

FDF Response

Consultation on introducing further HFSS advertising restrictions on TV and online for products high in fat, salt or sugar: Secondary legislation

Introduction

This submission is made by the Food and Drink Federation, which is the voice of the UK food and drink manufacturing industry, the largest manufacturing sector in the country, with a footprint in every parliamentary constituency. Our industry has a turnover of more than £112 billion, accounting for 20% of total UK manufacturing, and Gross Value Added (GVA) of more than £32 billion. Food and drink manufacturers directly employ over 478,000 people across every region and nation of the UK. 97% of our industry is small and medium-sized businesses.

FDF members support the Government's goal to reduce childhood obesity and recognise our responsibility to play a part in that goal being reached. Through voluntary action, reformulating products and offering appropriate portion sizes, FDF members are delivering substantial changes. Compared to 2017, FDF member products contribute 10% fewer calories, 12% fewer sugars and 16% less salt to the average shopping basket¹.

Following previous consultations on this policy, we are disappointed that the Government's position has not changed in any meaningful way, given the limited evidence underpinning the policy from a public health outcome point of view, and the unintended consequences that restrictions would have on both industry and consumers. We remain concerned that:

- **The evidence base is extremely weak and with a limited predicted benefit.** The Government's own impact assessment estimates the measures would only lead to a 2kcal a day deficit in children's calorie consumption² – the equivalent of half a Smartie. This will have negligible impact on levels of childhood obesity.
- **The impact assessment is flawed.** Not only is the estimated impact negligible, it is also overestimated, as it is based on HFSS advertising exposure before the HFSS ban on advertising to children in non-broadcast media was introduced in July 2017.
- **The measures will bring about increased costs for consumers.** Annual food and drink inflation is at its highest rate in 45 years, jumping to 18.2% in February 2023³. Family budgets, already affected by widespread increases in the cost of living, will be further impacted by the cumulative impact of Government policies. The FDF's Food Prices Report estimates that the cumulative cost of regulation in the next few years will lead to the average

¹ Kantar Worldpanel data for FDF members, nutrient growth versus the overall volume growth (percentage difference) from 2017 – 2021.

² Table 37 of [Final Impact Assessment](#)

³ [ONS Data February 2023](#)

household seeing an increase of £160⁴ per year to their food budgets. This will disproportionately affect lower-income households, who spend a higher proportion of their income on food (18.3%), compared to the average household (14.4%)⁵.

- **The measures will bring about increased costs for businesses.** Many food and retail businesses in the UK continue to face challenging headwinds due to the increased costs of ingredients, energy, packaging, labour, and moving goods in and out of the UK; alongside the relative weakness of the pound which has increased the cost of essential imported inputs. The Government's impact assessment estimates, that this policy alone is expected to cost HFSS advertisers in the region of £660M⁶.
- **The policy risks disincentivising company investment in reformulation and provision of smaller portion sizes.** For some categories, this policy will remove marketing levers normally used to promote these products. This will restrict the ability of businesses to bring these products to market successfully. Limiting this mechanism will pose a real threat to companies being able to engage in the Government reformulation programmes. Far from fulfilling the Government objective of encouraging reformulation, this policy will disincentivise it.
- **Restrictions are inappropriately targeted.** The measures will predominantly affect adult impressions. Advertising food and drink to adults is a fundamental commercial freedom, which underpins the healthy, vibrant, and innovative market that shoppers enjoy. Obesity is highest in areas where lower socio-economic groups are more prevalent. This merits a targeted intervention, in line with Government's levelling up agenda; opposed to this sweeping blanket approach.

If Government is intent on bringing forward the proposals, it is integral that the legislation and supporting guidance provide sufficient clarity for businesses to implement these complex regulations. It is also essential that a comprehensive and independent review of the policy is undertaken within 5 years from implementation and that a sunset clause is included. If the policy is not effective, it must be revoked.

Please find our feedback below to the consultation questions.

Categories in Scope

- 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 scope of the advertising restrictions?**

⁴ FDF (2021). [Food Prices Report](#)

⁵ [Trend in share of spend going on food and non-alcoholic beverages in low income and all UK households, 2009 - 2020/21](#)

⁶ Table 43 of [Impact Assessment](#)

Disagree. Although the Health and Care Act sets out that rules apply to ‘*identifiable less healthy food or drink*’ advertisements, it should be made clear in the Statutory Instrument (SI) that there is an exemption for brand advertising to prevent misinterpretation and overapplication of the rules.

The consultation outcome clearly states that:

‘It is only fair to allow the sector the option to move away from producing products that are HFSS. Including brand advertising in scope could restrict this opportunity. ...By identifiable we mean that a food or drink product is recognisable to the extent the public would recognise what HFSS product was being advertised. We agree that advertisement without identifiable HFSS products is a way to maintain brand awareness and a means to allow launches of new out-of-scope or non-HFSS products under the brand’.

It is important that Government sets out the brand exemption within the SI, as decisions are already being made by pre-clearance bodies around what constitutes an identifiable HFSS product. We are aware that future guidance for business will include further detail on the definition of an ‘identifiable product,’ but for clarity, and to ensure consistency in implementation and enforcement, we believe the SI should include a section dedicated to the brand exemption. Some of the language of this could mirror that used in the guidance on HFSS promotional restrictions. A proposed form of wording for the SI is suggested below:

(1) These Regulations shall apply to identifiable products, not brands or masterbrands, meaning that a brand’s product range may have products in and out of scope of the restrictions.

(2) An “identifiable product” means a product which is visually identifiable as one which has met the threshold for being classified as HFSS using the 2004/5 Nutrient Profiling Model.

(3) For the purposes of these Regulations, brands or companies shall not be treated as synonymous with less healthy food and drink products.

It would also be helpful if the responsible Minister could publish a formal statement confirming the brand advertising exemption. A formal statement would give added force to the sentiments around HFSS synonymity previously expressed in the Government consultation response, greater confidence to advertisers planning campaigns, and clearer notice to regulators as they draw up the guidance to implement the restrictions.

There is some confusion about how the regulation will work alongside the current advertising rules, which have stricter measures specific to advertising in children’s media. It is crucial that the CAP and BCAP codes are also revised accordingly to account for the different layers of restrictions.

⁷ [Consultation outcome - Introducing further advertising restrictions on TV and online for products high in fat, salt, and sugar.](#)

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

Disagree. The regulations cite a reference to the 2011 Nutrient Profile Model (NPM) technical guidance, but for clarity, the SI should explicitly reference that the 2004/5 NPM should be used.

Separately, we urge Government to update the 2011 NPM guidance to reflect the many questions that have arisen since it was published, particularly with respect to tolerances, fruit / vegetable / nut calculations, and specific gravity factors to ensure a consistent approach is applied by all users. The FDF has previously communicated these questions to DHSC, but some elements remain unclear. It would also be helpful for companies and enforcement officers to have a universal, Government accredited online calculator to help calculate the NPM score.

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

Disagree. We welcome the intention to mirror the product categories listed for the HFSS promotion and placement restrictions (England). We also welcome the decision for the restrictions to apply consistently to the out of home sector for all categories in scope. However, the following remains unclear:

Starters, sides, and small plates

Although this was originally identified in the consultation outcome as in scope, it appears that this category has not been included in the list of categories in scope of the advertising policy set out in the draft SI.

We have previously received guidance from DHSC that 'starters, sides and small plates' do not sit within the current HFSS Promotions Regulation (England) categories, and we would welcome confirmation from DHSC that 'starters, sides and small plates' are also out of scope of the Advertising Regulation.

Sandwiches

We note the draft SI now states the sandwich category applies to products sold in retail settings as well as in the out of home sector and understand the rationale for this consistency.

Products that are consumed as a main meal, or which may be ordered separately on a menu to form a main meal, which do not require reheating or re-cooking

We are unclear about the types of products you intend to include in this section of Category 13, and would welcome further clarification.

Category guidance

The draft SI provides only top-level information on the categories in scope. Companies will require Government to publish more detailed guidance including examples of what falls in and out of each category, and incorporating considerations for the out-of-home sector.

Businesses will need final guidance at least 12 to 18 months prior to the implementation date, and we ask that Government seeks input from industry on this, to ensure consistent understanding and implementation of the rules.

As part of this, we suggest working with the British Retail Consortium to further develop their [Category guidance on promotional restrictions in England](#) for this regulation. The FDF has also fed into development of this guidance.

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 food and drink products?

Agree. However, we believe there is an oversight in the regulation, which should be addressed.

Currently the draft Regulation 3(2) states that ‘*Products within the categories set out in the Schedule are “less healthy food or drink products” whether they are sold for consumption at home or elsewhere*’.

This wording does not account for the fact that not all products within categories listed in the Schedule are considered ‘less healthy’ (as the two criteria in 3(1) need to be met) and therefore regulation 3(2) should be re-worded as follows:

(2) Products defined in regulation 3(1) are “less healthy food or drink products” whether they are sold for consumption at home or elsewhere.

Businesses in scope

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.

6) Do you agree or disagree that the definition in regulation 4 accurately and clearly describes how to define employees of a business?

Agree. We support that the definition includes worldwide employees, to protect UK businesses.

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

N/A

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

N/A

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

N/A

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

Agree.

11) Are there any unintended consequences that the Government should consider regarding the definition of an SME?

None.

Services in scope

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

N/A

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

N/A

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

N/A

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?

Disagree. It is not clear exactly what the definition of 'transactional content' and 'paid for' media will cover. We note that the [consultation outcome](#) provides a list of paid for online media in scope, however this has not been set out in the draft SI. This is something that should be fully addressed in industry guidance.

Companies have also raised concerns that application of the rules to 'paid for' advertisements online does not explicitly exempt owned media. The consultation outcome clearly states that:

'The restriction will not, therefore, apply to 'owned media'...Owned media is any online property owned and controlled, usually by a brand. For owned media the brand exerts full editorial control and ownership over content; such as a blog, website or social media channels'.

Companies do pay for elements of their owned media. For example, companies now have to pay for verification on Twitter, or pay to host their own web domains. We therefore believe it needs to be explicitly set out in the SI that all 'owned media' is out of scope.

As part of this, it should also be made explicit in the SI that product samples and product-related media content distributed for free, without any obligation on the recipient to return the favour in the form of promotion do not constitute an incentive under the 'paid-for' advertising definition.

16) Do you have any additional comments on the draft regulations?

Guidance for businesses

We welcome the announcement that the policy implementation has been delayed until 1 October 2025, recognising that companies need time to interpret and implement the rules.

Final guidance for industry will be needed at least 12 to 18 months prior to the implementation date, to ensure a consistent understanding and implementation of the regulations. In order for this to be relevant and useful for businesses we request Government and ASA seek industry input to the guidance.

Annex 1 gives details of the timeline needed from concept to launch of an advertising campaign to help illustrate why guidance is needed well in advance.

Exemptions

As restrictions will only apply to paid-for internet advertising, by implication that means retailer websites will be exempt from restrictions on advertising their own brand HFSS products. However, we understand that paid-for advertising of branded identifiable HFSS products on these websites will not be permitted. We believe this is anti-competitive, as consumers go to a central retailer website to do their online shopping rather than place multiple purchases from multiple manufacturers.

A brand channel uses its own space to tell the brand story, and in a small number of cases there is the option to also purchase products. By comparison retailer websites exist to directly sell food and drink products to millions of shoppers each week. Brand channels are not comparable given the significant difference in size, scale and nature to retailer platforms.

Furthermore, retailer websites are already subject to restrictions on placement of HFSS products in England, and the devolved nations are considering similar restrictions. As such, we believe retailer websites should be classed as 'transactional content' and thus out of scope of restrictions, in order to prevent potential competition issues.

Post Implementation Review

It is essential that a comprehensive and independent review of the policy is undertaken within 5 years from implementation and that a sunset clause is included. If the policy is not effective, it must be revoked.

The review process must be transparent and clear parameters should be set now, to determine what success looks like. Key stakeholders involved with making this policy an operational success should be involved with the development of the review process, including consideration of the data and metrics that will be analysed to determine the impact of the policy on obesity levels.

Annex 1 - Example of Timings for Campaign Creative Development

Agree brief	Briefing session for the agency and subsequent feedback process to develop and agree the agency creative brief.	4 weeks
Campaign creative development	Creative development phase to deliver a new media-neutral campaign idea including rounds of feedback and amends and potentially engaging global stakeholders for approval.	10 - 18 weeks
Consumer testing (if required)	Dependent on format, but typically qualitative consumer research with representative campaign stimulus and collaborative analysis of debriefing materials to optimise idea.	6 – 7 weeks
Media planning	Channel and format planning to deliver the best possible impact for the creative vs the campaign aims.	8 weeks
Campaign execution	<p>Taking agreed creative platform and research learnings into development of specific executions.</p> <p>For all different formats required by the media plan, includes rounds of feedback and amends and engaging global stakeholders for approval.</p>	10 – 15 weeks
Production	Pre-production phase, shoot, or animation etc. and subsequent post-production phase, including all planning, preparation and delivery of different assets and formats required for the campaign. Highly dependent on the idea, but can be longest part of the entire process.	14 – 26 weeks
Total: 52 – 78 weeks		

Annex 2 - The UK Food and Drink Manufacturing Industry

The Food and Drink Federation (FDF) is the voice of the UK food and drink manufacturing industry, the largest manufacturing sector in the country. Our industry has a turnover of more than £112 billion, accounting for 20 per cent of total UK manufacturing, and Gross Value Added (GVA) of more than £30 billion. Food and drink manufacturers directly employ over 478,000 people across every region and nation of the UK. Exports of food and drink make an increasingly important contribution to the economy, exceeding £20 billion in 2021, and going to over 220 countries worldwide. The UK's 11,675 food and drink manufacturers sit at the heart of a food and drink supply chain which is worth £116 billion to the economy and employs 4.1 million people.

The following Associations actively work with the Food and Drink Federation:

ABIM	Association of Bakery Ingredient Manufacturers
BCA	British Coffee Association
BOBMA	British Oats and Barley Millers Association
BSIA	British Starch Industry Association
BSNA	British Specialist Nutrition Association
CIMA	Cereal Ingredient Manufacturers' Association
EMMA	European Malt Product Manufacturers' Association
FCPPA	Frozen and Chilled Potato Processors Association
FOB	Federation of Bakers
GFIA	Gluten Free Industry Association
PPA	Potato Processors Association
SNACMA	Snack, Nut and Crisp Manufacturers' Association
SSA	Seasoning and Spice Association
UKAPY	UK Association of Producers of Yeast
UKTIA	United Kingdom Tea & Infusions Association Ltd

FDF also delivers specialist sector groups for members:

Ice Cream Group
Organic Group
Seafood Industry Alliance
CBD Group