EXPLANATORY MEMORANDUM TO

THE ADVERTISING (LESS HEALTHY FOOD DEFINITIONS AND EXEMPTIONS) REGULATIONS 2024

2024 No. 1266

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Minister Andrew Gwynne, Parliamentary Under-Secretary of State for Public Health and Prevention at the Department of Health and Social Care, confirms that this Explanatory Memorandum meets the required standard.

2.2 Kevin Dodds, Deputy Director for Healthy Weight and Nutrition at the Department of Health and Social Care, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Amy Rodd at the Department of Health and Social Care, telephone: 020 7210 4860 or email: Amy.Rodd@dhsc.gov.uk, can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The purpose of this instrument is to define the products, businesses and services in scope of the advertising restrictions for less healthy food or drink on television (TV) and online, to give practical effect to the relevant provisions in the Health and Care Act 2022, which amended the Communications Act 2003.

4.2 This instrument provides additional exemptions to those that were provided in the primary legislation. The instrument exempts the following services from the online advertising restrictions: i) audio services; ii) Ofcom-regulated Internet Protocol Television (IPTV) services; iii) non-regulated IPTV services in instances where the content is simultaneously available in identical form on a regulated IPTV service.

4.3 The instrument also exempts specific products[1] from the advertising restrictions because they are already subject to separate regulatory regimes. The instrument includes a Schedule of 'Categories of Specified Food or Drink' which is part of the two-step approach for determining 'less healthy' food or drink products in scope of the advertising restrictions.

[1] The following items are exempt from the advertising restrictions: infant formula, baby food, follow-on formula and processed cereal-based foods for infants; total diet replacements for weight control products; meal replacement products with an approved health claim; food for special medical purposes.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The Government has committed to taking bold action on the childhood obesity crisis and creating the healthiest generation of children ever. In the 2023 to 2024 school year, just less than 1 in 10 children in England aged 4 to 5 years were living with obesity, rising to just under a quarter of children by the time they reach aged 10 to 11 years[2]. Children living with obesity are approximately five times more likely to be living with obesity in adulthood[3]. There is evidence showing that excess weight in childhood or adolescence is associated with increased risk of type 2 diabetes, coronary heart disease, high blood pressure and some cancers in adulthood [4,5]. Around 64% of adults in England[6] are above a healthy weight and this proportion is similar in Wales[7], Scotland[8] and Northern Ireland[9]. Of the adults above a healthy weight in England, around half live with obesity[6]. Obesity costs the NHS around £11.4 billion a year[10].

5.2 Obesity disproportionately affects children from lower socioeconomic backgrounds. As reported by the National Child Measurement Programme, children growing up in the most deprived areas in England are more than twice as likely to be living with obesity as those in the least deprived areas[2]. Children in year 6 (aged 10 to 11 years) from most ethnic groups (with the exception of white Irish, mixed white and Asian, and Chinese) are more likely to be living with obesity than white British children[2].

5.3 The Government wants to go further than the existing non-statutory regulatory approach, described in section 5.7, to further protect children from the significant amount of advertising for less healthy food or drink products that they are exposed to

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[2] NHS Digital (2024) National Child Measurement Programme, England, 2023/24 School Year: https://digital.nhs.uk/data-and-information/publications/statistical/national-child-measurement-programme/2023-24-school-year

[3] Simmonds, M. Llewellyn, A. Owen, C.G. Woolacott, N. Predicting adult obesity from childhood obesity: a systematic review and meta-analysis. *Obesity Reviews.* 2016; 17(2): 95-107. DOI: 10.1111/obr.12334. https://pubmed.ncbi.nlm.nih.gov/26696565/

[4] Reilly, J.J. Kelly, J. Long-term impact of overweight and obesity in childhood and adolescence on morbidity and premature mortality in adulthood: systematic review. *International Journal of Obesity.* 2011; 35: 891-898. https://doi.org/10.1038/ijo.2010.222

[5] Llewellyn, A. Simmonds, M. Owen, C.G. Woolacott, N. Childhood obesity as a predictor of morbidity in adulthood: a systematic review and meta-analysis. *Obesity Reviews.* 2016; 17(1): 56-57. https://doi.org/10.1111/obr.12316

[6] NHS Digital (2024) Health Survey for England, 2022 Part 2: https://digital.nhs.uk/data-and-information/publications/statistical/health-survey-for-england/2022-part-2

[7] Welsh Government (2022) National Survey for Wales headline results: April 2021 to March 2022: https://www.gov.wales/national-survey-wales-headline-results-april-2021-march-2022-html

[8] Scottish Government (2023) The Scottish Health Survey 2022 – volume 1: main report: https://www.gov.scot/publications/scottish-health-survey-2022-volume-1-main-report/pages/12/

[9] Department of Health Northern Ireland (2023) Healthy Futures: A strategic framework to prevent the harm caused by obesity, and improve diets and levels of physical activity in Northern Ireland: a consultation document: https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-cons-obesity-strategy-healthy-futures.pdf

[10] Frontier Economics (2022) Estimating the full costs of obesity: https://www.frontier-economics.com/media/hgwd4e4a/the-full-cost-of-obesity-in-the-uk.pdf

on TV and online. It is estimated that 6.4% of UK childhood obesity and 5.0% of childhood overweight is attributable to the advertising of less healthy food or drink[11].

5.4 Consultations were held in 2019[12] and 2020[12] on further advertising restrictions for less healthy food or drink products on TV and online. A response to these consultations was published in 2021[12] which confirmed the UK-wide policy as: a prohibition of advertising of less healthy food or drink products on TV between 5:30am and 9:00pm ('9pm watershed') (including Ofcom-regulated on-demand programme services (ODPS)), and a 24-hour restriction on paid-for advertising of these products online (including non-Ofcom regulated ODPS). The 2021 consultation response[12] also confirmed the policy intention on products, businesses and services in scope of the restrictions and set out exemptions to balance the health benefits and impacts on businesses.

5.5 The policy is set out in primary legislation in the Health and Care Act 2022, which amended the Communications Act 2003. The policy aims to reduce children's exposure to advertising of less healthy food or drink on TV and online. The policy is underpinned by evidence that exposure to advertising of less healthy products can affect what and when children eat, shaping their dietary preferences from a young age. Over time, excess calorie consumption can lead to children becoming overweight or obese, which puts their future health at risk as adults. The policy also aims to encourage businesses to reformulate their products and help create a healthier food environment. Over the coming years, the policy is estimated to remove 7.2 billion calories from UK children's diets per year and reduce the number of children living with obesity by 20,000[13]. The economic benefits of the policy over a 100-year appraisal period are estimated to be around £2bn[14]. In addition, it is estimated to provide NHS savings of £50m and social care savings of £40m[14]. Reduced premature mortality is expected to deliver an additional £119m of economic output[14].

5.6 Whilst there is clear evidence that the advertising restrictions will help to address childhood obesity, it is a complex issue for which there is no single solution. The advertising restrictions are intended to work alongside other regulatory interventions, including the Food (Promotion and Placement) (England) Regulations 2021[15], The Calorie Labelling (Out of Home Sector) (England) Regulations 2021[16] as well as the

[11] Mytton OT, Boyland E, Adams J, Collins B, O'Connell M, Russell SJ, et al. (2020) The potential health impact of restricting less-healthy food and beverage advertising on UK television between 05.30 and 21.00 hours: A modelling study. PLoS Med 17(10): e1003212. https://doi.org/10.1371/journal.pmed.1003212

[12] Department of Health and Social Care (2024) Less healthy food or drink: advertising and promotions restrictions: https://www.gov.uk/government/collections/less-healthy-food-or-drink-advertising-and-promotions-restrictions

[13] Department of Health and Social Care (2021) Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response: Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response - GOV.UK

[14] Department of Health and Social Care and Department for Digital, Culture, Media and Sport (2021) Impact assessment: introducing a 2100 to 0530 watershed on TV and online restriction for paid advertising of food and drink that are high in fat, salt and sugar (HFSS) products: https://assets.publishing.service.gov.uk/media/60d35279e90e0743934f6c3a/impact-assessment-hfss-advertising.pdf

[15] The Food (Promotion and Placement) (England) Regulations 2021: https://www.legislation.gov.uk/uksi/2021/1368/made

[16] The Calorie Labelling (Out of Home Sector) (England) Regulations 2021: https://www.legislation.gov.uk/uksi/2021/909/introduction/made

sugar, salt and calorie reduction and reformulation programmes[17] to encourage businesses to reformulate their products and create a healthier food environment.

What was the previous policy, how is this different?

5.7 Advertising on TV in the UK is currently regulated by the Advertising Standards Authority (ASA) through a system of co-regulation with Ofcom. The ASA enforces the UK Code of Broadcast Advertising (BCAP) which, since 2007, has prohibited the advertising of less healthy products, described as 'high in saturated fat, salt or sugar' (HFSS), around TV programming commissioned for or likely to appeal to children. Since 2017, the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code), which sets out the advertising rules for non-broadcast media (e.g. online, cinema, print), has prohibited HFSS advertising in media of obvious appeal to children, or where more than 25% of the audience is under 16 years old. However, evidence shows that some of the TV shows most watched by children are not captured by the current restrictions because they don't reach the audience threshold, and children are spending an increasing amount of time online, hence the need for the 9pm watershed on TV advertising of less healthy products and a 24-hour restriction on paid-for advertising of these products online[14].

6. Legislative and Legal Context

How has the law changed?

6.1 The Health and Care Act 2022, which amended the Communications Act 2003, made provision for a 9pm watershed for advertising for less healthy food or drink products on TV (including Ofcom-regulated ODPS). It also made provision for a 24-hour restriction for paid-for advertising of less healthy food or drink products online (including non-Ofcom-regulated ODPS).

6.2 The Communications Act 2003 was subsequently amended in December 2022 to change the coming into force date for the Advertising Regulations from 1 January 2023 to 1 January 2025[18]. An amending instrument was laid shortly afterwards to correct the coming into force date to 1 October 2025[19].

6.3 This instrument is required to give practical effect to the relevant provisions set out in the Health and Care Act 2022, which amended the Communications Act 2003. It is made using powers conferred by sections 321A(3), (4) and (5), 368FA(3), (4) and (5) and 368Z14(4), (5) and (6) of the Communications Act 2003.

6.4 Broadcasting and internet services are both reserved matters and the Advertising Regulations will apply UK-wide from 1 October 2025. DHSC officials have engaged with counterparts in the devolved governments throughout the policy development process.

Why was this approach taken to change the law?

6.5 This instrument provides the definitions for products, businesses and services in scope of the restrictions, which is necessary in order to implement the advertising restrictions set out in the Health and Care Act 2022, which amended the

[17] Office for Health Improvement and Disparities (2024) Sugar, salt and calorie reduction and reformulation: https://www.gov.uk/government/collections/sugar-reduction

[18] The Communications Act 2003 (Restrictions on the Advertising of Less Healthy Food) (Effective Date) (Amendment) Regulations 2022: https://www.legislation.gov.uk/uksi/2022/1311/regulation/2

[19] The Communications Act 2003 (Restrictions on the Advertising of Less Healthy Food) (Effective Date) (Amendment) (No.2) Regulations 2022: https://www.legislation.gov.uk/uksi/2022/1381/made

Communications Act 2003. The instrument also enacts exemptions from the online restrictions for: i) audio services, ii) Ofcom-regulated IPTV services, and iii) non-regulated IPTV services in instances where the content is simultaneously available in identical form on a regulated IPTV service. The instrument also exempts specific products from the advertising restrictions overall (see regulation 3(1)(a) and paragraph 1 of the Schedule) because they are already subject to separate regulatory regimes.

7. Consultation

Summary of consultation outcome and methodology

7.1 The policy was confirmed in 2021[12] following UK-wide statutory consultations in 2019 and 2020. In accordance with sections 321A(8), 368FA(8) and 368Z14(9) of the Communications Act 2003, a further consultation was held in 2022 to 2023 on a draft version of the instrument[12]. This sought views on the specific text in the draft Regulations to ensure the definitions for products, businesses and services in scope of the advertising restrictions were clear and fit for purpose. It also sought views on the exemption for audio services from the online restrictions. The consultation did not revisit policy decisions that were made following previous consultations.

7.2 The consultation highlighted some points for clarification in the drafting of the Regulations. These were set out in the Government's response to the consultation that was published in September 2024[12] and included:

1) providing further guidance on the product categories included in the Schedule to the Regulations which form part of the two-stage approach for defining a product as 'less healthy' for the purposes of the advertising restrictions.

2) changing the title of the Schedule from 'Categories of Less Healthy Food' to 'Categories of Specified Food or Drink' to clarify that products included in the Schedule are only in scope of the advertising restrictions if they are determined as 'less healthy' when applying the 2004 to 2005 Nutrient Profiling Model (NPM) using the 2011 Technical Guidance[20].

3) removing Category 14 ('sandwiches') from the Schedule of categories in scope and moving sandwiches to be caught within Category 13, which includes complete meals and components of complete meals that are purchased in both retail and out-of-home settings.

4) clarifying that the use of limited visual images relating to the provision of an audio service, or the use of subtitles or captions for accessibility purposes does not prevent the exemption for audio services from the online restrictions from applying, provided that they are not visual advertisements.

5) updating instances where the Regulations cross-reference other legislation that has been updated, is no longer in force and/or has been replaced by other legislation. All of these changes are reflected in the final instrument.

7.3 A further technical consultation[12] was held from September to October 2024 to clarify how the Regulations apply to IPTV services, which deliver television and advertising live over the internet. This sought views on the proposed exemption for Ofcom-regulated IPTV services from the online restrictions. This was necessary because, under the provisions introduced by the Health and Care Act 2022, advertising on regulated IPTV services would be subject to both the broadcast and online advertising

[20] Department of Health (2011) Nutrient Profiling Technical Guidance: https://assets.publishing.service.gov.uk/media/5a7cdac7e5274a2c9a484867/dh_123492.pdf

restrictions. Given that these services are regulated by Ofcom, capturing them under the broadcast advertising restrictions (9pm watershed) in the same way as Ofcom-regulated TV and ODPS was considered the most appropriate position. The consultation also proposed that where a regulated service is simultaneously available on a non-regulated platform and is identical in all respects, including the advertisements, the service on the non-regulated platform would only be subject to the broadcast restrictions. This clarification is necessary to avoid double regulation. The Government's response to the consultation will be published on 3 December 2024[12]. This will confirm that consultation feedback supported both of these proposals and regulation 6 of the instrument has been amended accordingly.

8. Applicable Guidance

8.1 To align with the laying of this instrument on 3 December 2024, DHSC will publish guidance on the food and drink product categories in scope of the advertising restrictions[12]. This will sit alongside implementation guidance that will be published by the ASA. The purpose of these guidance documents is to support those affected by the restrictions to understand and apply the Regulations ahead of them coming into force UK-wide on 1 October 2025.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment was published alongside the primary legislation, the Health and Care Act 2022, and is available on gov.uk[14].

Impact on businesses, charities and voluntary bodies

9.2 The impact on businesses, charities or voluntary bodies is estimated to be £199m annually[14]. Over 25 years, advertisers are expected to lose £659m in returns to advertising spending[14]. Transition costs are estimated at £5m and fall mainly to manufacturers and advertising agencies, with £1m in enforcement set-up[14].

9.3 The legislation does not impact food or drink small or medium-sized enterprises (SMEs), defined as having 249 employees or fewer, who pay to advertise less healthy food or drink products.

9.4 The legislation does not apply to activities that are undertaken by food or drink SMEs as they are exempt from the advertising restrictions. This instrument provides the legal definition for 'food or drink SME' necessary to enact the exemption set out in the Health and Care Act 2022, which amended the Communications Act 2003. This approach was taken due to insufficient data on the impact of applying the advertising restrictions to these enterprises. If food or drink SMEs were to be in scope of the restrictions, they could be less able to compete with large businesses who can use their brand recognition and resources to mitigate the effects of the restrictions.

9.5 The impact on the public sector is the costs for enforcement of the policy, which are estimated to be £10m per year[14]. However, the economic benefits of the policy over a 100-year appraisal period are estimated to be around £2bn[14]. In addition, it would provide NHS savings of £50m, social care savings of £40m, and reduced premature mortality is expected to deliver an additional £119m of economic output[14]. The costs of obesity to individuals, society and the NHS are significant and the benefits of reducing children's exposure to advertising for less healthy food or drink and preventing childhood obesity are therefore substantial. Over the coming years, the

policy is estimated to remove 7.2 billion calories from UK children's diets per year and reduce the number of children living with obesity by 20,000[13].

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 A statutory review clause is included in the instrument to carry out a review of the regulatory provisions in the Regulations. The conclusions of the first review must be set out in a report published before 1st October 2030 and subsequent reports must be published at intervals not exceeding five years. Reports will set out the objectives intended to be achieved through the Regulations, assess the extent to which they have been achieved, whether they remain appropriate and assess whether they could be achieved in an alternative way which involves less onerous regulatory provision.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 There are none.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").