-HFSS brand, or brand with non-HFSS products, this rises to over 80%<sup>18</sup>.

**Question 12 – Do you agree or disagree that regulation 5 clearly describes and fully captures what constitutes a service connected to regulated radio services?**

- I don't know

Broadcast radio is not within scope. Audio advertisements on the online streams of regulated commercial and community radio stations, will be exempt, provided there are no visual accompaniments to the sound.

The online marketing environment is fast-paced and innovative with new formats and marketing techniques developing all the time. It will be challenging for the Government to effectively future-proof this policy by identifying now all types of marketing communications and platforms that will be in use in the future. Therefore, it is vital that the new regulations have a regular two-yearly review mechanism built in where the scope can be adjusted to capture new marketing techniques that have evolved that may be exempt.

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<sup>15</sup> The Behavioural Insights Team (2022) Putting health in the spotlight: quantifying the impact of obesity prevention policies in the UK [http://www.bi.team/wp-content/uploads/2022/11/Putting-health-in-the-spotlight\\_-quantifying-the-impact-of-obesity-prevention-policies-in-the-UK-1.pdf](http://www.bi.team/wp-content/uploads/2022/11/Putting-health-in-the-spotlight_-quantifying-the-impact-of-obesity-prevention-policies-in-the-UK-1.pdf)

<sup>16</sup> Brown V, et al. (2018) The Potential Cost-Effectiveness and Equity Impacts of Restricting Television Advertising of Unhealthy Food and Beverages to Australian Children. *Nutrients*, 10(5), 622

<sup>17</sup> Mytton, O et al (2020) The potential health impact of restricting less-healthy food and beverage advertising on UK television between 05.30 and 21.00 hours: A modelling study. *PLoS Med* 17(10): e1003212. <https://doi.org/10.1371/journal.pmed.1003212>

<sup>18</sup> Cancer Research UK analysis of Nielsen data for on linear television channels of ITV1, Channel 4, Channel 5 and Sky One in the month of May 2018.

**Question 13 – Do you agree or disagree that regulation 6 clearly describes and fully captures what audio-only content is?**

- **Disagree, it is not clear**

The regulations are not clear. In the regulations, audio-only is described as consisting wholly of sound, with no visual content or components, including moving or still images, legible text, or a combination of these. It is unclear whether this applies to either brand or identifiable product visuals, or both, and this needs to be clarified.

There needs to be a clearer definition of what constitutes audio-only, with examples provided of what this includes, for a range of different types of media. This is currently not clear, leaving the regulations open to interpretation and the potential for loopholes.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up to date with emerging evidence and practice.

**Question 14 – Do you agree or disagree that regulation 6 makes it clear what is considered a visual advertisement included with an audio item?**

- **Disagree, it is not clear**

The regulations are not clear. Audio advertising which has a visual component is in scope of the restrictions. We seek clarity as to whether this includes either brand or identifiable product advertising, or both, within the visual component.

We are concerned the phrase ‘visual’, in regards to products, not brands, could lead to a loophole in the restriction where brands can promote HFSS products, providing they can’t be identified as a particular (branded) product. Examples of this could be using cartoon or drawn pictures of products, or emojis, that are likely to be HFSS or have the effect of promoting HFSS products.

Rather than being applied to identifiable HFSS products, we would like to see the regulations require that any food or drink that is shown in marketing communications must be identifiable as a non-HFSS product with the advertiser able to provide data to show the product(s) shown are defined as ‘healthier’ using the NPM.

There could also be issues with regards to what device is being used. For example, a music streaming service such as Spotify could be audio-only when being listened to through a car/vehicle speaker system where there is no screen, but then might not be audio-only when used on a device at home, such as a laptop or TV, where still and moving images can be and are used. It is not clear how this will be regulated. Additionally, it is not clear whether social media filters, such as one used by Cadbury in 2016 to promote Crème Eggs<sup>19</sup>, would be covered/included. Such filters are becoming increasingly common on social media and are often targeted at children and young people.

Clear definitions are needed to remove the current uncertainty, and the regulations would benefit from inclusion of a list of items/examples of types of advertising that are covered by the regulations, to make it easier to identify what is exempt.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to keep up with emerging evidence and practice. This is particularly pertinent for social media, as advertising on these platforms is constantly evolving.

**Question 15 – Do you agree or disagree that the relevant parts of the regulations provide sufficient overall clarity on the services in scope of the advertising restrictions?**

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<sup>19</sup> <https://www.campaignlive.co.uk/article/cadbury-first-uk-confectionery-brand-use-new-snapchat-ad-platform/1387029>



- **Disagree, it is not clear**

It is unclear. Audio advertising which has a visual component is in scope of the restrictions. We seek clarity as to whether this includes either brand or identifiable product advertising, or both, within the visual component.

There is an issue with accountability, with regards to the online marketing environment. The online marketing environment is fast-paced and innovative with new formats and marketing techniques developing all the time. It will be challenging for the Government to effectively future-proof this policy by identifying now all types of marketing communications and platforms that will be in use in the future. Therefore, it is vital that the new regulations have a regular two-yearly review mechanism built in where the scope can be adjusted to capture new marketing techniques that have evolved that may be exempt to ensure the regulations keep up with emerging evidence and practice.

It is also not clear from the regulations how or indeed if they will align with other legislation focused on controlling online advertising, namely the Online Safety Bill and the Online Advertising Programme (OAP). There needs to be clarity on this and to establish if there are any contradictions between the various pieces of legislation and regulations which could arise. The focus of the OAP is that the regulatory framework for online advertising builds trust and tackles the underlying drivers of harm in online advertising. This is a welcome focus which we support, however, it is unclear if the regulations align with this and will support achievement of this focus.

#### **Question 16 – Do you have any additional comments on the draft regulations?**

There is a pressing need for effective regulation to restrict junk food advertising online as part of a comprehensive approach to reduce obesity.

We are extremely disappointed that the UK Government has chosen to delay the implementation of these regulations, despite the widespread evidence of their effectiveness. The food and drink industry have been aware of the government's intention to regulate since the obesity strategy was first published in 2016, and as such it is unacceptable that the reason for the delay to implementation given by the government is that industry needs more time to prepare. By the time the regulations are implemented in 2025, the industry will have had almost a decade to prepare, and during that time rates of obesity will have continued to rise significantly.

There is clear evidence which shows that unhealthy food marketing causes harm and needs to be effectively restricted. This evidence needs to be recognised, with a focus on how to make the regulations as effective as possible across media accessed by children.

Online and TV advertising are reserved matters to UK Government, but other relevant aspects of advertising, such as out of home advertising and sports sponsorship, is devolved to the Scottish Government. It is vital there is a commitment from the UK Government to work closely with the Scottish Government in reserved policy areas which directly impact obesity prevention.

Recent polling shows high levels of public support for the interventions which restrict advertising and exposure of children and young people to this advertising<sup>20</sup>. Polling from the Obesity Health Alliance found that 74% of people support not showing junk food adverts before 9pm and online<sup>21</sup>.

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<sup>20</sup> Public Health England (2018) Calorie reduction: The scope and ambition for action  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/800675/Calories\\_Evidence\\_Document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800675/Calories_Evidence_Document.pdf)

<sup>21</sup> <https://obesityhealthalliance.org.uk/2020/06/03/74-of-the-public-support-government-action-on-obesity-in-the-wake-of-emerging-links-with-covid-19/>

Existing rules ban/prohibit advertising in the media for products which are clearly high in fat, salt and sugar where more than 25% of the audience are children (under the age of 16). However, this rule is ineffective and doesn't protect children from exposure to unhealthy food marketing. For example, advertising of less healthy food and drink featured during a prime-time programme in the evening, on a YouTube channel or social media channel can lead to children being exposed to this advertising, without breaching the rule i.e. if an online video is watched by 10 million people, a breach does not occur until more than 2.5 million children have seen it. Age verification procedures on social media platforms are weak and do not prevent children from using and accessing the platforms, and children being able to access content through their parents' accounts. Despite Facebook and other social media platforms setting the minimum age for users at 13, research suggests that a third of 9 to 12-year olds in the UK have a Facebook profile<sup>22</sup>.

Further evidence from a recent report by Nesta shows that young people aged 13 to 16 are exposed to high levels of unhealthy food advertising online. It found that of nearly 5,000 adverts examined, over 70% were regarded as unhealthy, and that young people from more deprived, lower income backgrounds reported 50% greater exposure to unhealthy food adverts than their counterparts from less deprived, higher income backgrounds. The research also found very high recognition of the influence of advertising on eating and drinking habits – 80% agreed – and just under two-thirds (65%) agreed that the government should take action to address online advertising<sup>23</sup>. The study also found that more than 60% of the advertising the young people were exposed to was paid-for advertising. In this regard, we are pleased to note that paid-for advertising includes non-monetary payments. This helps to close a loophole and could prevent a shift to other forms of payment for advertising.

Such impacts can also be seen in younger children. Evidence from a recently published scoping review reported that social media is an independent risk factor for obesity in primary school children, and heavy media use during preschool years is associated with small but significant increases in BMI, especially if used for 2 or more hours per day<sup>24</sup>.

We note influencer marketing is not mentioned in the regulations. This is a significant omission given the increased use and prevalence of this type of advertising, particularly for young people. Not including influencer marketing could become a significant loophole. Influencer marketing is a now a well-established and growing type of online advertising. Studies suggest that half of brands believe influencers are key to driving a brand's success<sup>25</sup>. Indeed, influencer marketing was proposed to be included in the OAP, discussed earlier in our response to question 15, which was consulted on by the UK Government in June 2022. Failure to include influencer marketing in the current regulations further raises the question of how or indeed if the regulations will align with other implemented and proposed legislation, and creates a loophole in the regulations.

We understand that brand advertising is out with the scope of the regulations. We have significant concerns about leaving it up to the regulator to decide if a brand is considered to be synonymous with an HFSS product. The current regulatory system has a poor track record in this regard, and is widely evidenced to be ineffective. The existing guidance from the Advertising Standards Authority (ASA) is vague and lists scenarios rather than providing an objective definition of an HFSS brand. The guidance states, "*...it is for the ASA to decide on a case by-case basis whether an advertisement has the effect of promoting an HFSS product and should therefore be subject to the HFSS product advertising rules.*" Given the sheer number of HFSS brands in existence, it is completely unrealistic for the decision to be made on whether the regulations should apply on a case-by-case basis.

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<sup>22</sup> <https://www.theguardian.com/technology/2013/jan/23/facebook-admits-powerless-young-users#:~:text=However%2C%20there%20is%20no%20stringent,a%20quarter%20have%20Facebook%20profiles>

<sup>23</sup> Nesta (2022) Online food and drink marketing to young people

[https://media.nesta.org.uk/documents/Online\\_food\\_and\\_drink\\_marketing\\_to\\_young\\_people\\_v4\\_MP9FMYi.pdf](https://media.nesta.org.uk/documents/Online_food_and_drink_marketing_to_young_people_v4_MP9FMYi.pdf)

<sup>24</sup> Bozzola E et al (2022) The Use of Social Media in Children and Adolescents: Scoping Review on the Potential Risks. *Int J Environ Res Public Health*;19(16):9960. doi: 10.3390/ijerph19169960.

<sup>25</sup> [https://www.iabuk.com/sites/default/files/user\\_attached\\_file/Influencer%20Marketing%20Marketers%20Survey\\_0.pdf](https://www.iabuk.com/sites/default/files/user_attached_file/Influencer%20Marketing%20Marketers%20Survey_0.pdf)

Permitting brand advertising is an obvious loophole that will be exploited by companies to be able to continue to advertise.

In this regard, we would like to see the scope of the regulations extended to include other types of advertising/media in due course, such as outdoor advertising, including digital outdoor advertising, and sports sponsorship, for example. This would make an important contribution to reducing inequality in childhood obesity outcomes. Evidence from a study carried out in Scotland found that children in the most deprived areas were 18% more exposed to unhealthy food and drink marketing outdoors than those from the least deprived areas<sup>26</sup>. As outlined earlier in our response, this is an area of advertising which is devolved to the Scottish Government, and it is important that the Scottish and UK Governments work together in this regard to ensure a uniform and complementary approach across the UK, to support obesity reduction.

### **About us**

Obesity Action Scotland provide clinical leadership and independent advocacy on preventing and reducing overweight and obesity in Scotland.

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<sup>26</sup> Olsen, J et al (2021) *Exposure to unhealthy product advertising: Spatial proximity analysis to schools and socio-economic inequalities in daily exposure measured using Scottish Children's individual-level GPS data*, Health and Place 68; 102535