

Action on Sugar & Action on Salt Response to Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: consultation on secondary legislation

Action on Sugar is working to reach a consensus with the food industry and Government over the harmful effects of a high sugar diet and bring about a reduction in the amount of sugars in food and drink products. Action on Sugar is supported by 23 expert advisors.

Action on Salt is successfully working to reach a consensus with the food industry and Government over the harmful effects of a high salt diet and bring about a reduction in the amount of salt in processed foods as well as salt added to cooking, and the table. Action on Salt is supported by 21 expert scientific members.

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CASSH Responses to Consultation Questions

Question 1

We agree that It is clear that a product falls within the scope of the restrictions if it falls within a narrow set of products defined in the Schedule; scores 4 or more (if it is not a drink) or 1 or more (if it is a drink) according to the Nutrient Profiling Technical guidance; and if it is sold for consumption at home or elsewhere.

We note that the above only applies to food and drink businesses with over 250 employees, as outlined in regulation 4.

We have highlighted previously the narrow scope of the regulations, and strongly recommend that all HFSS products – i.e. any product defined as HFSS according to NPM guidance, not just those subject to the sugar and calorie reduction programmes and the Soft Drinks Industry Levy – should be within the scope of the restrictions. Introducing categorisation adds complication; the NPM's very purpose is to define products as HFSS. Using just the NPM, without categorisation, would provide a greater incentive to reduce overall calories, sugar, saturated fat and salt rather than just focusing on one nutrient, whilst also increasing beneficial nutrients such as fruit and vegetables, fibre and protein.

Salty products not covered by the categories in the calorie reduction programme would still be advertised, including cheese and salted butter, baked beans, processed meats, stocks and gravies, all of which are major contributors of salt to children's diets. We know that an individual's preference to salt and salty foods is a learned behaviour that we acquire in childhood, therefore it is imperative that we reduce advertising of these foods to ensure children eat as little salt as possible. A high salt intake increases blood pressure and therefore the risk of cardiovascular disease¹, which is already a risk factor of obesity.

Via email correspondence with DHSC, we have questioned whether food and drink aimed at young children would be included within the scope of promotion and advertising restrictions. DHSC have indicated that it is not the policy intention to cover infant formula, follow on formula or baby foods

¹ Ma et al. 24-Hour Urinary Sodium and Potassium Excretion and Cardiovascular Risk. N Engl J Med 2022; 386:252-263

as defined in Regulation (EU) No.609/2013, but some (e.g. snack foods) may fall within scope and this would be determined by enforcement agencies in the case of promotion restrictions. This appears to be a problematic decision, and relies on under-resourced agencies to determine eligibility based on their understanding of the guidance, rather than placing the health and wellbeing of young children at the forefront. In the case of advertising restrictions, we strongly recommend that any product aimed at children (e.g. with the use of cartoon characters/animations, age flashes, colourful packaging, marketing material) should be included within scope, with clear guidance provided for the regulators. Additionally, we strongly recommend that any sweetened milk or milk alternative marketed for children over 1 year of age is included in the scope for these guidelines, including those marketed as toddler milks – these are currently not included in the Sugar Reduction Programme. There is no scientific basis for these products and there are no regulations that control the composition of milks for children over 1 year of age, even though many are currently marketed with the same branding as infant formula. These are simply sweetened dried milk powders or liquids (using primarily lactose and maltodextrins as sweeteners) with added nutrients. UK Government guidance says that growing up and toddler milks are not necessary and this should be reflected in all policies relating to advertising and marketing restrictions.

Furthermore, evidence shows that young children should not consume food and drinks that contain sweeteners². Any product containing sweeteners should not be advertised to children.

The proposals should also be strengthened by including alcoholic drinks. There is a need for stricter marketing restrictions to protect children and young people from alcohol advertising. Just like all marketing, alcohol adverts do appeal to children and young people. Products such as energy drinks are gateway products and children and young people who drink energy drinks are more likely to develop health damaging behaviours such as drinking alcohol. Evidence demonstrates the particular appeal of sweet, brightly-coloured ready-to-drink products amongst adolescents³. Not only is there evidence to suggest that they appeal to young people, our research has shown the extremely high sugar content in these drinks⁴. With the introduction of location promotion restrictions, alcohol promotions have increased in retailers – this is a clear loophole and unintended consequence which must be covered within the advertising restrictions.

Question 2

We agree it is clear that the standard for determining the nutrient profiling model score for a product is to use the Nutrient Profiling Technical Guidance published by the Department of Health on 1 January 2011, which is accessible on the Department's website. We recommend that the regulations include an evaluation mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

The Nutrient Profiling Model (NPM) is a widely used and established, evidence-based tool that is already being used by the food industry and advertisers for advertising restrictions to children's programmes. Using an existing tool that the food industry are already familiar with would make the restrictions easier to follow and adopt. Using a consistent approach across advertising and promotions would provide a greater incentive to manufacturers to reformulate their products to

² First Steps Nutrition Trust, 2019. [Sweet enough already?](#)

³ Gates, P., et al (2007). The influence of product packaging on young people's palatability rating for RTDs and other alcoholic beverages

⁴ Action on Sugar (2020) <http://www.actiononsugar.org/surveys/2020/ready-to-drinkalcoholic-beverages/#d.en.764846>

reduce overall calories, salt, sugar and saturated fat, enabling them to both advertise and promote their products without restrictions.

The NPM has undergone numerous reviews, the latest one taking place in 2018 with the recommendations published in a consultation to stakeholders and updates to be confirmed by Government. We note that this latest review would bring the NPM in line with the latest dietary advice and evidence, and strongly support the release and use of the updated version.

Until this is released, we agree that the current NPM is suitable. Following the recent (2022) unsuccessful legal proceeding put forward by Kellogg Company vs Secretary of State for Health and Social Care⁵, there is now a precedent for the NPM to apply to food and drink regulations, and to the categories of foods set out in the Schedule, as defined in The Food (Promotions and Placement) (England) Regulations 2021.

Question 3

We disagree - the text in the Schedule describes which products fall within scope of the restrictions. However, there are some instances where clarification would be useful:

- Will breadsticks be included within category 2?
- Will on-the-go breakfast drinks be included, if they contain added sugar, in category 1?
- Will processed fruit snacks, including 100% fruit snacks that would contain free sugars, be included under category 4?

Additionally, as highlighted earlier, we note the narrow scope of the restrictions excludes many products that would be classed as HFSS, including:

- Food and drinks aimed at young children - via email correspondence with DHSC, we have questioned whether food and drink aimed at young children would be included within the scope of promotion and advertising restrictions. DHSC have indicated that it is not the policy intention to cover infant formula, follow on formula or baby foods as defined in Regulation (EU) No.609/2013 these products, these products, but some may fall within scope and this would be determined by enforcement agencies. This appears to be a problematic decision, and relies on under-resourced agencies to determine eligibility based on their understanding of the guidance, rather than placing the health and wellbeing of young children at the forefront. In the case of advertising restrictions, we strongly recommend that any product aimed at children (e.g. with the use of cartoon characters/animations, age flashes, colourful packaging, marketing wording) should be included within scope, with clear guidance provided for the regulators. Furthermore, evidence shows that young children should not consume food and drinks that contain sweeteners. Any product containing sweeteners should not be advertised to children
- Salty products not covered by the calorie reduction programme categories would still be advertised, including cheese and salted butter, baked beans, processed meats, stocks and gravies, all of which are major contributors of salt to children's diets. We know that an individual's preference to salt and salty foods is a learned behaviour that we acquire in childhood, therefore it is imperative that we reduce advertising of these foods to ensure children eat as little salt as possible. A high salt intake increases blood pressure and

⁵ <https://www.judiciary.uk/wp-content/uploads/2022/07/Kellogg-v-SSHSC-judgment-040722.pdf>

therefore the risk of stroke and cardiovascular disease which is already a risk factor of obesity.

- Alcohol - Evidence demonstrates the particular appeal of sweet, brightly-coloured ready-to-drink products amongst adolescents. Not only is there evidence to suggest that they appeal to young people, our research has shown the extremely high sugar content in these drinks. With the introduction of location promotion restrictions, alcohol promotions have increased in retailers – this is a clear loophole and unintended consequence which must be covered within the advertising restrictions

We strongly recommend that these restrictions should be treated as an initial step, with a longer term goal of extending the restrictions to all products that would be classed as HFSS, for the benefit of population health and wellbeing. The restrictions should be evaluated within three to five years, and extended thereafter.

Businesses are expected to consult with regulators to determine if their products are subject to the restrictions, should they be unclear on the definitions. Therefore, regulators must be provided with comprehensive and clear guidance to enable them to fulfil this role.

We are pleased to see there are no exemptions for seasonal and/or temporary foods, or any further exemptions. Previous policies (calories on menus, location promotions restrictions, Transport for London advertising restrictions) demonstrate that exemptions are confusing, unjustified and do not create a necessary 'level playing field'.

Additionally, the regulations only apply to product identifiable food and drinks and not the brands themselves which is a huge loophole that has already been exploited in the case of Transport for London's advertising restrictions. We would like to see further guidance on what constitutes the 'brand', if the 'brand' is HFSS identifiable.

Question 4

We agree, it is clear that all categories laid out in the Schedule apply to both retail and out-of-home food and drink products that are 'less healthy as defined by the NPM', and the regulation 3 only applies to large (over 250 employee) retail and out-of-home food and drink businesses.

We strongly support policies that address unhealthy food and drinks sold within the out of home sector, which has not faced the same level of measures to increase transparency and accountability as the retail sector to date, and has therefore profited unfairly. More than one in four adults and one in five children eat in the out of home sector at least once a week, and meals and drinks available in the sector are more likely to contain more calories, salt, sugar, saturated fat and be sold in larger portions than equivalent products sold in the retail sector. Access to food and drinks sold in the out of home sector has been increasingly facilitated by delivery companies and their websites/smart phone apps.

We strongly recommend that the restrictions be extended to include all businesses, not just large businesses. The calories on menu labelling impact assessment⁶ estimates that 49% of out of home turnover occurs in businesses with 250+ employees. We recognise that the government does not want to place extra burden on SMEs, however there are various tools available that would enable SMEs to determine whether their meals are subject to the restrictions, without the need for large teams or specialist support from Registered Nutritionists.

We recommend that the restrictions be regularly evaluated, and extended in due course.

Question 5

We agree, the definition in regulation 4 accurately and clearly describes what businesses will be classified as ‘food and drink SMEs’; as to being a business which involve or are associated with the manufacture or sale of food or drink during the financial year and on the first day of the financial year, employs fewer than 250 people for the purposes of those businesses (in the UK or internationally), with no exemptions other than that for a franchise business if the franchise agreement is limited to the alcoholic drinks and the franchisee is free to determine what other food or drink is provided.

Question 6

We agree, the definition in regulation 4 accurately and clearly describes how to define employees of a business, as those who are employed for the purposes of the business, in a contract (in oral or in writing) that is full or part time employment, and whom could work for an associated business but who work for the purposes of this (food and drink) business. However, it could be made clearer for SMEs by defining whether agency workers and those working on zero-hour contracts would be included.

Question 7

We agree, the definition in regulation 4 accurately and clearly describes what features of a business would constitute a franchise, with no exemptions other than that for a franchise business if the franchise agreement is limited to the alcoholic drinks and the franchisee is free to determine what other food or drink is provided.

Question 8

We agree, the definition in regulation 4 accurately and clearly describes what would constitute a franchise agreement, with no exemptions other than that for 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.

Question 9

We agree, the definition in regulation 4 accurately and clearly describes that the total number of employees in a business includes those employed outside of the UK or by franchises. It is vital that parity is provided for all food and drink SMEs whether inside or outside the UK.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/992872/calorie-labelling-impact-assessment.pdf

Question 10

We agree, the definition in regulation 4 accurately and clearly describes the complex definition of an SME as being a business, or franchise business, with fewer than 250 employees working for the purposes of food and drinks business (by any contract, part time or full time, in oral or in writing) based anywhere in the world, with only an exemption for franchise agreements that are limited to the alcoholic drinks where the franchisee is free to determine what other food or drink is provided.

Question 11

We agree, the definition contained within the Health and Care Act, which applies to these regulations, is clear that only large businesses (over 250) employees, that are involved or associated with the manufacture or sale of food or drink within the specified categories in the Schedule, that are less healthy, as defined by the NPM, will be included in the regulations. And only if they undertake paid for advertising (paid for meaning any monetary or non-monetary payments).

A timetable of each stage of the 9pm and online restrictions process must be published in full. This is vital to ensure the regulations are kept on track, as well as to allow food and drink businesses to be fully prepared for the incoming restrictions.

However, we strongly recommend that all businesses should be subject to these restrictions, regardless of their size. SMEs that manufacture/sell unhealthy food and drinks are contributors to the UK's obesity problem. SMEs operating within the retail sector are required to display a nutrition information panel and ingredient list, which enable the NPM calculation. SMEs operating in the out of home sector would also be able to calculate NPM using a variety of tools e.g. Food Standards Scotland's MenuCal⁷. Additionally, with the development of the Food Database Transparency Partnership, by October 2025 all companies could be expected to provide full nutritional information for national reporting purposes. Most SMEs use online advertising and should not be excluded.

Any cost to businesses has to be balanced against the personal, societal and economic costs posed by diet-related non-communicable diseases and related ill health, such as cardiovascular disease, obesity, type 2 diabetes and various cancers. Currently, it would appear that businesses have priority, while population health suffers and life expectancy stalls. We strongly recommend that the government considers the value of health over commercial interests, and invests in policies that protect wellbeing, the NHS and the economy.

Question 12

We are unsure that regulation 5 clearly describes and fully captures services connected to regulated radio services. Broadcast radio is not within scope. Audio advertisements on the online streams of regulated commercial and community radio stations are in scope, but will be exempt provided there are no visual accompaniments to the sound.

The online marketing environment is constantly evolving, and poses a huge challenge for the Government to effectively future-proof this policy by identifying now all types of marketing communications and platforms. Therefore, it is vital that the new regulations are regularly evaluated and adjusted to include new marketing practices that may evolve as a result of the introduction of the restrictions.

⁷ <https://menucal.fss.scot/Account/LogOn?ReturnUrl=%2f>

Question 13

We agree, it is clear. Audio-only is described as consisting wholly of sound and including no visual component, whether moving or still images, or legible text, or a combination of those elements.

Question 14

We disagree, it is not clear. We seek clarity as to whether this includes either brand or product identifiable (or both) visuals. For example, if an audio ad is product-identifiable, but the visual component is not product-identifiable, then would this be exempt? We also seek clarity on what would constitute product identifiable in different formats e.g. Alexa and Spotify can have a visual component depending on where streamed eg in a car; YouTube could have an audio that is product-identifiable, with a still brand logo/image; Instagram/Tik Tok/SnapChat filters can be both brand and product identifiable.

We are concerned the phrase ‘visual’, in regards to products, not brands, could lead to a loophole in the restriction whereby brands can promote HFSS products, providing they can’t be identified as particular branded products. 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.

Instead, any food or drink that is shown in marketing communications must be accompanied by data to prove that it is non-HFSS.

Question 15

We disagree, it is 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 product identifiable, or both, within the visual component.

Question 16

Additional comments: CASSH fully support comprehensive and proportional restrictions on the advertising of less healthy products, and support the introduction of these restrictions as an initial step that should be fully evaluated and extended in the near future. We also support recommendations made by the Obesity Health Alliance, of which we are a member.

Baseless Delay

We do not agree with the delay until October 2025, which is baseless and designed to appeal to trade organisations and a subset of MPs. Unhealthy diets are a leading cause of death and disability globally⁸, but this is not the fault of individuals. The food industry is operating within by a growth and shareholder-driven model, whereby the production and sale of cheap and unhealthy food and drinks are central to profits. The availability, accessibility and affordability of these products far outstrips healthy and nutritious products that would support population and environmental health. Cardiovascular disease, type 2 diabetes, obesity and many cancers, alongside many other health conditions, all have a root in unhealthy diets, and all of these conditions put a great strain on individual health, families and communities, the NHS and the economy. The government must recognise its critical role in creating healthier food environments and placing the health of the UK population above commercial interests. The delay of these restrictions – one of many necessary

⁸ GBD 2017 Diet Collaborators. Lancet 2019; 393: 1958–72

policies, and a policy that the food industry has been well aware of for many years - demonstrates that health and prosperity is not a core value.

Restrictions Don't Go Far Enough

As they stand, the restrictions impact a narrow set of product categories⁹. While these products are key sources of sugar and calories in the UK diet, they do not represent the full range of contributors and exclude many calorific products that are also high in salt.

The restrictions only apply to unhealthy food and drink advertising in media where more than 25% of the audience is under 16 years old. However, advertising featured in prime time evening spots, on a YouTube channel, or by a social media influencer popular with both adults and children, can lead to large numbers of children being exposed without breaching the current threshold.

We have serious concerns about leaving the regulator to define when a brand is considered synonymous with HFSS products. 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 brands, it is completely unrealistic for advertising on social media platforms to be assessed on a case-by-case basis.

Public Support

Recent polling demonstrates that the restrictions have strong support from the public, with 71% of people agreeing that children should only see healthier food and drinks online¹⁰. Nesta also asked young people aged 13-16 years to monitor the advertising they were exposed to¹¹, finding:

- Over 70% of adverts seen were for HFSS products
- Young people in lower income groups reported about 50% more examples of unhealthy food and drink marketing than those in higher income groups.
- 65% of the participants agreed that the government should take action to ban online marketing.

Impact on Childhood Obesity

There is a clear link between exposure to unhealthy advertising, and this link and the level of exposure have both been underestimated by the government's impact assessment. The impact assessment uses a Kantar calculation to estimate exposure, which relies on many estimates and extrapolations. An independent analysis of the methodology used highlighted a significant flaw in that it relies on advertising spend data as a proxy for the reach of that advertising¹². This is notoriously unreliable in digital marketing as brands can significantly boost the reach of their paid advertising via social media engagement.

⁹ Burt et al. Salt: the forgotten foe in UK public health policy BMJ 2022; 377 :e070686

¹⁰ YouGov Plc. Total sample size was 5,232 adults. Fieldwork was undertaken between 7th - 11th December 2022

¹¹ https://media.nesta.org.uk/documents/Online_food_and_drink_marketing_to_young_people_v4_MP9FMYi.pdf

¹² Tatlow-Golden, M., & Parker, D. (2020). The Devil is in the Detail: Challenging the UK Department of Health's 2019 Impact Assessment of the Extent of Online Marketing of Unhealthy Foods to Children. International journal of environmental research and public health, 17(19), 7231. <https://doi.org/10.3390/ijerph17197231>

Furthermore, research shows children with overweight and obesity consume around 45 kcals more than their peers when they see junk food advertising. The IA does not take this into account, meaning the benefits to children with excess weight are significantly underestimated¹³.

Children from lower socio-economic groups tend to watch more TV and spend more time online. They are also more likely to have a weight classed as overweight or obese than their more affluent peers. Data from 2022 shows that 31.3% of Year 6 children living in the most deprived areas are living with obesity, compared to 13.5% of those living in the least deprived areas¹⁴, and there is clear evidence that children with obesity are five times more likely to become adults with obesity. Cancer Research UK found young people from the most deprived communities were 40% more likely to remember junk food advertisements every day compared to young people from better-off families¹⁵. A systematic review found children from minority and socio-economically disadvantaged backgrounds are disproportionately exposed to unhealthy food advertising¹⁶.

In addition, the impact assessment calculation is based on highly credible evidence showing the relationship between seeing advertising and immediate food consumption, but does not consider the longer term effects of advertising. Advertising has been designed by advertising companies with huge levels of resource to determine the techniques that will increase product and brand awareness, build positive attitudes and connections with brands and products to create new dietary norms, and ultimately create loyal customers and generate profit. Restrictions on junk food advertising has the potential to change long-term food consumption, meaning the benefits are massively under-stated.

Advertising Will be Restricted, Not Banned

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 instead¹⁷. The food industry formulated and released new products to prepare for the regulations coming into place, and also reformulated many existing lines to ensure they would comply with the restrictions. The delays send a message that the government is not sure on their direction, and create uncertainty for the food industry while undermining the progress made by some companies.

¹³ Russell SJ, Croker H, Viner RM. (2019) The effect of screen advertising on children's dietary intake: A systematic review and meta-analysis. *Obes Rev* ;20(4):554-568.

¹⁴ <https://digital.nhs.uk/data-and-information/publications/statistical/national-child-measurement-programme/2021-22-school-year>

¹⁵ https://www.cancerresearchuk.org/sites/default/files/a_prime_time_for_action.pdf

¹⁶ Backholer, K, Gupta, A, Zorbas, C, et al. 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*. 2020; 1– 20

¹⁷ 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.