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Consultation outcome

# Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response

Updated 24 June 2021

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## Executive summary

### Introduction

Childhood obesity is one of the biggest health problems this nation faces, with one in every 3 children in England leaving primary school overweight or living with obesity.<sup>[footnote 1]</sup> The Prime Minister is determined to tackle this issue and has been clear that we must prioritise our children's health. In 2018, government set the ambition to halve childhood obesity by 2030. Since launching our strategy 'Tackling Obesity: empowering adults and children to live healthier lives',<sup>[footnote 2]</sup> COVID-19 has brought the dangers of obesity into sharper focus, with evidence demonstrating that those who are overweight or living with obesity are at greater risk of being seriously ill and dying from the virus. We know that reducing excess weight is one of the few modifiable risk factors for COVID-19. Obesity is also associated with reduced life expectancy. It is a risk factor for a range of chronic diseases including cardiovascular disease, type 2 diabetes, at least 12 types of cancer, liver and respiratory disease. Therefore, government has been clear that for the future resilience of the population, we need to address the risks obesity presents to our whole population now.

To meet our ambition to halve childhood obesity by 2030, it is imperative we reduce children's exposure to products high in fat, salt and sugar (HFSS) advertising on TV and online. We want to ensure that the media our children engage with the most promotes a healthy diet. Evidence suggests that exposure to HFSS advertising can affect what and when children eat,<sup>[footnote 3][footnote 4][footnote 5]</sup> shaping children's food preferences from a young age.<sup>[footnote 6][footnote 7]</sup> Over time, excess consumption can lead to children becoming overweight or obese, all of which puts their future health at risk.

### Why government is acting

Current advertising restrictions for HFSS products during children's TV and other programming of particular appeal to children are insufficient to protect children from seeing a significant amount of unhealthy food adverts on TV, and do not account for the increasing amount of time children spend online. Analysis from September 2019 demonstrated that almost half (47.6%) of all food adverts shown over the month on ITV1, Channel 4, Channel 5 and Sky1 were for HFSS products and this rises to nearly 60% during the 6pm to 9pm slot.<sup>[footnote 8]</sup>

Ofcom research suggests that children's viewing peaks in the hours after school, with the largest number of child viewers concentrated around family viewing time, between 6pm and 9pm.<sup>[footnote 9]</sup> In this period children are watching programming not specifically aimed at them, with half of children's viewing taking place during adult commercial programming where restrictions on HFSS advertising are weaker.

Evidence suggests that HFSS food marketing in traditional media, such as TV, affects children's eating and eating-related behaviour,<sup>[footnote 10]</sup> with emerging evidence also suggesting that HFSS food marketing in digital media has similar effects.<sup>[footnote 11]</sup> Therefore, the combined impact on children from TV and online advertising underlines the importance for government to address HFSS advertising. In addition, the 2019 consultation responses raised concerns of displacement of HFSS advertising from TV to online, which government has taken into account.

### The 2019 and 2020 consultations

In July 2020, as part of the 'Tackling Obesity' strategy, government announced its intention to implement a 9pm watershed on TV for HFSS advertising. This aligned with the 2019 consultation (<https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and->

sugar) feedback (which ran from March to June 2019) where 79% of respondents supported this proposal. From November to December 2020, we also consulted on introducing a total H.F.S.S. restriction online (<https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and-sugar>). The rationale for this proposal in the online space was threefold:

- future-proofing the policy against changes in children’s media habits which are shifting online
- accounting for a lack of transparency and independent data for adverts served online
- addressing concerns with the efficacy of online controls which seek to target H.F.S.S. adverts away from children

Consultation responses showed strong support for a proposal to introduce a total online H.F.S.S. advertising restriction with 74% in agreement.

## **The final policy**

Following careful consideration of the evidence submitted and comments made by stakeholders during the consultation exercise, we have reached the following final policy decisions that will apply UK wide. Following this, government has decided that implementing further H.F.S.S. advertising restrictions on TV and online represents the best intervention to meet the objective of reducing children’s exposure to H.F.S.S. advertising. This follows consideration of a range of alternatives, including enhanced industry-led measures. The policy that will apply UK wide, is as follows:

- introduce, simultaneously at the end of 2022, a 9pm TV watershed for H.F.S.S. products and a restriction of paid-for H.F.S.S. advertising online
- all on-demand programme services (O.D.P.S.) under the jurisdiction of the UK, and therefore regulated by Ofcom, will be included in the TV watershed for H.F.S.S. advertising
- non-UK regulated O.D.P.S. will be included in the restriction of paid-for H.F.S.S. advertising online because they are outside UK jurisdiction

## **Products in scope**

In addition, we have revised the products in scope following consultation feedback. We have reduced the scope to those categories that are of most concern to childhood obesity. These are listed in Annex 1 of the consultation response. To determine whether or not such a product is H.F.S.S., the 2004 to 2005 Nutrient Profile Model (N.P.M.) will then be used. This is consistent with the approach that will be used for the promotions restrictions on price and volume policy, which is part of the Tackling Obesity strategy.

## **Paid for advertising**

The government has considered feedback from a range of stakeholders, and has concluded that the online restrictions should be limited to paid-for advertising. Paid-for space online is any space where a third party has had to pay the owner to display content and is outlined in more detail in Annex 3.

## **Owned media**

The restriction will not, therefore, apply to ‘owned media’. This is to ensure that brands can continue to talk about their products in the spaces they own, so that adults are not prevented from travelling to owned media online spaces and so that important factual information can be shared, such as

allergen ingredients on a brand's own online spaces. 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<sup>[footnote 5]</sup>.

## Exemptions

The policy will have a number of exemptions to balance health benefits and impact on business. They are as follows:

- brand advertising (online and 9pm TV watershed), provided there are no identifiable HFSS products in the adverts, brands can continue to advertise. This is to ensure that brands are not pigeonholed as synonymous with HFSS products and have the freedom to reformulate and move towards offering healthier products
- small and medium enterprises (SMEs) (online and 9pm TV watershed), businesses with 249 employees or fewer that pay to advertise HFSS products will be exempt from the HFSS restrictions. We do not currently have sufficient data to include SMEs in the policy, and the impact of the restrictions applying to these enterprises at this time, in what for many will be the recovery phase from the pandemic, may be disproportionate. Furthermore, advertising restrictions could mean SMEs are less able to compete with larger brands who can use their brand recognition and resources to mitigate the effects of the proposed HFSS restrictions
- audio (online) – as the impact and levels of child exposure to HFSS advertising on audio only media (podcasts, online only radio) remains unclear, these restrictions will not apply to online audio only content where it is streamed
- broadcast radio is not included in the policy, as highlighted in the 2019 consultation we did not propose further restrictions on other forms of advertising regulated by the Advertising Standards Authority's (ASA) BCAP (radio) and CAP codes (including print, outdoors, direct marketing and cinema)
- business to business (online only) – businesses can continue to promote their products or services to other businesses, which we hope will prevent unintended consequences of impeding business activity where commerce is not with the purpose of encouraging children's consumption of HFSS food or drink
- transactional content (online only) – to ensure that the buying and selling of products is allowed to continue and that consumers have enough information at the point of sale/purchase

## Liability and enforcement

- broadcasters and ODPs under UK jurisdiction (including video-on-demand) will be liable for breaches of the HFSS TV watershed
- advertisers will be liable for breaches of the paid-for online HFSS restriction
- for non-UK ODPs, the advertiser will be liable for breaches of the online HFSS restriction on these platforms

This approach best aligns with the current enforcement frameworks across TV, online and ODPs advertising. It will provide greater regulatory coherence for broadcasters, platforms, advertisers and regulators as the liable parties for HFSS advertising breaches will be the same as for other breaches of the advertising codes.

## Online platforms

We also considered and consulted on whether other actors, including online platforms, in the online advertising ecosystem should have responsibility for advertisements that breach an online restriction, alongside the responsibility of advertisers. The issue of whether online platforms should take on more responsibility for advertising served on their services is not unique to H.F.S.S. advertising, equally applying to other areas such as fraudulent advertising and scam adverts, as well as other forms of potentially harmful or misleading advertising.

Following consultation feedback, the government will entrust the regulators to determine what constitutes an advertiser. With regard to online platforms, for the purposes of these new restrictions, government is committed to reviewing the regulatory framework for services providing online advertising content through the Online Advertising Programme which we will consult on as soon as possible this year. As part of this work, government will consider regulation of the content and placement of advertising online, duties on service providers, and to what extent the current regulatory regime is equipped and funded to tackle the challenges posed by online advertising. We intend to legislate on the conclusions of the Online Advertising Programme, subject to consultation and Parliamentary time.

## **Enforcement**

For H.F.S.S. advertising, government will appoint Ofcom as the statutory regulator. The confirmed regulatory authority will then be able to appoint a day-to-day regulator to carry out frontline regulation. Government expects the ASA to fulfil this role, which is supported by consultation feedback. This co-regulatory structure has been successful in broadcast and the government believes that it will make enforcement both rigorous and proportionate within the changing online media landscape.

Government proposes that the frontline regulator uses powers contracted out by Ofcom to promote compliance with and understanding of the new H.F.S.S. advertising restrictions. The frontline regulator can then through informal powers (for example reputational sanction, such as naming and shaming), and takedown requests in the first instance insist on the advert being removed. For serious breaches or repeated breaches or where regulatory mechanisms available to the frontline regulator have failed to satisfactorily tackle the non-compliance, the chosen frontline regulator will have the option to refer these cases to the backstop regulator (Ofcom).

Ahead of implementation, we will work with the regulators to ensure guidance is available for businesses to understand the new restrictions. Government is committed to work closely with industry to ensure they are supported to implement the new requirements ahead of them coming into force.

## **Impact of policy**

Alongside the consultation response we are publishing the accompanying Equality Assessment and Impact Assessment. The Impact Assessment outlines in detail the costs and benefits of this policy and has been updated to account for new evidence provided through the consultation responses in 2019 and 2020. These documents are intended to be read in tandem.

## **Implementation**

Government has committed to implementing restrictions for TV and online at the same time and will aim to do so at the end of 2022. Government will use the upcoming Health and Care Bill to legislate for these changes. This Bill will enter parliament in this parliamentary session.

The categories of food and drink in scope will be taken forward in secondary legislation. After publishing the consultation response, we intend to conduct a short enforcement consultation on these regulations.

As part of government standard practice, we will review and evaluate the policy 5 years post implementation. We are planning for this review to take place in 2027.

## Introduction

### The need to protect UK's health

Childhood obesity is one of the biggest health problems this country faces. More than one in 5 children in England are obese or overweight by the time they start primary school, and this rises to more one third by the time they leave.<sup>[footnote 12]</sup> It is also an issue that affects adults, with around two-thirds (63%) of adults being above a healthy weight,<sup>[footnote 13]</sup> and of these, half live with obesity.

Obesity is associated with reduced life expectancy. It is a risk factor for a range of chronic diseases including cardiovascular disease, type 2 diabetes, some types of cancer, respiratory disease<sup>[footnote 14]</sup> and liver disease.<sup>[footnote 15]</sup> For children, it can also have a big impact on mental health. Those who are overweight and obese are more likely to experience bullying, stigmatisation and low self-esteem.<sup>[footnote 16]</sup> It also makes them more likely to go on to become obese adults,<sup>[footnote 17]</sup> which puts them at risk of the health issues outlined above.

The prevalence of obesity has become an even more pressing issue because of COVID-19. Evidence shows that people who are overweight or living with obesity who contract COVID-19 are at greater risk of dying from the virus.<sup>[footnote 18]</sup> As excess weight is one of the few modifiable risk factors for COVID-19, the government has been clear that there is an urgent need to take action.

Furthermore, the prevalence of obesity disproportionately affects people from lower socio-economic backgrounds. Children growing up in low income households are more than twice as likely to be obese as those in higher income households.<sup>[footnote 19]</sup> Children from black, Asian and minority ethnic (BAME) families are more likely than children from white families to be overweight or obese and this inequality gap is increasing.<sup>[footnote 20]</sup> There is evidence to suggest that disparities in excess weight may explain some of the observed differences in outcomes linked to COVID-19 for older adults and some BAME groups.<sup>[footnote 21]</sup> It is noted that some of the other risk factors for having serious COVID-19 complications, such as type 2 diabetes, heart disease and respiratory disease are obesity comorbidities.<sup>[footnote 22]</sup> Reducing obesity and focusing on the health of our children will help to ensure we are a more resilient, healthier adult population in the future.

Obesity also has significant financial costs. It is estimated that obesity-related conditions are currently costing the NHS £6.1 billion per year.<sup>[footnote 23]</sup> The total costs to society of these conditions have been estimated at around £27 billion per year,<sup>[footnote 24]</sup> with some estimates placing this figure much higher.<sup>[footnote 25]</sup>

We know that obesity is a complex problem caused by many different factors. No one policy and no one sector will reduce obesity on its own and it will take time to reduce obesity levels in the UK. To tackle obesity the UK government has now published 3 chapters of the Childhood Obesity Plan,<sup>[footnote 26]</sup> and most recently the Tackling Obesity strategy,<sup>[footnote 27]</sup> which aims to help adults and children to live healthier lives.

A critical part of delivering this goal is reducing excessive calorie intake. We make numerous decisions about the food we eat, and every day we are presented with encouragement and opportunity to eat the least healthy foods. This can be through the advertisements we see on TV and online, the range of foods sold in our local shops or delivered straight to our doors, and the food that is promoted in-store and online. All of this is intended to influence the choices we, and our children make.

That is why, since 2019, **DHSC** and **DCMS** have held 2 consultations looking at introducing further advertising restrictions on TV and online for products high in **H.F.S.S.**

## **How **H.F.S.S.** advertising restrictions will help**

Despite current **H.F.S.S.** advertising restrictions that apply online and during children's TV and other programming of particular appeal to children, analysis commissioned by **DCMS** for the 2019 consultation showed that in 2017 children were still exposed to a significant amount of **H.F.S.S.** product advertising. It showed that there were an estimated 3.6 billion <sup>[footnote 28]</sup> child impacts on TV<sup>[footnote 29]</sup> and 0.7 billion child impressions online in 2017.<sup>[footnote 30]</sup> Through evidence received in response to this consultation we additionally heard that our initial figures for online impressions were a significant underestimation and that online **H.F.S.S.** advertising exposure was 15.1 billion impressions in 2017.<sup>[footnote 31]</sup> We have updated our analysis to reflect that fewer product categories are now in scope. This indicates there were 2.9 billion **H.F.S.S.** TV impacts and 11 billion impressions online in 2019.

Furthermore, the diet advertised on TV and online does not reflect the healthy balanced diet that would support us all to live healthier lives. Evidence suggests that **H.F.S.S.** product advertising is more prevalent on TV than other food and drink product advertising.<sup>[footnote 32]</sup>

Research from September 2019 shows that almost half (47.6%) of all food adverts shown over the month on ITV1, Channel 4, Channel 5 and Sky1 were for **H.F.S.S.** products and this rises to nearly 60% during the 6pm to 9pm slot — the time slot where children's viewing peaks.<sup>[footnote 33]</sup> Additionally, online food and drink advertising spend has increased by 450% between 2010 and 2017<sup>[footnote 34]</sup> (it should be noted this percentage includes **H.F.S.S.** and non-**H.F.S.S.** products). This highlights the need to futureproof the policy to align with children's media habits and to reflect where **H.F.S.S.** advertising spend has been moving.

Studies show that children's exposure to **H.F.S.S.** product advertising can affect what children eat and when they eat.<sup>[footnote 35]</sup> This can happen both in the short term, increasing the amount of food children eat immediately after being exposed to a **H.F.S.S.** advert,<sup>[footnote 36][footnote 37]</sup> and in the longer term by shaping children's food preferences from a young age.<sup>[footnote 38][footnote 39]</sup>

Based on research commissioned by government to inform the 2019 and 2020 policy consultations, and evidence we received through this consultation, we estimate that introducing a watershed across broadcast TV and a restriction for paid-for online advertising could remove up to 7.2 billion calories from children's diets per year in the UK.<sup>[footnote 40]</sup>

It is important to note that this figure is a population wide estimate and calculating an average 'calorie lost' figure per child does not reflect the fact that this policy could have a greater impact on certain children. For example, there is evidence that children from lower socio-economic households spend more time watching TV and online,<sup>[footnote 41]</sup> and are therefore exposed to more **H.F.S.S.** food advertising compared to higher income households.<sup>[footnote 42]</sup> These children are also twice as likely to be obese as those from high income households. Evidence also suggests that **H.F.S.S.** adverts have a greater impact on those children who are already overweight or obese.<sup>[footnote 43]</sup> This indicates that these individuals are more likely to be affected by any restriction to **H.F.S.S.** advertising.

In total, over the coming years this policy could be expected to reduce the number of obese children by around 20,000.

Importantly, in our impact assessment, health benefits have been estimated from changes in children's immediate consumption of **H.F.S.S.** products. Health effects on adults have not been monetised in our analysis. While there is some evidence linking **H.F.S.S.** advertising exposure to



changes in adult's purchases and consumption,<sup>[footnote 44][footnote 45][footnote 46]</sup> it is not conclusive enough to be used in quantifying policy impacts. If H.F.S.S. advertising does have a positive influence on adult consumption, the policy could generate significant additional health benefits for the adult population.

This situation has not been replicated on the costs side of our cost-effectiveness estimate. Here, the method used to estimate costs to H.F.S.S. advertisers captures all the increased purchases derived from advertising, potentially from both adults and children. The method also includes any effects of a price premium H.F.S.S. advertisers can charge as a result of their advertising activity. This means should H.F.S.S. advertising have an impact on adults, it would be captured within the costs, but not the benefits, and so the net benefit of the policy would be underestimated. Unfortunately given the available evidence, the presence and magnitude of this effect cannot be estimated more definitively. It is key to reiterate that although it is expected this policy may have some impact on adult consumption, the focus of the policy is removing H.F.S.S. advertising from child audiences.

We know that a number of UK companies are proactively exploring options to reformulate their products. Government commends this and we hope that these advertising restrictions will add a further incentive for companies to make their products healthier, as they will then be able to advertise their products without these new H.F.S.S. advertising restrictions.

## **Children's media consumption**

### **Broadcast media habits**

Despite a decline over recent years, data from the British Audience Research Board (BARB) – the body that compiles audience measurement and television ratings for broadcasters and the advertising industry – shows that children aged 4 to 15 watched 43% less broadcast TV in 2017 than they did in 2010.<sup>[footnote 47]</sup> Despite this decline, children still spend a significant amount of time watching broadcast TV – 7 hours 56 minutes a week in the first half of 2019.<sup>[footnote 48]</sup> As such, government considers it appropriate to introduce a TV watershed to limit children's exposure to H.F.S.S. advertising when they watch TV.

Ofcom research shows that children's viewing peaks in the hours after school, with the largest number of child viewers concentrated around family viewing time, between 6pm and 9pm.<sup>[footnote 49]</sup> In this period children are watching programming not specifically aimed at them, with half of children's viewing taking place during adult commercial programming where restrictions on H.F.S.S. advertising typically don't apply.

### **Online media habits**

Ofcom has found that children aged 12 to 15 now spend more time online than watching broadcast TV.<sup>[footnote 50]</sup> Since 2019, the way that children consume media has changed, with 5 to 15-year-olds spending around 20 minutes more online per day than in front of a TV set, and evidence suggests that this shift will continue.<sup>[footnote 51]</sup> The platforms they use online are also diversifying, with new forms of social media gaining popularity in recent years.<sup>[footnote 52]</sup>

Evidence also suggests that the diversification of viewing habits where traditional broadcast advertising is combined with online consumption may be amplifying the effectiveness of advertising.<sup>[footnote 53]</sup> This all emphasises the need for robust restrictions for H.F.S.S. advertising on both TV and online.

## **2019 consultation summary**

In Childhood obesity: a plan for action, chapter 2 (<https://www.gov.uk/government/publications/childhood-obesity-a-plan-for-action-chapter-2>), government announced plans to consult on introducing a 9pm watershed on TV and online for advertising H.F.S.S. products.

The main aim of this consultation was to gather views on how best to reduce children's exposure to H.F.S.S. advertising in order to reduce children's overconsumption of these products.

We also set the following objectives to ensure that any potential future restriction:

- would be targeted to the products of most concern to childhood obesity
- would be proportionate
- would be easily understood by parents or guardians, so that they can be supported in making healthy choices for their families
- would drive reformulation of products by brands

The consultation received significant interest with 1736 responses from individuals, businesses and organisations:

- 92% of responses were from individuals (1596)
- 2% from businesses (this was 29 in total which included advertising, broadcasters, food manufacturers and retailers, out-of-home food providers and online platforms)
- 6% from organisations (this was 111 in total which included academia, health NGOs, local authorities, NHS trusts and trade associations)

Respondents answering as individuals came from a wide variety of sectors, including charities, government, the NHS, students, social care and the private sector. 189 individuals selected 'other' and a large proportion of these were parents or guardians. When looking at all individuals, 64% of respondents were parents or guardians. The age of these parents or guardian's youngest child varied, with 34% being over 18, 22% aged between 10 and 18 years old, 26% aged between 3 and 10, and 18% less than 3 years old.

Overall, there was strong support for introducing a watershed for H.F.S.S. products to broadcast TV and online with 79% and 73% in agreement, respectively. There were noticeable differences in views from individuals, organisations and business. 81% of individuals supported a watershed restriction for broadcast TV, compared with 73% of organisations and 13% of business. Similarly, for an online watershed, 74% of individuals and 65% of organisations were supportive but only 14% of businesses. There was also a strong correlation between the answers for broadcast TV and online, with 86% of those supporting a watershed restriction for TV also supporting a watershed restriction online. Likewise, 88% of respondents who supported no government intervention for TV also supported no government intervention online.

## **Breakdown of consultation responses**

1736 responses were submitted in total, with 1479 submitted via the online survey and 257 via email. The analysis below, presents data by respondent type (individual, business or organisation) and outlines the percentages of responses (to note that the percentages do not necessarily add up to 100 because not all questions were answered by all respondents and due to rounding), as well as the most common views expressed in any free text sections.

The consultation focused on some key themes aimed at shaping the policy, for example:

Should further advertising restrictions be applied to other types of media in addition to broadcast TV and online?

How should HFSS products be defined?

What restrictions should be placed on broadcast TV HFSS advertising?

Should government provide an exemption to these rules for when there are low child audiences?

What restrictions should be placed on online HFSS advertising?

Should these restrictions be introduced at the same time for TV and online?

These themes were selected to align with the main aims of the policy outlined above; with all of them working to ensure future restrictions are proportionate and easily understood by parents and guardians as well as businesses and organisations. Furthermore, asking how HFSS products should be defined addressed our aim to target products of most concern to childhood obesity and which could be the focus of reformulation efforts.

During and post-consultation we met stakeholders from a cross section of sectors, including broadcasters, online platforms, food and drink manufacturers, health NGOs and academics. We used these meetings to discuss the consultation and clarify their responses.

## Scope of further restrictions

### Should further advertising restrictions be applied to other types of media in addition to broadcast TV and online?

#### Consultation questions: 1 to 3

1. The government proposes that any further advertising restrictions apply to broadcast TV and online. Do you think that any further advertising restrictions should be applied to other types of media in addition to broadcast TV and online?
2. If answered yes, which other media should be subjected to further HFSS advertising restrictions?
3. Please explain why you think that we should extend additional advertising restrictions to these types of media.

## Consultation feedback

The consultation proposed further action on TV and online. We asked in the consultation whether further restrictions should be applied to other types of media and, if so, what other forms of advertising and why. We proposed that brand advertising and the rules relating to advertising HFSS products in programming or content of particular appeal to children were also out of scope.

89% of respondents thought that restrictions should apply to other types of media. Of these, 72% thought it should also apply to cinemas, 66% to outdoor, 63% to radio and over 50% to direct marketing and print. The response varied depending on whether it was an individual, organisation or business responding. 90% of individuals thought that restrictions should apply to other types of media, 85% of organisations also thought this but only 25% of businesses did. For business, the most popular response to this question was no, with 75% thinking that restrictions should not be applied to any other type of media. It is important to note that in response to other questions in this consultation, the majority of businesses did not think restrictions should be applied to TV or online

advertising either. Broadcasters, who strongly supported no further restrictions on TV and online, in a scenario where advertising restrictions were introduced for TV, called for those restrictions to be extended to all media to prevent displacement and ensure a level playing field.

We asked respondents if there was any other media that we have not listed that should be subject to further restrictions. Analysis of these free text answers showed the most popular media type mentioned as sponsorship, followed by apps/games and social media.

Question 3 of the consultation asked why respondents thought we should extend additional advertising restrictions to these types of media. The most common answers were for the health benefits and to reduce children's exposure to **HFSS** advertising, followed by the need for equity across all media.

## **Government decision**

Following careful consideration of the feedback received, government has decided to progress with introducing a TV watershed. For online, government wanted to consider how it could go further than a watershed and introduce a total online restriction. government therefore held a separate consultation on this in 2020 and the analysis of responses to that consultation are included below. From the outset, government's intention was clear that the focus was to be on the media that children engage with the most, this being online and TV. We acknowledge there may be a level of displacement in **HFSS** advertising to other types of media as a result of the policy, but we believe this approach is consistent with children's current **HFSS** advertising exposure.

While government was clear in the consultation document that brand advertising was not in scope of the proposals, a number of health **NGOs** called for brand advertising to be included in the restrictions. Government remains of the view that this should remain out of scope of these new restrictions as its concern is around identifiable **HFSS** product exposure.

We want to give brands the opportunity to reformulate their products. A brand that is currently synonymous with **HFSS** products may not be in the future. 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. The evidence on the impact of advertising to children is also centred on product-specific adverts. It should be noted that a brand is only able to advertise/sponsor if the advert does not include an identifiable less healthy food and drink product. The inclusion of a product(s) would mean sponsorship/advertising could not be used online or on TV before 9pm. 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.

The proposed restrictions do not replace the **ASA** existing rules concerning sponsorship. Existing measures include clear and robust rules to ensure sponsorship is not targeting at children. For example, the use of mascots or celebrities of specific appeal to children would be considered a breach of the **ASA** rules.

Government remains of the view that these new restrictions would not amend the existing rules around programming of particular appeal to children. The definition of **HFSS** products in scope for a watershed advertising restriction is less stringent than that currently in place for children's programming, as government recognises that a different approach is needed during media where the audience base is mixed, and does not think it acceptable to dilute current restrictions where the majority of viewers are some of our youngest children.

## **HFSS definition**

### **How should **HFSS** products be defined?**

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## Consultation questions: 4 to 5

4. The government proposes that any additional advertising restrictions apply to food and drink products in Public Health England's (PHE) sugar and calorie reduction programmes, and the Soft Drink Industry Levy, using the NPM 2004 to 2005 to define what products are HFSS. Do you agree or disagree with this proposal?

5. If you do not agree with the proposal what alternative approach would you propose and why? Please provide evidence to support your answer.

## Consultation feedback

The consultation proposed that any additional advertising restrictions apply to food and drink products in PHE's sugar and calorie reduction programmes, and the Soft Drink Industry Levy (SDIL), using the Nutrient Profiling Model (NPM) 2004 to 2005 to define what products are HFSS.

The majority of respondents (83%) agreed to using this definition. This differed across respondent type, with 85% of individuals, 63% of organisations and only 26% of businesses agreeing. For business, 65% of respondents disagreed with this proposal.

Of the 10% of total respondents who disagreed with the proposal, 22% (the highest proportion) did so because they fundamentally disagree with government health advice in general. 14% of respondents wanted government to use the updated NPM, 13% thought that it is not for government to intervene and 11% wanted the NPM applied to all food and drinks and not a reduced list of product categories.

When looking by sector, advertisers tended not to support the 2004 to 2005 NPM as they did not think it would drive reformulation and they thought it was inconsistent with models in other jurisdictions. The food and drink industry had mixed responses, with some recommending applying the Scottish 'discretionary' categories to the 2004 to 2005 NPM, some recommending using SDIL/the reformulation programme's thresholds instead of the 2004 to 2005 NPM and others recommending using portion size to determine NPM score. The out of home food sector suggested using the Scottish 'discretionary' categories and some commented that food delivery services were usually reliant upon generic product advertising (for example, showing an unbranded food item) and wanted clarity on how this system would work for them. Businesses across sectors mentioned their worry about the use of the updated NPM when it was published. Generally, the health sector supported the 2004 to 2005 NPM as a first step, but some called for the updated NPM to be applied to all products. The majority of health organisations requested a 3-year review to consider switching to use the full updated NPM. Individuals, local government and NHS trusts all broadly supported the 2004 to 2005 NPM.

## Government decision

Reflecting on the views expressed by respondents and the objective of the policy to be targeted to those products of most concern to childhood obesity, government has decided to shorten the list of products from PHE's calorie and sugar reduction categories and from products that are subject to the SDIL that are in scope of the advertising restrictions. This updated list continues to include the products that are most heavily advertised and of most concern to childhood obesity. The items that will be included are listed at Annex 1. This list of products is also in line with other government policies to restrict the promotion and placement of HFSS products in retail,<sup>[footnote 54]</sup> and supplemented by additional products covering the out of home sector (main meals, starters/sides/small plates, children's meal bundles and sandwiches).

If the product fits into one of the listed categories, the 2004 to 2005 NPM will then be applied to determine if it is HFSS. The 2004 to 2005 NPM is based on scientific evidence and is already used by industry to determine which products can or cannot be advertised to children on TV during children's viewing times. Therefore, we hope that these new measures are easy to understand and implement.

We are aware that certain nutritional data is needed to calculate the NPM score and that this is specific to each product and brand. For example, some yoghurts may be classed as HFSS and others not. Some adverts use generic products in the background, for example, a holiday company featuring an ice cream. However, unless this is an identifiable branded product it will be exempt from these restrictions (although in the spirit of the policy, we would welcome advertisers' own efforts to use healthier background products). Where a number of products are shown in a single advert, for example in a retail advert, all identifiable products must not be HFSS.

As part of chapter 2 of the childhood obesity plan, government commissioned PHE to revise the NPM in line with updated dietary advice on free sugars and fibre. The revised NPM has not yet been published and we are working to publish it shortly. It is the government's intention to use the 2004 to 2005 NPM for this policy and any change to this in future would be consulted on.

## **Broadcast advertising options**

### **What restrictions should be placed on broadcast TV HFSS advertising?**

#### **Consultation questions: 6 to 7, 11 to 19**

6. Please select your preferred option for potential further broadcast restrictions:

- option 1 – introduce a 9pm watershed
- option 2 – ladder option
- option 3 – no government intervention

7. Please select the reason/s for your choice, providing supporting evidence for your answer. Please tick all that apply

- a) Will reduce children's exposure to HFSS advertising and in turn reduce their calorie intake
- b) Will drive further reformulation of products
- c) Will reduce economic impact on broadcasters
- d) Will reduce economic impact on advertisers
- e) Reduces risk of displacing of advertising spend
- f) Easy to implement
- g) Easy for advertisers and regulators to understand
- h) Easy for parents and guardians to understand
- i) Other – please specify

## Consultation feedback

Respondents were asked whether they preferred the following options:

Option 1: H.F.S.S food and drink in scope (determined by the 2004/2005 N.P.M) could not be advertised before 9pm, on broadcast TV, with an exemption for channels and or programmes (which was asked of respondents) with low child (less than 1%) audience.

Option 2: a ladder system to determine what products can and cannot be advertised between before 9pm of advertising restrictions to incentivise reformulation (rewarding companies that are reformulating their products or already have healthier products on the market, by giving them advertising freedoms based on N.P.M scores).

Option 3: no government intervention.

Feedback from the consultation showed preference for option 1, to introduce a 9pm watershed, with 79% (1072) of all total respondents choosing this option (individual: 999; organisation: 70; business: 3).

12% (164) of respondents selected option 2, a ladder option (individual: 153; organisation: 8; business: 1).

9% (118) of respondents selected option 3, no government intervention (individual: 80; organisation: 18; business: 20).

### Option 1 – introduce a 9pm watershed

When broken down into type of respondent, individuals and organisations both preferred option one, with 81% and 73% of respondents in those categories selecting this option. For business, only 13% of respondents selected option one.

From those who selected option 1, the main reasons stated for choosing this option were that it will reduce children's exposure to H.F.S.S advertising and in turn reduce their calorie intake (78% of respondents thought this); that it is easy for parents and guardians to understand (56% of respondents thought this); and that it is easy for advertisers and regulators to understand (48% of respondents thought this). 35% also thought that option one would drive further reformulation of products.

Health N.G.O.s, individuals, local government and NHS trusts generally supported this option.

Broadcasters opposed this option and said that they did not believe the impact was justified by the calorie reduction gained. In addition, advertisers, the food and drink industry and the out of home industry also did not support a TV watershed as they believed this policy would disproportionately target adults. The food and drink sector said that they did not think this would incentivise reformulation of products.

### Option 2 – ladder option

Only 12% of respondents selected option 2. It was selected by 13% of individuals, 8% of organisations and 4% of businesses. The main reason people selected this option was because they thought it would drive further reformulation of products (55% of people selecting option 2 thought this), followed by it reducing children's exposure to H.F.S.S advertising and in turn their calorie intake (51%).

Those who selected option 2 were asked follow up questions on what **NPM** thresholds should be used. 94% agreed with the **NPM** thresholds suggested. 59% thought that the **NPM** thresholds should decrease over time to offer rewards in line with reformulation efforts, with only 13% thinking these thresholds should stay static.

Most sectors opposed this option, with the food and drink industry, out of home and advertisers saying that it will not drive reformulation of products. In addition, health **NGOs** also thought that this option was too complex to understand.

### **Option 3 – no government intervention**

9% of respondents supported option 3, of which included 83% of businesses, 7% of individuals and 18% of organisations. Those with preference for option 3 cited that it would reduce the economic impact on advertisers (15%) and broadcasters (15%), be easy to implement (14%), and would reduce the risk of displacing advertising spend (10%).

Those selecting option 3 were asked if there were any alternative measures that might help meet our policy objectives: 39% answered yes to this question. The most popular alternative measure suggested was government funded education on health, cooking and physical activity, with 44% proposing this. 17% of respondents to this question answered that they did not think it was government's job to intervene here.

Broadly advertisers and broadcasters supported option 3 and said that current restrictions are already working effectively. They highlighted their work on campaigns such as 'veg power' and 'eat them to defeat them' and argued that working on health messaging through their programming was more impactful than advertising restrictions. Some also said that any further rules should be developed by the **ASA**, across their broadcast and non-broadcast codes which set out the rules for advertising standards and placement in the UK. The food and drink industry generally supported this option, citing work administered and applied independently by the **ASA**, including examples of the **ASA's** work on portion size and reformulation of products, as a reason for no further advertising restrictions. Health **NGOs** opposed this option and said that there is evidence and public support for intervention in this area.

### **Government decision**

Following consultation feedback and considering evidence submitted during the consultation exercise, government has decided that it will implement option one: a 9pm watershed for **HFS** advertising on broadcast TV to reduce the amount of **HFS** advertising that children are exposed to. Government recognises that efforts have been made by broadcasters to promote a balanced diet. Campaigns such as 'eat them to defeat them' provide positive initiatives for children across the UK. However, based on the evidence available to government, it has been decided that more decisive measures are required in order to tackle the issue of childhood obesity. During the development of this policy, **DHSC** and **DCMS** carefully considered the impact any restrictions will have on industry and any business sectors that will see greater impacts. Impacts from these options have been balanced against the impact advertising of **HFS** food and drink has on children's consumption, preferences and future health benefits. Government has decided that to meet the urgent need to address the risks obesity presents, option one is the most effective way to reduce children's exposure to **HFS** advertising on broadcast TV.

In addition, in line with responses to the consultation, we believe this option meets the other objectives of this policy of being easily understood by parents and driving reformulation of products.

### **Low child audience exemption for TV restrictions**



## Should government provide an exemption to these rules for when there are low child audiences on TV?

### Consultation questions: 8 to 10

8. If you selected option 1 (a 9pm watershed), government proposes an exemption for when there are low child audiences. Should this exemption apply to channels or programmes? Please explain your answer.

9. If you selected option 1 (a 9pm watershed), do you agree that 1% of the total child audience (around 90,000 children) is the appropriate level at which programmes or channels should be exempted? (Choose only one) Please explain your answer.

10. If you selected option 1 (a 9pm watershed) and you do not agree that 1% of the total child audience is the correct threshold to grant an exemption please propose an alternative threshold, providing evidence to support your answer.

### Consultation feedback

In the consultation, government proposed an exemption for TV channels and programmes with low child audiences. We suggested setting this level as 1% of the total children's audience; that is, fewer than 90,000 child viewers. Those channels and programmes would still be subject to the existing prohibitions around children's programming but would not be subject to any further restrictions. We sought views on this proposed level and whether it should apply to channels, programmes or both.

Of the respondents who selected option one, approximately 60% did not support an exemption for channels/programmes with low child audiences. 43% of these respondents thought that if there was an exemption, it should apply to the programme, and 30% of respondents thought it should apply to the channel. Some health stakeholders called for it to apply to both programme and channel simultaneously.

When asked if 1% of the total child audience (around 90,000 children) was the appropriate level of exemption, the majority of respondents (55%) said no, with 21% saying yes and 25% answering 'I do not know'. When asked to provide further commentary, the most common response was that there should be no exemption (65%) followed by respondents saying the threshold should be lower (23%).

Those who did not agree that 1% was the correct threshold were asked to propose an alternative threshold. Only 192 respondents answered this question, but 85% of those that did said there should be no exemption, 6% said it should be lower than proposed and less than 1% said it should be higher than proposed.

Health NGOs, local government and NHS trusts were against any exemptions. Broadcasters were against any advertising restrictions for TV but said that if they were implemented then there should be exemptions to ensure parity with broadcast restrictions.

### Government decision

Following consideration, government has decided against inclusion of the low child audience exemption. The aim of the policy is to reduce children's exposure to HFSS advertising. Therefore, it was felt that allowing an exemption that could at any time expose 90,000 children (1% child

audience) across multiple channels to H.F.S.S. advertising undermined the policy intention to protect all children equally.

## **Online advertising restrictions**

### **What restrictions should be placed on online H.F.S.S. advertising?**

#### **Consultation questions: 20 to 35**

#### **Consultation feedback**

The consultation asked for views on the best way to restrict H.F.S.S. advertising online. We consulted on the following options:

- option 1: introduce a 9pm to 5.30am watershed online
- option 2: strengthen current targeting restrictions
- option 3: mixed option
- option 4: no government intervention

Feedback on the consultation showed a preference for option one, with 72% of respondents choosing this option. Of the remaining options, 14% of respondents preferred option 3, 8% preferred option 4 and 6% preferred option 2.

#### **Option 1 – introduce a 9pm watershed**

Option one was chosen by the majority of individuals (74%) and organisations (65%) but only 14% of businesses. The main reasons stated for choosing this option were that it would reduce children's exposure to H.F.S.S. advertising and hence reduce their calorie intake (79% of respondents thought this), that it would be easy for parents and guardians to understand (38%), and would drive further reformulation of products (36%).

Those selecting this option were asked additional questions about exemptions. 73% did not agree that any exemptions should be applied to advertisers that can demonstrate exceptionally high standards of evidence that children will not be exposed to H.F.S.S. advertising. When asked what should be required to meet the definition of exceptionally high standards, the majority of people answered that there should be no exemptions, with only 7% thinking viewing data and 5% thinking age verification being in place could be used as evidence that children would not be exposed to these adverts.

We also asked whether there should be exemptions for certain kinds of advertising where a time-based restriction would be challenging. The majority of respondents (78%) said there should be no exemption, with only 6% saying there should be. For the people who said there should be an exemption, we asked what types of advertising should be exempted and 72% of these respondents said that all types should be treated the same.

Advertisers, the food and drink industry and online platforms responded saying that a watershed was not viable for all advertising formats online. They also said that it ignores the current tools that are available for segmenting advertising online. However, health N.G.O.s, local government and NHS trusts supported the proposal and were opposed to any exemptions, as they said there were insufficient means for enforcement and monitoring online. Broadcasters generally opposed any restrictions but made clear that if they were imposed for TV, they should also be imposed online in order to level the playing field and help avoid displacement.

## **Option 2 – targeted option**

Option 2 was the least preferred option, with only 6% of respondents selecting it. Only 1% of organisations, 6% of individuals and 14% of businesses preferred this option. The reasons people selected this option included that it would reduce children's exposure to HFSS advertising and in turn reduce their calorie intake (52%), it would be easy for parents and guardians to understand (40%) and would drive reformulation of products (36%).

Those selecting option 2 were asked some additional questions. They were asked if the existing restrictions on advertising HFSS products to online audiences where children make up more than 25% of the audience should be lowered. 34% of respondents to this question thought it should be lowered to 1%, 24% thought it should be lowered to a 10% threshold and 22% of respondents thought it should not be reduced.

They were also asked if advertisers should have to provide any specific sources of evidence to prove they excluded under 16s for behaviourally targeted advertising. 60% of respondents to this question answered yes, with only 10% answering no. Those who answered yes were asked what evidence they proposed using. Only 7 respondents answered this question, 29% proposed using data demonstrating viewership and 29% suggested having no exemptions.

Health NGOs were strongly opposed to this option, they said that the current system is failing to protect children and isn't transparent. There was real concern in this sector that as children have been known to falsify their age online or use parent's/guardians, or shared household accounts, this option would not sufficiently protect children from being exposed to HFSS adverts.

## **Option 3 – mixed option**

Option 3 was selected by 14% of respondents made up from 14% of individuals, 13% of organisations and 5% of businesses. The reasons people selected this option included that it would reduce children's exposure to HFSS advertising and in turn reduce their calorie intake (55%), that it would drive further reformulation of products (38%) and that it would be easy for parents and guardians to understand (22%).

Those selecting option 3 were asked if a watershed should be applied to video advertising online and a targeted restriction to all other advertising, 92% of which agreed that it should, with only 3% saying that it should not.

These respondents were also asked about exemptions. When asked about the 25% threshold for targeting restrictions, 47% of respondents said the threshold should be lowered to 1%, 24% said it should be lowered to 10% and 17% thought it should not be reduced.

The advertising sector highlighted that time-based restrictions would not work for all forms of media online and argued, therefore, that online needed to be treated differently to broadcast TV. There was little other commentary for this option.

## **Option 4 – no government intervention**

8.4% of respondents selected this option, this included 67% of businesses, 6% of individuals and 22% of organisations. The main reason given for selecting this option was that it is easy to implement (13%) and easy for parents and guardians to understand (10%), this was followed by it reducing the economic impact on advertisers (11%) and broadcasters (10%).

For those selecting option 4, the respondents were asked if there were any alternative measures from online platforms, regulators or the advertising sector that might help meet the policy objectives. The majority (61%) of respondents answered no, with only 22% answering yes. Only 20 respondents

suggested alternatives, and of these, education campaigns were most popular and suggested by 40%, followed by the view that government should not play a role in intervening (20%).

## **Government decision**

Following consideration of the consultation responses, government decided it should act to reduce children's exposure to **H.F.S.S.** advertising online. However, it was felt the options consulted on did not address concerns raised around the practical challenges of applying a watershed online.

### **A 9pm online watershed**

Responses from industry highlighted concerns that an online watershed would not be an appropriate tool for content regulation. Respondents highlighted that TV is a linear medium that pushes content and advertising to a mass audience in a manner traditionally dictated by time of day. Online, however, is an on-demand medium commonly targeted to individual users, where time of day is neither a determining factor in what content is consumed, nor a proxy for establishing who is likely to consume it. Therefore, taking into account these responses, government have decided not to take this option forward.

### **Strengthening current targeting restrictions**

Government have decided not to take forward this option, as there were significant concerns regarding the efficacy of controls to protect children when advertising is served dynamically to users. Government outlined concerns with targeting in the consultation and did not receive any evidence in response that demonstrated the reliability of this approach in terms of protecting children online. The effectiveness of any targeting approach is further reduced when children bypass age verification through, for example, the use of someone else's profile online.

### **Mixed option**

In addition to the reasons set out for options 1 and 2 above, government decided not to take forward this option, due to feedback highlighting that this approach would be difficult to implement effectively.

### **No government intervention**

Government decided not to take forward this option, as this would not support government's aims in tackling childhood obesity. Although some respondents suggested that **C.A.P.** was better placed to explore this issue through adapting its self-regulatory advertising codes, government concluded that existing standards do not go far enough in limiting children's exposure to **H.F.S.S.** advertising on TV and online.

Therefore, government decided to conduct a further consultation on how we would introduce a total **H.F.S.S.** advertising restriction online. This consultation was open from 10 November 2020 to 22 December 2020. The response, which goes into further detail, can be found further down the page.

## **Implementation**

### **Should these restrictions be introduced at the same time for TV and online?**

**Consultation question: 36**

### **Consultation feedback**

The consultation proposed to introduce any advertising restrictions arising from the consultation at the same time on TV and online to reduce displacement between the different types of media. 92% of respondents were in favour of this. All types of respondents preferred this option, with 91% of individuals, 95% of organisations and 78% of businesses selecting this response. Of the minority that disagreed with implementing these restrictions at the same time, their view was that implementation should not be delayed in order to wait for tandem implementation of online measures, or that they were generally against the implementation of any further restrictions in the first place.

## **Government decision**

Government has decided that these restrictions will apply to TV and online at the same time at the end of 2022.

## **2020 consultation summary**

Like the 2019 consultation, the 2020 consultation on a total online restriction also received significant interest with 2864 responses from individuals, businesses and organisations.

- 91% of responses were from individuals (2615)
- 3% from businesses (a total of 80 which included advertising, broadcasters, food manufacturers and retailers, out of home food providers and online platforms)
- 6% from organisations (a total of 169 which included academia, health NGOs, local authorities, NHS trusts and trade associations)

Respondents answering as individuals came from a wide variety of sectors, including charities, government, NHS, students, social care and the private sector. When looking at all individuals, 28% (744) of respondents identified themselves as parents or guardians and almost all (734) had at least one child under the age of 16.

## **Breakdown of consultation responses**

2864 responses were submitted in total, with 2795 submitted via the online survey and 69 via email.

The analysis below, presents data by respondent type (individual, business or organisation) and outlines the percentage of responses (to note that the percentages do not necessarily add up to 100 because not all questions were answered by all respondents and due to rounding), as well as the most common views expressed in any free text sections.

The objectives of the 2020 consultation follow those of the 2019 consultation, with the main aim remaining unchanged. This was to reduce children's overconsumption of HFSS products by reducing their exposure to HFSS advertising on TV and online. The consultation also stated our aim to ensure the policy:

- would be targeted to the products of most concern to childhood obesity
- would be proportionate
- would be easily understood by parents and guardians, so that they can be supported in making healthy choices for their families
- would drive reformulation of products by brands

This was a technical consultation on a total online restriction which considered the following themes:

- scope and definitions

- enforcement
- platform responsibilities

Before and during the consultation we met stakeholders from a cross section of sectors, including advertisers, broadcasters, online platforms, food and drink manufacturers, health NGOs and academics. We used these meetings to discuss the consultation and clarify their responses.

## Advertising in scope

In light of our analysis of the responses and evidence provided in response to the 2019 consultation, government set out proposals in the 2020 consultation to take further action online to protect children from HFSS advertising through the introduction of a total online restriction for HFSS advertisements. The rationale for this approach was set out as follows:

To reflect children's changing media habits and mitigate displacement of HFSS advertising from TV to online, as children are now spending more time online than on TV with this forecast to continue.

Alongside children's usage, advertising spend is increasing online with a 450% increase in food and drink online advertising spend between 2010 and 2017<sup>[footnote 55]</sup> highlighting the need to futureproof the policy to ensure an effective reduction of children's exposure to HFSS advertising

Government is concerned that due to a lack of transparency online it is the only way to ensure we are truly protecting children from HFSS adverts. There is limited independent public data to reliably monitor the extent to which children are exposed to HFSS adverts online, and this lack of transparency does not provide sufficient reassurance that our children are adequately protected in this space from HFSS advertising.

The proceeding sections provide a detailed analysis of feedback received in response to the 2020 consultation on proposals for a total online restriction and explain why government has decided to narrow the scope of the online restriction to paid-for HFSS advertising.

### Consultation question: 1

1. Do you support the proposal to introduce a total online HFSS advertising restriction?

## Consultation feedback

In response to question 1, 74% supported the proposal to introduce a total online HFSS advertising restriction, whilst 25% disagreed. Of those who answered the question, 75% of individuals agreed with question one, as did 85% of organisations and 23% of businesses.

The most common answer from those that agreed was that the restrictions proposed were necessary to protect children (32%) and that this would reduce exposure to HFSS advertising for children and adults, improve people's health and help people make healthier choices. Health NGOs, academics, local authorities, NHS trusts and public bodies supported the introduction of a total online restriction. These parties stated that this would be more effective than a watershed, easier to understand and that the current targeting methods were not accurate enough. It was also suggested that these restrictions could create more advertising space for healthier products and could help parents make healthier choices for their children.

Broadcasters called for a total online restriction as being necessary for consistency if a 9pm TV watershed is implemented, to mitigate the displacement of **H.F.S.S.** advertising spend on TV to online. Broadcasters felt that there should be broadly consistent policies across mainstream media, in pursuit of policy effectiveness, but also to not disadvantage one sector over another. They also thought that a total online restriction would be a logical reflection of consumer (and especially children's) media behaviour, whereby TV viewing has declined, and online usage and advertising exposure has grown. Broadcasters also observed that some online platforms expressed reservations about applying a watershed online in terms of their operational ability to comply. Broadcasters argued, therefore, that a full ban would be the only workable policy response.

The out-of-home sector, online platforms, advertisers, food and drink retailers, and food and drink manufacturers, did not support a total online restriction as they believed the approach had a limited evidence base, was disproportionate (flagging that proposed rules for **H.F.S.S.** would be stricter than rules for alcohol or gambling advertising) and would unfairly hold online advertisement to a higher standard than television. Online platforms and advertising industry respondents also believed the proposals did not reflect the low risk of children being exposed to **H.F.S.S.** adverts online due to the availability of online targeting tools. Online platform respondents added that existing targeting technology offered a more proportionate solution to targeting **H.F.S.S.** advertising away from children.

Respondents who did not support a total online ban also proposed alternatives. Alternatives were proposed by respondents from the food and drink industry, the advertising industry, and online platforms.

In parallel to government's policy development, the Committee for Advertising Practice (**CAP** – the committee who set the standards for non-broadcast advertising) are developing a self-regulatory mechanism based on targeting. While the government welcomes the proactiveness of the **CAP** in this space, the government's view remains that a solution that relies on targeting would not be sufficient to meet the objective of the policy.

Many respondents pointed to the current set of rules outlined in the **CAP** code as proportionate and successful in restricting children's **H.F.S.S.** exposure and that therefore no further government intervention was needed. We also received proposals to strengthen the existing rules, in particular reducing the child audience threshold for content to qualify as of particular appeal to children from 25% to a range of suggested figures lower than this.

## **Government decision**

Taking into consideration consultation feedback, including the range of alternatives proposed by respondents, government will legislate to introduce a 9pm TV watershed and an online **H.F.S.S.** advertising restriction simultaneously to limit displacement of **H.F.S.S.** advertising spend from TV to online. The online restrictions will apply to all paid-for online **H.F.S.S.** advertising. Our definition of 'paid-for' captures where an advertiser pays by monetary or other reciprocal means for the placement of adverts online. See Annex 3 for a full summary of types of advertising included.

In reducing the scope of the online restriction to paid-for advertising, we have carefully considered the need for proportionality in balancing the policy objectives with the evidence available and impact on business.

The 2020 consultation set out the rationale to legislate for an online restriction to eliminate exposure of children to **H.F.S.S.** advertising in this space. The rationale for this approach was to address concerns about the accuracy of targeting away from children and independent data verifying audience make-up online. As such any alternative proposals would therefore need to meet a high bar in terms of protecting children online. While some information was provided on the proportion of a target audience that adverts reached, there was not enough data to determine that targeting

technologies would be effective in preventing online adverts reaching children for any type of product. Therefore, we consider all alternatives that rely on this approach as insufficient to meet the policy objectives.

## Scope

### Consultation questions: 2 to 4, 7 to 8

2. We propose that the restrictions apply to all online marketing communications that are either intended or likely to come to the attention of UK children and which have the effect of promoting identifiable HFSS products, while excluding from scope:

- marketing communications in online media targeted exclusively at business-to-business
- factual claims about products and services
- communications with the principal purpose of facilitating an online transaction

Do you agree with this definition?

3. Do you foresee any difficulties with the proposed approach on types of advertising in scope?

4. If answered yes, please can you give an overview of what these difficulties are? Please provide evidence to support your answer.

7. Our proposed exemption for factual claims about products and services would include content on an advertiser's social media. Do you agree with this approach?

8. We propose that any advertisers which sell or promote an identifiable HFSS product or which operate a brand considered by the regulator to be synonymous with HFSS products should be required to set controls which ensure that their posts regarding HFSS products can only be found by users actively seeking them on the advertiser's own social media page. This could be achieved, for example, by ensuring that the privacy settings on their social media channels are set so that their content appears on that page only. Do you think this would successfully limit the number of children who view this content?

## Consultation feedback

In response to question 2, where we asked about the scope of the policy, 53% supported the definition of advertising in scope, whilst 31% disagreed. Of the individuals that answered the question, 55% agreed; as did 41% of organisations and 18% of businesses that answered the question.

Respondents commented that the term 'exclusively' in the online marketing communications between businesses made the definition too narrow, given that business-to-business advertisements are not generally targeted at businesses to the exclusion of consumers and that (at least) one party is always a consumer in every interaction. Health NGOs and academics raised concerns about loopholes where businesses could market HFSS products to other businesses on public platforms and children would still be exposed.

## Business to business exemption



Respondents from the advertising industry and food and drink industry agreed the business-to-business exemption was necessary so that an advertiser's capacity to promote their products and services to other companies or other operators in the supply chain was not limited. Health NGOs opposed the inclusion of this exemption citing concerns that it would open the policy up to loopholes where companies could use it to reach children on social media.

## **Factual claims**

Many respondents felt the definition of factual claims was not clear and it would be difficult for a regulator to make a clear distinction between what factual claims were and how they differed from promotional claims and communication to facilitate online sales. Local authorities, NHS trusts and public bodies echoed this, stating these differences would need to be made clear in guidance if included. Furthermore, health NGOs and academics raised concerns that in the absence of clarity, loopholes in the policy would emerge. Food and drink manufacturers agreed with the inclusion of the factual claims exemption and stated this was necessary to allow the consumer to have enough information at the point of choice but also highlighted the right to use nutritional claims (such as 'low fat').

## **Transactional exemption**

Several respondents, including health NGOs and academics, thought that the definition was unclear and difficult to interpret, and asked how 'principal purpose' could be determined. Local authorities, NHS trusts and public bodies raised concerns about loopholes where HFSS products could be advertised if a 'swipe to buy' or a 'buy now' feature was included. Food and drink manufacturers also raised that this would give an unfair advantage to retailers if they were able to advertise products by linking to their retail site but manufacturers with no online retail environment were banned from advertising.

Overall, broadcasters and health NGOs cautioned against having exemptions generally.

## **Challenges with the proposed approach**

In response to question 3, 44% foresaw some difficulties with the proposed approach, whilst 28% did not. Of those that answered question 3, 42% of individuals foresaw some difficulties with the proposed approach; as did 66% of organisations and 82% of businesses.

Food and drink manufacturers raised concerns that it was unclear what products were considered HFSS as the 2019 consultation response had not been published. The use of the 2004 to 2005 NPM model also raised concerns, as respondents stated that this would disincentivise reformulation, and that some of these products efforts would never be classed as 'healthier' under the NPM despite reformulation. They suggested using the PHE reformulation thresholds instead of the NPM to decide if a product was allowed to advertise or not. Conversely local authorities, health NGOs, NHS trusts and public bodies stated the 2004 to 2005 NPM did not go far enough and the model used should be the update to the NPM, which is yet to be published.

Several respondents, including the out-of-home food sector, opposed the proposal to include companies' owned media or 'opted-in' media within the scope of restrictions, as consumers that are exposed to this content, for example on a business's own website, would have intentionally entered the site or opted in to these communications. These respondents recommended a narrower definition of including paid-for advertising only. Food and drink manufacturers also raised concerns with how this would apply to paid sponsorships.

Some respondents thought that sites behind paywalls should be exempt from restrictions, as exposure of **H.F.S.S.** adverts to children should be significantly reduced in this space due to targeting tools used by these platforms.

Many respondents raised concerns that these restrictions would disproportionately affect **S.M.E.s**, particularly those businesses that rely on social media as their online presence and main way to reach their customers compared to large businesses that already have greater brand awareness. A think tank also raised that **S.M.E.s** may unintentionally breach regulations and face penalties as a result of lack of expertise and awareness of **A.S.A** rules. These concerns were echoed by food and drink retailers and manufacturers, who thought that **S.M.E.s** would require additional and clear guidance to support compliance and a longer time for implementation.

## **Social media**

In response to question 7, 49% agreed with the exemption for factual claims including content on an advertiser's social media, whilst 30% disagreed. Of those that answered the question, 50% of individuals agreed with question 7; as did 37% of organisations and 58% of businesses that answered question 7.

Respondents that agreed with this exemption on social media stated that it was necessary for businesses to communicate with their customers and an important part of freedom of commercial expression. Conversely, concerns were raised about the social media exemption by health **N.G.O.s**, academics, local authorities, NHS trusts and public bodies who worried about 'influencer marketing' and brands paying for or gifting influencers to advertise **H.F.S.S.** products on their social media. They also raised concerns about defining what was purely factual and what was promotional information.

In response to question 8, 41% agreed restricting the social media pages of brands synonymous with **H.F.S.S.** products so these can only be found by users who actively seek them would limit the number of children who view this content, whilst 30% disagreed. Of those that answered the question, 42% of individuals agreed with the question; as did 29% of organisations and 18% of businesses.

Both the out-of-home food sector and food and drink manufacturers disagreed with the inclusion of the measure, claiming that it could create a competitive advantage for aggregators and retailers who sell a wide range of brands and therefore are unlikely to be determined as 'synonymous with **H.F.S.S.**' themselves. Others were concerned that this measure would negatively impact the drive of brands to develop healthier alternatives or make stepwise changes as their social media would still be subject to controls if they were defined as 'synonymous with **H.F.S.S.**' and would limit their ability to refresh their brand. Government also heard that **S.M.E.s** would find this problematic due to lack of engagement with the existing guidance.

Several respondents, including health **N.G.O.s**, academics, NHS trusts and public bodies, raised concerns with the brand guidance and asked for clarity on how to determine whether a brand was 'synonymous with **H.F.S.S.**' and who would decide this.

## **Government decision**

### **Business-to-business**

The government has decided there will be a business-to-business exemption. This would allow for online advertising of wholesaler's products to its business customers and prevent any unintended impacts on businesses. Acknowledging the views of respondents concerning our proposed definition, we will ensure the chosen definition for this exemption is easy to understand and proportionate.

### **Factual exemption and owned media**

Acknowledging concerns raised by respondents, government has decided that the factual claims exemption will not be included as it appeared unlikely that a meaningful and enforceable distinction between factual and non-factual claims could be drawn. Government has concluded that regulators will be capable of discerning whether any given example of media featuring an **H.F.S.S.** product is advertising in nature, as they currently do through application of the **CAP** and **BCAP** codes for existing rules for advertising.

In the consultation, the government proposed owned media was in scope but covered by a factual exemption. Consultation feedback flagged potential loopholes and enforcement issues with the factual exemption.

Additionally, the intention of this policy is not to end the online transactions of products, recognising there must be a space for businesses to speak about their products. These platforms allow consumers to make informed purchasing decisions, such as allergen ingredients. It should be noted that we do not want to prevent people visiting owned media spaces when they do so of their own volition. As part of the consultation, it was also raised that child exposure to **H.F.S.S.** content on owned media is unclear, as the only available data is on advertising spend and therefore related only to paid for advertising. It is important that all reasonable steps are taken to ensure that adult choices and freedom of expression are not restricted in non-paid-for online spaces. Taking this into consideration, government has therefore decided that the new restrictions will not apply to an advertisers' owned media (website, apps, social media page, video sharing platform page and so on).

This decision will also help support **SMEs** as government understands that many **SMEs** rely on free social platforms (particularly business pages) for visibility and customer interactions and may find it much more difficult to compete if social distribution platforms are on the whole restricted. It is also understood that **SMEs** cannot use brand advertising to the same degree as large well-established brands, so would be largely excluded from online advertising channels.

## **Transactional content**

Purchasing food and drink online is a key way in which many households in the UK purchase food. Therefore, to ensure that products can still be bought online, government has decided to include the transactional exemption, to ensure that the buying and selling of products is allowed to continue and that consumers have enough information at the point of sale/purchase. We will outline examples in guidance of what is and is not in scope of this exemption. For example, we would make clear that adverts with a 'click now to buy' button or 'swipe up to buy' function would not be allowed as they are not the point of purchase, instead designed to push people to actively seek out products. In contrast, if a user searches for a **H.F.S.S.** product on an aggregator's website, the aggregator will be able to list information about that product because users have actively visited the site in order to purchase goods.

## **Audio only media content**

Government has also decided that as the impact and levels of child exposure to **H.F.S.S.** advertising on audio only media (for example, podcasts, online only radio) remains unclear, these restrictions will not apply to these forms of media. It is important to clarify that this exemption does not cover media on other platforms or on TV where **H.F.S.S.** products can be clearly identified through the audio content of an advert. Broadcast radio is not included in the policy, as highlighted in the 2019 consultation we did not propose further restrictions on other forms of advertising regulated by the **ASA's BCAP** (radio) and **CAP** codes (including print, outdoors, direct marketing and cinema).

## **SMEs**

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## Consultation questions: 9 to 10, 22 to 23

9. In your sector or from your perspective, would a total restriction of online HFSS advertising confer a competitive advantage on any particular operator or segment of the online advertising environment?
10. If answered yes, are there steps that could be taken when regulating an online restriction to reduce the risk of competitive distortions arising?
22. Would a total restriction on HFSS advertising online have impacts specifically for start-ups and/or SMEs?
23. What, if any, advice or support could the regulator provide to help businesses, particularly start-ups and SMEs, comply with the regulatory framework?

## Consultation feedback

In response to question 9, where we asked if a total restriction of online HFSS advertising would confer a competitive advantage on any operator or segment of online advertising, 20% agreed whilst 40% disagreed.

Respondents commented that this would give advantage to advertisers of healthy food in line with government's overall obesity strategy. It was also raised that large brands and platforms/publishers outside of the UK would be given a competitive advantage. Respondents raised concerns that the measure would risk increasing operating costs for businesses and so it would benefit larger businesses and impact heavily on SMEs, further reinforcing that existing HFSS brands would be strengthened relative to new entrants. Conversely, respondents also stated that total restrictions would apply to everyone equally and would level the playing field between healthy and unhealthy food.

Furthermore, in response to question 10, 38% agreed there are steps that can be taken to reduce the risk of competitive distortions, whilst 27% disagreed. Many respondents stated that if restrictions were implemented competitive distortion was unavoidable and if the distortion was towards healthier food, this was positive and would support a change in the market towards healthier foods.

In response to question 22, 32% agreed a total restriction on HFSS advertising online would have impacts for start-ups and/or SMEs, whilst 23% disagreed and 45% stated 'I don't know'. Of those that answered the question, 31% of individuals agreed with question 22; as did 29% of organisations and 80% of businesses.

Suggestions provided in response to question 23 stated that clear, comprehensive guidance alongside practical examples and guidance on the NPM could be provided by the regulator to help business, particularly start-ups and SMEs.

## Government decision

We understand concerns that including SMEs in the online restriction would create barriers to entry into the food and drink retail market, impact brand awareness and discourage food and drink retailers from adopting online trading into their business models. Government is also aware that the level of child exposure to HFSS adverts online from SMEs is not currently clear. As such, including SMEs may lead to unintended consequences for smaller businesses. Many SME and micro-sized enterprises rely on online advertising as their sole means of promoting their products and communicating with their customers. Advertising online can be far less costly than other forms of

media and so can be more budget-friendly for them, presenting lower barriers to entry. The impact of the restrictions applying to these enterprises at this time, in what for many will be the recovery phase from the pandemic may be disproportionate, as these businesses may rely on the free/ low cost online advertising tools, such as social media to a greater extent than larger businesses. In contrast, larger companies will be able to rely on their brand recognition regardless of whether they are able to advertise online or not.

Despite brand advertising being permitted, this would not be sufficient to allow an **SME** producer to promote themselves as they cannot develop a brand without raising awareness of their product. With this increased barrier to entry, larger incumbent firms would potentially benefit with an existing customer base. The effects on competition would depend on the specific product, for example where there are multiple large chocolate brands that compete, this may be sufficient to ensure the market works well. Even with this example, new entrants would add to the competition and support increased innovation.

Therefore, in light of feedback received and in order to make the policy proportionate, government has decided that **SME** advertisers (those with 249 or fewer employees on the first day of the financial year), involved with the manufacture or sale of food or drink, will be exempt from the new **HFSS** restrictions. A franchise is to be treated as part of the franchisor business and is not separate for the purposes of determining the number of employees a business has.

There is no exemption for wider stakeholders, outside of these **SME** advertisers, based on size. Introduction of such an exemption could risk creating a significant loophole that would allow large manufacturers and retailers of **HFSS** products to bypass the restrictions by engaging smaller advertising firms. However, there is no restriction on a small **HFSS** manufacturer engaging with a large organisation to generate and disseminate advertising. It is government's intention to work with the regulators to ensure that clear guidance is available for businesses to understand the new restrictions and ensure their compliance.

All businesses, including **SMEs**, will continue to be subject to the existing rules on **HFSS** as set out by the **ASA**.

## Definitions

### Consultation questions: 5 to 6

5. Do you agree that for the purpose of a total online advertising restriction for **HFSS** products, the term 'advertiser' should be defined as a natural or legal person, or organisation that advertises a product or service?

6. Do you agree that for the purpose of appropriate measures, the term "online service providers" should include all internet services that supply services or tools which allow, enable or facilitate the dissemination of advertising content?

## Consultation feedback

In response to question 5, 64% agreed with the definition for advertiser, whilst 13% disagreed. Of those that answered the question, 64% of individuals agreed with question 5, as did 69% of organisations and 60% of businesses.

Although most respondents agreed with the definition, health NGOs and academics wanted to ensure that this definition included aggregators and businesses that did not sell their own product.

Local authorities, NHS trusts and public bodies suggested that the definition should make explicit that some form of payment from advertiser to online platform should be necessary to be considered in scope.

This was echoed by a media platform that suggested:

an 'advertiser' should be considered as a natural or legal person, or organisation, that pays an online service provider to place an advertisement for its products or services on the online service provider's platform.

In response to question 6, 72% agreed with the definition for online service providers, whilst 15% disagreed. Of those that answered the question, 72% of individuals agreed with question 6, as did 83% of organisations and 45% of businesses.

The majority of respondents, including broadcasters, agreed with the definition whilst online platforms and their representative associations generally disagreed. However, some respondents cautioned that the category 'online service provider' was too generic and broad and could include businesses with little or no involvement in advertiser decision-making.

## **Government decision**

Following consultation feedback, the government will entrust the regulators to determine what constitutes an advertiser. With regard to online platforms, for the purposes of these new restrictions, we will review the question of the role of online platforms in the advertising ecosystem separately as part of the government's Online Advertising Programme, which we intend to consult on later this year, and so the definition of 'online service provider' has not been pursued as part of the proposals.

## **Broadcast video on demand**

### **Consultation questions 11 to 12**

1. We are proposing that broadcast video on demand (BVoD) is subject to a watershed restriction as Project Dovetail will mean they have BARB equivalent data. Do you know of other providers of online audience measurement who are able to provide the same level of publicly available assurance with regard to audience measurement?
2. If answered yes, do you think that platforms or advertisers using those forms of audience measurement should be subject to a similar approach as BVoD?

## **Consultation feedback**

In response to question 11, 6% knew of other providers of online audience measurement, whilst 36% disagreed. Of those that answered the question, 5% of individuals agreed with question 11, as did 11% of organisations and 31% of businesses. Furthermore, in response to question 12, 76% agreed that platforms or advertisers using these forms of audience measurement should be subject to a similar approach as BVoD, whilst 16% disagreed.

Some responses referred to Project Dovetail, a project undertaken by broadcasters and BARB to ensure that audience measurement of all broadcaster content viewed on any device could be measured to the same high standards. Some broadcasters supported BARB measurement, backed up by a Joint Industry Committee approach, with independent audit and verification. They claimed that Project Dovetail would deliver this industry-recognised gold-standard of measurement for BVOD. As such, it would be possible to implement a watershed approach for BVOD.

However, other respondents to the 2020 consultation referenced alternatives that provide similar data to Project Dovetail including Project Origin from the Incorporated Society for British Advertisers, The Publishers Audience Measurement Company and Nielsen's Digital Ad Ratings, while others referred to UK Online Management (UKOM).

Health NGOs, academics and online companies disagreed with the premise that a standard industry-wide measure was appropriate for online, given that the market comprised different segments. The former stated it would be impossible to have an online equivalent of BARB data and the latter disagreed with the assertion that BARB was a "gold standard" that was superior to online measurement. These organisations also questioned whether it was appropriate for BVODs to be subject to a 9pm watershed, but if it was progressed they wanted this restriction to apply to both the time the programme was originally aired and the time the programme was viewed on the BVOD.

The advertising industry and food and drink sector disagreed that any platform with appropriate audience measurement should be subject to the same requirements as BVOD (a 9pm watershed), as they claimed the online environment is not linear in nature and therefore a time-based restriction would be inappropriate. Instead they preferred no further government action or an approach based on a targeting restriction.

## Government decision

We proposed using audience measurement to allow for those ODPs (also known as BVODs or VODs) who met a set criteria of audience measurement to be placed in the HFSS TV watershed, rather than the online restrictions. Following consultation feedback, the government has decided to apply the watershed to all ODPs under the jurisdiction of the UK. This will apply to the time the programme is viewed.

Government has decided not to use audience measurement data to support the inclusion of UK ODPs in the TV HFSS watershed as, based on feedback, this mechanism will not provide assurance of compliance with the provision. Further, as UK ODPs are defined in law as a single category (in the 2003 Communications Act) we consider it would be subjective to differentiate between them on this basis. This approach is also coherent with linear TV and will be more easily understandable to parents and guardians.

Many UK ODPs do not carry third party adverts, so we consider there is limited risk in treating broadcast and non-broadcaster UK ODPs in the same way. For the UK ODPs that do include advertising in their programming, the government is confident that the watershed will sufficiently protect children from HFSS adverts because, although ODPs are served via the internet, operationally they align more to linear TV for advert clearance. The government is content that the operational protocols that UK ODPs adhere to provide sufficient assurance that these service providers will adhere to the newly proposed HFSS advertising restrictions.

In the event of a breach, the proposed regulatory framework will allow the frontline regulator to refer serious, reckless or repeat HFSS advertising breaches made by UK ODPs to Ofcom as the statutory backstop. For non-UK ODPs, these platforms will be captured by the online restrictions (as opposed to the watershed), as they do not fall under UK jurisdiction and are not already regulated by Ofcom.

## Enforcement

## Consultation questions: 13 to 16 and 20 to 21

13. What sanctions or powers will help enforce any breaches of the restriction or of the appropriate measures requirements by those in scope of this provision?

14. Should the statutory “backstop” regulator for HFSS marketing material be:

15. If answered b, which body or bodies should it be?

16. Do you agree that the Advertising Standards Authority (ASA) should be responsible for the day-to-day regulation of a total online HFSS advertising restriction?

20. Do you consider that the sanctions available (voluntary cooperation and civil fines in instances of repeated or severe breaches) are sufficient to apply and enforce compliance with a total online HFSS advertising restriction?

21. Do you consider that the imposition of civil fines by the statutory regulator is sufficient to enforce compliance with the appropriate measures requirements?

## Consultation feedback

In response to question 13, 59% agreed fines would be the most appropriate to enforce any breaches of the restrictions. Of those that answered the question, 62% of individuals agreed with fines, as did 46% of organisations and 31% of businesses. In response to question 20, only 22% agreed current available sanctions were sufficient to enforce compliance, whilst 45% disagreed. Furthermore, in response to question 21, 26% agreed the imposition of civil fines by the statutory regulator would be sufficient to enforce compliance, whilst 36% disagreed.

Those that agreed with fines stated this should be linked to the size of the business, in line with those for TV advertising and sufficient to outweigh the financial gain of continuing non-compliant advertising. However, some respondents believed that fines were insufficient due to the global nature of the internet and recommended the sanctions included information gathering powers, site-blocking by Internet Service Providers, and powers over suppliers of support services to websites such as payment providers, cloud hosts and servers that are required to withdraw or limit their use by offending websites or platforms.

Respondents that agreed with current sanctions being sufficient justified that there was already good adherence to the ASA's Advertising codes (BCAP code for broadcast advertising and the CAP code for non-broadcast advertising) and only in a small minority of cases had the matter been referred for self-regulatory sanctions.

In response to question 14, 19% agreed a new public body should be the statutory backstop, while 31% agreed it should be an existing body. Of those that answered an existing public body should be the statutory backstop: 33% stated this should be the ASA; 19% Ofcom; 12% PHE; 10% DHSC; 10% for other; and 5 other options (another existing body, the FSA (Food Standards Agency), local authorities, HSE (Health and Safety Executive), ICO (Information Commissioner's Office) and a newly created body) all with less than 10%. Of individuals that answered this question, the most popular (33%) answer was the ASA, as it was for businesses that answered the question (44%), whilst the most popular answer for organisations (44%) was Ofcom.



One industry respondent believed that a regulatory backstop was not required, noting that the “overwhelming majority” of advertisers found to be in breach of the ASA’s Codes amended or withdrew the non-compliant advert promptly.

In response to question 16, 40% agreed the ASA should be responsible for day-to-day regulation of the online restrictions, whilst 21% disagreed. Of those that answered the question, 40% of individuals agreed with question 16, as did 40% of organisations and 59% of businesses.

Many respondents supported a continued role for the ASA given their extensive experience as an advertising regulator. Industry and regulator feedback in the consultation response highlighted that the ASA’s public complaint handling principles were successful for most cases. However, several stakeholders raised the issue of increased ASA workload, the need for more funding, and the question of who should pay.

Health NGOs, local authorities, NHS trusts and public bodies raised concerns that the current regulatory regime is not fit for purpose. Respondents cited that they feel there is currently a lack of transparency, or adequate sanctions, and proactive monitoring in regard to enforcement action from the ASA.

Broadcasters believed the ASA should take a more proactive approach and use a simpler, more effective set of rules to ensure compliance. They noted that TV already operated under a pre-clearance model.

Concerns were also raised over an increased risk that the ASA could be legally challenged when it came to enforce the proposed new HFSS restrictions, with some stating there was a potential for judicial review unless the rules were easy to understand and easy to understand and apply.

## **Government decision**

Government has decided to appoint Ofcom as the statutory backstop regulator of these restrictions. Ofcom will have the ability to appoint a frontline regulator. Ofcom has shared responsibility for broadcast advertising with the ASA since 2004 and ODPS since 2010, as such it is likely they will be the best fit for this role. However, appointment is at the discretion of Ofcom. The ASA would also have to agree to a co-regulatory approach for the proposed new HFSS restrictions. Building on this relationship will allow for the swift and effective implementation of proposed HFSS restrictions.

Considering consultation feedback, government recognises the ASA to be a well-placed regulator to carry out day-to-day regulation for the new HFSS advertising restrictions. However, the appointment of an appropriate frontline regulator falls with Ofcom. The ASA has experience with online advertising, and already enforces a detailed advertising code (the CAP code). The ASA also acts as the front-line regulator for existing HFSS restrictions around children’s TV programming), online content and ODPS.

Regarding the increased risk to the frontline regulator’s judgements being legally challenged with new restrictions in place, we believe much of this can be mitigated through clear rules. Legal challenges can take many forms, they may relate to the frontline regulator only or raise issues that may invite the frontline regulator to work with Ofcom and/or other parties to resolve. Ofcom’s role as a formal HFSS advertising backstop will offer further support to legal challenges that require input from both regulators. We believe having a statutory backstop behind new restrictions may also promote better compliance due to the threat of civil sanctions. Government proposes that the frontline regulator uses regulatory mechanisms (reputational sanction, that is naming and shaming) and takedown procedures, in the first instance. In line with health NGOs consultation feedback, government will also encourage the chosen frontline regulator to strengthen transparency and reporting around this approach for HFSS.

For serious breaches or where less severe sanctions have not resulted in a satisfactory resolution, or in cases of reckless or repeated breaches of the restrictions, the frontline regulator will be able to refer broadcasters or advertisers to the backstop regulator (Ofcom). This co-regulatory relationship looks to replicate parts of the existing relationship the ASA has with Ofcom for broadcast advertising. The statutory backstop regulator will then have the power to issue civil sanctions, such as fines, where justified — for example when takedown measures are ignored and/or in cases of serious, reckless or repeat HFSS advertising breaches. The maximum size of any fines will be set in line with those found in broadcasting to bring further parity between broadcast and online. Fines may be levied against broadcasters and UK ODPs for breaches of the new HFSS rules, in the case of breaches online, it would be the advertiser who would be fined.

While instances should be rare where information gathering powers are needed, we believe these additional powers will be necessary in the online world where the traditional role of publisher is absent and where Ofcom is not regulating a licensed entity. These powers will mitigate the risk that the HFSS restrictions can be avoided through lack of engagement.

### **Consultation questions: 24 to 27**

24. We note the challenges of applying statutory regulation to overseas persons. It is our intention to restrict the HFSS adverts seen by children in the UK. From your sector or from your perspective do you think any methods could be used to apply the restriction to non-UK online marketing communications served to children in the UK?

25. Do you see any particular difficulties with extending the scope to non-UK online marketing communications as well as UK communications?

26. Do you see any difficulties with the proposed approach in terms of enforcement against non-UK based online marketing communications as opposed to UK based ones?

1. Do you think these restrictions could disproportionately affect UK companies?

### **Consultation feedback**

In response to question 24, 28% agreed methods could be used to apply the restriction to non-UK online marketing communications, whilst 18% disagreed. In response to question 25, 38% saw particular difficulties with extending scope to non-UK online marketing communications, whilst 16% did not. In response to question 26, 40% saw difficulties with the proposed approach in terms of enforcement against non-UK based online marketing communications, whilst 13% did not. Furthermore, in response to question 27, 34% agreed these restrictions could disproportionately affect UK companies, whilst 27% disagreed.

Several respondents explained that a reliable and effective framework for cross-border enforcement existed through the ASA's inclusion in the European Advertising Standards Alliance (EASA). Some respondents raised that most overseas food and drink advertisers and online platforms impacted by the restrictions would be major global businesses that could be held to account because of the reputational damage they would face by breaking the restrictions.

Other respondents suggested that, in extreme cases of non-compliance, it could be possible to block access to illegal content if more proportionate interventions had failed. This could be part of a package of sanctions to restrict access to sites serving illegal non-UK online marketing communications to children in the UK.

However, despite the ASA's approach through the EASA, respondents raised that a 'material amount' of communications would fall outside the ASA's remit and would not be referred to the envisaged statutory regulator. Other respondents stated that enforcement should rely on ASA technical enforcement solutions and takedown of advertising by an intermediary.

Both the out-of-home food sector and food and drink manufacturers raised that there would be an advantage to non-UK companies, as it would be difficult to enforce and penalise multinationals and would make UK companies less competitive because the proposals were more restrictive.

## Government decision

With regards to the extent of enforcement, government proposes a similar exclusion as in the Tobacco Advertising and Promotions Act 2002, namely, to exclude adverts which are:

- published online by a person who does not carry on business in the United Kingdom
- not intended to be accessed principally by persons in the United Kingdom (or any part of the United Kingdom)

For adverts served to UK consumers from outside the UK, we propose that the frontline regulator will continue to use existing appropriate and necessary (self-regulatory) systems, such as EASA, or the cooperation of individual countries to support enforcement, to seek compliance with HFSS restrictions. This allows complainants that make a complaint in one country about an advert originating from another to receive the same redress available in the country of origin.

We acknowledge the frontline enforcement against businesses based abroad will be limited with this system given that the UK's HFSS advertising restrictions will be stricter than most other countries. However, given that only large (non-SME advertisers) businesses are in scope, we believe that most relevant businesses would have some form of UK presence or would wish to avoid the negative publicity of being named and shamed.

Where the self-regulatory approach does not work, the frontline regulator will be able to refer to Ofcom who can, where legally appropriate, seek fines from those businesses. Even in this instance, we acknowledge that there is a limit to what the backstop regulator can achieve with non-UK entities. Existing regulatory guidance outlines the steps the backstop regulator could be reasonably expected to take in these situations.

## Platform responsibility

### Consultation questions: 17 to 19

17. Do you agree with our proposal that advertisers are liable for compliance with a total online HFSS advertising restriction?

18. Do you consider that online service providers should be prohibited from running advertising that breaches the restriction or should be subject to a requirement to apply appropriate measures?

19. If answered yes, please expand on what you consider these measures should be.

## Consultation feedback

In response to question 17, 68% agreed that advertisers should be liable for compliance, whilst 21% disagreed. Of those that answered the question, 68% of individuals agreed with question 17, as did 84% of organisations and 51% of businesses.

In response to question 19, the majority (57%) considered online service providers should be prohibited from running advertising that breaches the restrictions. Of those that answered the question, 57% of individuals considered online service providers should be prohibited from running advertising that breaches the restrictions, as did 78% of organisations and 24% of businesses.

12% of respondents considered that online service providers should be subject to appropriate measures. Of these respondents, 28% thought these measures should be fines, whilst 17% thought these should be advertising prohibitions.

The majority of respondents agreed that advertisers should be liable for compliance with a total online H.F.S.S. advertising restriction, although they had differing views on whether advertisers should be partially, primarily or solely responsible for compliance.

Online platforms generally believed that responsibilities should remain with advertisers, as did food and drink retailers. Some respondents stated that under the current system primary responsibility rested with the advertiser, but the publisher and agency also bore responsibility for ensuring adherence to the CAP rules. They further explained that advertisers were held to be primarily responsible for complying with the Code because they exercised primary control over the creative content, media placement and audience targeting of their advertising.

Broadcasters believed that advertisers should at least be partially liable for compliance, although other actors, such as online platforms should also be accountable. The out-of-home food sector and food and drink manufacturers stated that online platforms should also be responsible. Health NGOs, local authorities, NHS trusts and public bodies echoed this view and stated that platforms would be able to restrict H.F.S.S. adverts from non-UK companies. Other respondents suggested that advertisers, advertising intermediaries and self-service advertising platforms that facilitated the placement of advertising through the open marketplace online should be subject to greater responsibilities than online publishers.

## **Government decision**

Government wants to ensure that online advertising regulation sufficiently incentivises compliance with the rules and drives rapid remedial action where the rules are breached. We considered whether other actors in the online advertising ecosystem should have responsibility for advertisements that breach an online restriction, alongside the responsibility of advertisers. The online advertising ecosystem is complex and dynamic. The scale and speed of advertising online, as well as the personalised nature of advertising and lack of transparency in this system, makes it difficult for regulators to keep pace with advertising code breaches without the cooperation of platforms who hold significant data on the advertising they process and host on their services. Consumers also reasonably expect that platforms will take their own action to ensure that the advertising hosted on their services is compliant with the rules.

Following consultation feedback, government will entrust the regulators to determine what constitutes an advertiser. With regard to online platforms, for the purposes of these new restrictions government is committed to reviewing the regulatory framework for services providing online advertising content through the Online Advertising Programme which we will consult on as soon as possible this year. As part of this work, government will consider regulation of the content and placement of advertising online, duties on service providers, and to what extent the current regulatory regime is equipped and funded to tackle the challenges posed by online advertising. We will legislate on the conclusions of

the Online Advertising Programme in this Parliament, subject to consultation and parliamentary time. We are currently of the view that the scope of the restrictions which will cover all online paid-for media will be sufficient to capture instances of H.F.S.S. advertising across online mediums.

Irrespective of the conclusion of that consultation, we propose that advertisers – the entity who pays (either monetary or other reciprocal benefit) for the placement of an advert – will be liable for compliance with online restrictions for paid H.F.S.S. advertising. Outside of the UK, we propose that the frontline regulator will continue to use existing cooperative (self-regulatory) systems, such as EASA, for matters of extraterritorial jurisdiction. The responsibility for extra territorial contraventions of H.F.S.S. restrictions will be the same as domestically; that is advertisers of H.F.S.S. products.

## **Outcome and next steps**

Government has carefully considered all the consultation responses to inform its thinking and next steps on this proposal. Government has decided to legislate to introduce a 9pm watershed to broadcast TV and to H.F.S.S. advertisements shown during programming on B.V.O.D. services, and to introduce restrictions on online paid-for H.F.S.S. advertising at all times.

Government intends to legislate for this in the upcoming Health and Care Bill. Subject to agreement in Parliament, it aims for these restrictions to come into force at the end of 2022. We will work with the regulators to ensure guidance is available for businesses to understand the new restrictions and will continue to work closely with industry to ensure businesses are supported in implementing the new requirement ahead of it coming into force.

A summary of the decisions is presented below:

These restrictions will only apply to broadcast TV and online and will not be applicable to other forms of media. Brand advertising and the rules relating to advertising H.F.S.S. products in programming or content of particular appeal to children were out of scope for this consultation. Therefore, the restrictions will not impact on either of these areas.

Products in scope of both TV and online restrictions are those listed within Annex 1 of this document. To determine whether or not the items listed in Annex 1 are H.F.S.S. products, the 2004 to 2005 Nutrient Profile Model (N.P.M.) will be used. The restrictions outlined below will apply to products defined as H.F.S.S..

We will introduce a 9pm TV watershed for products that meet the definition outlined above.

All Q.D.P.S. under UK jurisdiction (i.e. Q.D.P.S. or video-on-demand) will be liable for breaches of the H.F.S.S. watershed.

For non-UK Q.D.P.S., these platforms will be captured by the online restrictions (as opposed to the watershed) because they do not fall under UK jurisdiction and are not regulated by O.f.c.o.m.

Online restrictions will apply to all paid-for online H.F.S.S. advertising outlined in Annex 3. This means that the policy will not apply to owned media.

However, there will be exemptions for:

- brand advertising (applies to both the TV watershed and online restrictions)
- S.M.E.s (applies to both the TV watershed and online restrictions)
- audio only (applies to online restrictions only) – broadcast radio is not included in the policy, as highlighted in the 2019 consultation we did not propose further restrictions on other forms of advertising regulated by the ASA's B.C.A.P. (radio) and C.A.P. codes ( including print, outdoors,

- direct marketing and cinema)
- business-to-business advertising (applies to online restrictions only)
- media supporting point of sale/purchase/transactional content (applies to online restrictions only)

Ofcom will be appointed as the appropriate authority (backstop) and will have powers to appoint a frontline regulator. Ofcom will also be able to issue civil sanctions, such as fines and formal information gathering powers, to enforce compliance with online restrictions. Ofcom will retain its role as statutory backstop to enforce broadcast restrictions.

The role of platforms in online advertising content regulation will be examined as part of government's Online Advertising Programme, on which the government will consult on later this year.

The restrictions for TV and online will be introduced at the same time at the end of 2022.

We will review and evaluate the policy 5 years post implementation, currently planned for 2027.

As per all other advertising restrictions, this will apply to the UK as a whole.

## **Annex 1: products in scope**

These products will be in scope and determined high in fat, salt and sugar (HFSS) if they are defined as less healthy: receiving a score of 4 or more for food and one or more for drink, using the 2004 to 2005 Nutrient Profiling Model (NPM).

- soft drinks with added sugar
- juice drinks with added sugar
- milk drinks with added sugar
- crisps and savoury snacks
- breakfast cereal
- chocolate confectionary
- sugar confectionary
- ice cream
- cakes
- sweet biscuits
- morning goods
- pudding and dairy desserts
- yoghurts
- pizza
- chips and potato products
- family meal centres
- complete main meals (ready meals)
- breaded and battered products
- main meals (out-of-home)
- starters, sides and small plates (out-of-home)
- children's meal bundles (out-of-home)
- sandwiches (out-of-home)

## **Annex 2: description of products in scope**

This section is intended to provide greater clarity as to what products fall under the product category lists. This represents government's position at this time pending parliamentary scrutiny of the Health and Care Bill. The food and drink categories in scope will be taken forward in secondary legislation and consultation on the wording of draft regulations will take place.

Industry will recognise that the categories are aligned to PHE's reformulation categories and broadly similar to the categories included in scope of volume and price promotion policy.

### **Category 1: Prepared soft drinks containing added sugar ingredients.**

The following provisions apply for the purposes of this category:

1. "Soft drink" means:

(a) a beverage of an alcoholic strength not exceeding 1.2%, or

(b) a liquid or a powder which, when prepared in a specified manner, constitutes a beverage of an alcoholic strength not exceeding 1.2%

(2) A liquid or a powder is prepared in a specified manner if it is:

(a) diluted

(b) combined with crushed ice, or processed so as to create crushed ice,

(c) combined with carbon dioxide, or

(d) prepared by way of a process that involves any combination of the processes mentioned in paragraphs (a) to (c)

2. (1) A soft drink is "prepared" if it is:

(a) a soft drink within paragraph 1(1)(a), or

(b) a beverage that would result from preparing a liquid or a powder within paragraph 1(1)(b)

(i) in a specified manner (see paragraph 1(2)), and

(ii) in accordance with the relevant dilution ratio

(2) The "relevant dilution ratio" means:

(a) the dilution ratio stated on, or calculated by reference to information stated on, the packaging of the soft drink, or

(b) where no such dilution ratio or information is stated, the dilution ratio of similar drinks on the market.

3. (1) A soft drink contains "added sugar ingredients" if any of the following are combined with other ingredients at any stage in the production of the soft drink:

(a) calorific mono-saccharides or di-saccharides

(b) a substance containing calorific mono-saccharides or di-saccharides

(2) But a soft drink does not contain "added sugar ingredients" only by reason of containing fruit juice, vegetable juice or milk (or any combination of them).

(3) For the purposes of sub-paragraph (2):

(a) “fruit juice” is to be construed in accordance with regulation 5 (sugar content condition: fruit juice) of the Soft Drinks Industry Levy Regulations 2018([1]) (“the ~~SDIL~~ Regulations”)

(b) “vegetable juice” is to be construed in accordance with regulation 6 (sugar content condition: vegetable juice) of the ~~SDIL~~ Regulations

(c) “milk” is to be construed in accordance with regulation 7 (sugar content condition and exempt soft drinks: milk and milk-based drinks) of the ~~SDIL~~ Regulations

4. (1) The following are “exempt soft drinks”:

(a) alcohol substitute drinks which meet specified conditions, and

(b) soft drinks of a specified description which are for use for medicinal or other specified purposes.

(2) For the purposes of sub-paragraph (1)(a), the specified conditions are:

(a) condition 1 provided for by paragraph (2) of regulation 9 (exempt soft drinks: alcohol substitute drinks) of the ~~SDIL~~ Regulations, and

(b) one or more of conditions 2, 3 and 4 provided for by paragraphs (3) to (5) of that regulation

(3) For the purposes of sub-paragraph (1)(b)

(a) the specified purposes are the purposes provided for by paragraph (1) of regulation 10 (exempt soft drinks: medicinal or other purposes) of the ~~SDIL~~ Regulations, and

(b) the specified descriptions are the descriptions provided for in paragraphs (2) and (3) of that regulation

Category 2: crisps and other savoury snacks including all potato crisps and similar products made from potato, other vegetables, grain or pulses, including extruded, sheeted and pelleted snacks such as pitta bread based snacks, pretzels, poppadums, prawn crackers, pork scratchings, salted popcorn, and bagged savoury crackers or biscuits. This category does not include raw, coated or flavoured nuts.

Category 3: breakfast cereals including ready-to-eat cereals, granola, muesli, porridge oats and other oat-based cereals.

Category 4: confectionery including chocolates and sweets.

Category 5: ice cream, ice lollies, frozen yogurt, water ices and similar frozen products.

Category 6: cakes (including cupcakes).

Category 7: sweet biscuits and cereal bars.

Category 8: morning goods, including croissants, pains au chocolat and similar pastries, crumpets, pancakes, buns, teacakes, scones, waffles, Danish pastries and fruit loaves.

Category 9: desserts and puddings, including pies, tarts and flans, cheesecake, gateaux, dairy desserts, sponge puddings, rice pudding, crumbles, fruit fillings, powdered desserts, custards, jellies and meringues.

Category 10: sweetened (whether with sugar or otherwise) yoghurt and fromage frais.



Category 11: pizza (except plain pizza bases).

Category 12: roast potatoes, potato and sweet potato chips, fries and wedges, potato waffles, novelty potato shapes (such as smiley faces), hash browns, rostis, crispy potato slices, potato croquettes.

Category 13: any of the following:

Products that are marketed (whether or not with a carbohydrate accompaniment) as ready for cooking or reheating without requiring further preparation, including:

- vegetarian, fish, meat or poultry products in a sauce
- fish, meat or poultry alternative products in a sauce

but not including such products sold whether plain or with a marinade, glaze, dressing, seasoning or similar accompaniment.

Breaded or battered:

- vegetarian, fish, meat, or poultry products
- fish, meat or poultry alternative products

including fish fingers, fish cakes, chicken nuggets and breaded meat substitute.

Category 14: (main meals Q.Q.H), products that are marketed as a main meal menu item accompaniment (greater than or equal to 500 kcal), fried chicken or seafood and chips, sausage with vegetables and mash, curry with rice, pasta or noodle dishes, pies and quiche with meal accompaniments (such as roast meals). Also includes items that can be ordered separately on a menu to form a main meal such as curry and rice, sausages and mash, fried chicken and chips.

Category 15: (starters, sides and small plates Q.Q.H) Includes items such as garlic or cheesy bread, chicken including battered, breaded or grilled and chicken wings, seafood including battered, breaded or grilled, nachos, chips or other potato products or dishes. Best practice guidelines suggested for sharing plates or platters that include these dishes.

Category 16: (children's meal bundles), menu items aimed primarily at children grouped together to form a 'meal bundle' at a set price. Children's meal bundles can include a combination of a starter, main meal, pudding and/or a drink for a set price. Menu items within 'children's meal bundles' can include products from other categories, for example, pizza, pastry products or starters, side dish or small plates.

Category 17: (sandwiches), sandwiches as sold, on the go covering retailers, manufacturers and the eating out, takeaway and delivery sector. For example, sandwiches, filled subs, baguettes, ciabattas, wraps, bagels, filled muffins (such as bacon, egg sausage muffin), or small burger less than 500 kcal (hamburger or cheeseburger) filled bun or bap, including a burger in a bun, filled croissants, toasties, paninis.

### **Annex 3 – paid for advertising**

In line with consultation feedback, to reduce children's exposure to H.F.S.S product advertising and mitigate the migration of advertising from television advertising to online (after implementation of the 9pm watershed), government will introduce online restrictions that will apply to all paid-for online H.F.S.S advertising. This section outlines the forms of paid-for advertising online in scope where an advertiser pays for placement of adverts across the following paid for spaces online. This represents government's position at this time, pending parliamentary scrutiny of the Health and Care Bill.

Paid-for online display advertising, such as banner ads on news websites and apps, swipe to buy.

Paid-for online video advertising, such as video ads served before or during on video sharing sites.

Paid-for online social media advertising, such as in-feed advertising on social media.

Paid-for search listings, such as sponsored links on search engines.

Paid-for listings on price comparison or aggregator services, such as sponsored listings on food delivery services.

Paid-for influencer marketing, such as influencer posts paid for/sponsored by an advertiser.

Paid-for in-game advertising, such as banner ads in games apps.

Paid-for newsletter advertising, such as banner ads in a cookery newsletter.

Paid-for advertisements distributed through web widgets, such as those located on the sidebar of websites.

Paid-for in-game advertisements.

Paid-for advertorials.

Paid-for advergames.

Paid-for product specific sponsorship (brand advertising/sponsorship is not in scope, so an organisation is able to advertise or provide sponsorship as a brand if the advert does not include an identifiable HFSS product).

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