



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

Key

Writing in **BOLD** represents consultation questions.

Writing highlighted in yellow – selected answers

Writing in plain dark blue text – expanded answers

Consultation Questions

Products in Scope

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

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

This uses the Nutrient Profiling Technical Guidance published by the Department of Health on 1 January 2011, which is accessible on the Department's website. Many businesses and regulators will be familiar with this guidance, having used it to guide broadcasting restrictions on television advertising to children. It will also be helpful for these regulations to be in line with guidance set out in support of promotion and placement restrictions: [Restricting promotions of products high in fat, sugar or salt by location and by volume price - GOV.UK \(www.gov.uk\)](#)

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

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

It is clear that the standard for determining the nutrient profiling model score for a product is to use the Nutrient Profiling Technical Guidance published by the Department of Health on 1 January 2011, which is accessible on the Department's website.

The Nutrient Profiling Technical Guidance provides clear guidance on how to generate a nutrient profile score, using the Nutrient Profile Model (NPM) to products, and is an evidence-based tool that is already used in practice to define products that can be advertised to children and where products can be located in retail environments. There are resources available to calculate NPM scores for existing and prospective products so this no longer has to be calculated manually.

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

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

The text in the Schedule clearly and accurately describes which products fall into, and which are exempt from, each of the categories, which are also set out in the Schedule (those outlined as a limited set within the SDIL, Sugar and Calorie Reduction programmes). We are pleased to see there are no exemptions for Seasonal and/or temporary foods, or any further exemptions which could lead to confusion.

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

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

Regulation 3 states "whether they are sold for consumption at home or elsewhere." This clearly means that the categories apply to both retail and out-of-home food and drink products. We strongly support the Government's proposals to introduce legislation that covers less healthy food and drinks, within the set of categories laid out in the schedule, sold both in retail and out-of-home.

Businesses in scope

Do you agree or disagree that the definition in regulation 4 accurately and clearly describes what businesses will be classified as 'food and drink SMEs'?

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

This is clear, however it may be important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge if new business models are created.

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

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

The definition in regulation 4 accurately and clearly describes how to define employees of a business as one that employs fewer than 250 people for the purposes of those businesses (in the UK or internationally), with no exemptions. This definition has undergone extensive recent consultation and is used in The Food (Promotions and Placement) (England) Regulations 2021 and The Calorie Labelling (Out of Home Sector) (England) Regulations 2021.

We believe it is important that the regulations includes a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

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

This definition has undergone extensive recent consultation and clearly describes what features of a business would constitute a franchise. It will be important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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

- **Agree, it is clear**
- **Disagree, it is not clear**
- **I don't know**

Please explain your answer

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

This definition has undergone extensive recent consultation and clearly describes what features of a business would constitute a franchise. It will be important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

This is clear within the following text:

“a) a business that is carried on pursuant to a franchise agreement is to be treated as part of the business of the franchisor and not as a separate business carried on by the franchisee;

b) persons employed for the purposes of the business in a country or territory outside the United Kingdom are to be taken into account.”

It is vital that parity is provided for all food and drink SMEs whether inside or outside the UK.

We believe it is important that the regulations includes a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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

- **Agree, it is clear**
- Disagree, it is not clear
- I don't know

Please explain your answer

The definition in regulation 4 accurately and clearly describes the definition of an SME as being a business, or franchise business, with fewer than 250 employees based anywhere in the world, with only an exemption for franchise agreements that are limited to the alcoholic drinks where the franchisee is free to determine what other food or drink is provided.

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

- Agree, it is clear
- Disagree, it is not clear
- I don't know

Please explain your answer

Only large businesses (over 250) employees, that are involved or associated with the manufacture or sale of food or drink within the specified categories in the Schedule, that are less healthy, as defined by the NPM, will be included in the regulations.

SMEs that manufacture or sell unhealthy food and drinks, whether for consumption at home or elsewhere, contribute to the UK's obesity problem.

However, in recognising that small and medium businesses, particularly those providing food out of the home, will argue that they find the regulations more burdensome to implement, we support the application of restrictions to the sale of less healthy food and drinks in businesses with over 250 employees as a pragmatic solution, which is consistent with The Calorie Labelling (Out of Home Sector) (England) Regulations 2021. Large businesses already have to provide calorie information for menus, and all businesses that sell food in packaging have to provide nutrition information, and will be well placed to calculate the NPM.

Services in scope

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

- Agree, it is clear
- Disagree, it is not clear
- I don't know

Please explain your answer

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

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

We note that some businesses that sell predominantly less healthy food (for example McDonalds) have very recognisable 'jingles' and can also use celebrity endorsement (e.g.: Katy Perry singing for Just Eat). We believe it is important that the regulations include a mechanism

for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge or in response to increasing evidence that broadcast radio or online streams of radio stations should be included in these regulations.

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

- Agree, it is clear
- **Disagree, it is not clear**
- I don't know

Please explain your answer

It is not clear. Audio-only is described as consisting wholly of sound and including no visual component, whether moving or still images, or legible text, or a combination of those things. We seek clarity as to whether this includes either brand or product identifiable, or both, visuals.

We believe it is important that the regulations include a mechanism for the scope of the restrictions to be formally reviewed and revised to close any loopholes that emerge.

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

- Agree, it is clear
- **Disagree, it is not clear**
- I don't know

Please explain your answer

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

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

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

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

- Agree, it is clear
- **Disagree, it is not clear**
- I don't know

Please explain your answer

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

Do you have any additional comments on the draft regulations?

The Faculty of Public Health fully supports the proposal to introduce a 9pm watershed on TV and a total online HFSS advertising restriction as an effective way to protect children from influential unhealthy food and drink adverts. We were extremely disappointed that the Government has delayed the introduction of these regulations and the opportunity to help tackle the obesity crisis in our population. In the UK we have an established principle that unhealthy food marketing causes harm and needs effective restriction. The conversation now should be how to make the restrictions as effective as possible across media accessed by children.

Food and drink industry companies who wish to continue advertising their brands and products have many options open to them, including reformulation, shifting their advertising to post 9pm, or advertising non-HFSS alternatives in their portfolio. There is clear evidence that industry had made progress in preparing for the regulations through product reformulation and range innovation that bring their product range into compliance. Policy delays (and the potential for even further changes to this policy) not only provide further uncertainty to industry, they also undermine the positive steps taken by progressive retailers to improve health and meet ethical responsibilities.

We would like to recommend:

- A provision should be written into the final legislation to provide a mechanism for the scope of the restrictions to be formally reviewed and revised at regular intervals. This regular review would be used to update regulations as needed, including the below.
 - Updates to reflect future innovations that are involved or associated with the advertising of sale of food or drink, including new media not currently covered by the scope of the legislation.
 - Review to identify and close any unforeseen loopholes that may occur
 - Updates when there are any changes in the Nutrient Profiling Technical Guidance. We note that the current guidance does not specifically include ultra-processed food (UPF) in the scoring process, however evidence is emerging of the specific health risks (including those related to obesity) associated with UPF.
- Regular proactive monitoring to identify non-compliance: Given the vast nature of the TV and online environment and the short life-span of some TV and digital marketing campaigns, it is vital that level of compliance with this policy is not based on reactive complaints alone. Ideally proactive monitoring would be carried out by an independent group with full details on breaches published.

We suggest further consideration should be given to the following points:

- Many brands, their logos and products have strong HFSS product association for example the 'Golden Arches' of MacDonal'd's. Some brand logos or names incorporate HFSS products making it difficult to separate the brand from the associated HFSS product. For this reason, we would urge the regulation to require that all advertising and marketing content for food or drink brands must only feature non-HFSS products.

- Legislation should require any promotion of HFSS products to display these in portion sizes which encourage healthy eating.