

## **Response to the Department for Health and Social Care and the Department for Culture, Media and Sport**

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

March 2023

#### **1. About ISBA**

- 1.1. ISBA represents UK brand advertisers. We are the only body in the UK that enables advertisers to understand their industry and shape its future, because we bring together a powerful network of marketers with common interests, empower decision-making with knowledge and insight, and give a single voice to advocacy for the improvement of the industry.
- 1.2. ISBA is a member of the Advertising Association, and represents advertisers on the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the sister organisations of the Advertising Standards Association (ASA) which are responsible for writing the Advertising Codes. We are also members of the World Federation of Advertisers (WFA). We are able to use our leadership role in such bodies to set and promote high industry standards, as well as a robust self-regulatory regime.

#### **2. Introduction**

- 2.1. We welcome the long-awaited publication of this consultation – and the opportunity for ISBA, our sister advertising trade bodies, and stakeholders from other areas of the economy to respond. We need clarity on important elements of the HFSS<sup>1</sup> restrictions legislated for in the Health and Care Act 2022. The extended delay in publication has resulted in profound uncertainty for the businesses we represent, and there continue to be fundamental questions about the way in which the restrictions will operate, which we detail below.
- 2.2. We welcome the announcement<sup>2</sup> by the Government of a delay in the implementation date of the 9pm broadcast/ODPS watershed and paid-for online ad ban until 1 October 2025. In the Written Ministerial Statement, this is explicitly attributed to Ministers' recognition of the impossibility of the previous timeline for implementation, after the political instability the country experienced in 2021-22. That acknowledgement of the industry position was important, as heretofore we have had limited confidence that the Government has listened to advertisers' perspective on these restrictions, which will have a severe impact on their operations.

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<sup>1</sup> We are aware that the Health and Care Act 2022 and the draft Regulations refer to 'Less Healthy Foods' (LHF); however, for ease, we continue to use the more widely-used acronym HFSS in this response.

<sup>2</sup> <https://questions-statements.parliament.uk/written-statements/detail/2022-12-09/hcws433>

- 2.3. We hope that the Government's recognition of the need for advertisers to have sufficient time to adapt to and comply with the restrictions will extend to the publication of the necessary guidance for industry. **Any future guidance published by government, including on the transactional content exemption and the categories of products in scope, must come a minimum of 12 months – and, ideally, 18 months – before the restrictions come into effect.**
- 2.4. Throughout the process of government consulting on and legislating for aspects of the Obesity Strategy, we have been clear: advertisers recognise that the United Kingdom faces an obesity crisis and accept that they can and should play their part in tackling it. Indeed, they have demonstrated as much by their investment in previous initiatives targeted at increasing physical activity (such as the Daily Mile), improving food education and people's diets (such as Eat Them to Defeat Them), and the reformulation and resizing of products. They have focused on the areas which we know work when it comes to moving the dial on obesity. Advertising companies are *part* of the solution; but they should not be the *whole* of the solution, and our concern remains that, with these restrictions, government is treating the curbing of advertising as a silver bullet.
- 2.5. When the Government consulted on the Obesity Strategy,<sup>3</sup> ISBA joined with the IPA and IAB UK to issue an unprecedented joint response.<sup>4</sup> We argued that the proposed measures were:
- “a disproportionate and inequitable response to the sought policy outcome ... built on an evidence base that is incomplete and flawed. It ignores, without justification, good practice in the market and a more proportionate and sophisticated response that builds on that good practice.”
- That sophisticated response was a proposal from industry for a solution based on effective and evolving online targeting practice. In its response to the 2019 and 2020 consultations,<sup>5</sup> the Government said that its view “remains that a solution that relies on targeting would not be sufficient to meet the objective of the policy”. At no point did the Government engage with us to attempt to understand the capabilities of targeting, instead dismissing our contention out of hand. We continue to believe that this approach is in error.
- 2.6. We also continue to believe that the Government is proceeding with measures which are not supported by the evidence. For our response to the Obesity Strategy consultations, ISBA and the Advertising Association commissioned

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<sup>3</sup> <https://www.gov.uk/government/consultations/total-restriction-of-online-advertising-for-products-high-in-fat-sugar-and-salt-hfss/introducing-a-total-online-advertising-restriction-for-products-high-in-fat-sugar-and-salt-hfss>

<sup>4</sup> <https://www.isba.org.uk/knowledge/isbaipabipa-hfss-joint-consultation-response>

<sup>5</sup> <https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and-sugar/outcome/introducing-further-advertising-restrictions-on-tv-and-online-for-products-high-in-fat-salt-and-sugar-government-response>

SLG Economics to analyse the Impact Assessment, Evidence Note, and other policy documents. This report showed clearly that the Government had not made the case for the proposed policy.

2.7. Among the conclusions were that the IA and associated documents:

- did not take into account the decreasing extent to which children are exposed to HFSS advertising on television, with exposure dropping by over 80% since 2005 and expected to decline by 11% in every year for the next five years;
- contained mathematical errors which, although they were highlighted in the ISBA/IPA/IAB UK consultation response, were not corrected;
- overestimated the size of the online food and drink advertising market, underestimated the cost of native advertising, and therefore overestimated the volume of HFSS online advertising impacts; and
- ignored the impact of the existing CAP restrictions on HFSS advertising online, as well as the fact that 25% of ads are not actually viewed.

As a result, the report concluded that the central estimate of the reduction in calorie consumption and the associated benefits should be only, at the very most, around 5% of the figure quoted by the Government. In other words, a maximum of 40 calories per year would be removed from a child's diet – or less than half the calories in one glass of skimmed milk. This meant that the costs of the proposed policies, identified by the Government as £673m, would likely be over five times the maximum estimated benefits – identified as £118m. The report also pointed to the wider economic costs of the policies, estimated at almost a £1bn per annum hit to industry.<sup>6</sup>

2.8. This £1bn hit comes at a time when many food & drink manufacturing businesses and retailers are reporting continued headwinds – not least because of the increased costs of ingredients, energy, packaging, labour, and transport of goods in and out of the UK. They also face other regulatory challenges which are further driving up costs for business. These costs can only be absorbed for so long before they begin to be passed on to consumers – people who are already struggling with a cost of living crisis. The FMCG sector is rightly highly regulated and, as such, British food and drink is prized for its quality and safety. However, shoppers do end up paying the price for poor regulation when this drives up costs, which are then passed on.

2.9. We also note the view of the Regulatory Policy Committee on the IA. Their opinion, published in June 2021, rated the cost-benefit analysis as “weak”, and giving “inadequate support for decision-making”.

2.10. We regret that, given these assessments, the Government has proceeded with the proposed HFSS restrictions. They are not supported by the evidence, and disproportionately impact on both adult freedom of choice and our members’

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<sup>6</sup> <https://www.isba.org.uk/knowledge/slg-economics-review-governments-policy-hfss-advertising-restrictions>

freedom to advertise their legitimate and legal products. They do allow the Government to point to a watershed and ban as evidence of having ‘done something’; but we do not believe that they are a substitute for the hard thinking, investment and reform which is truly necessary for a holistic approach to tackling Britain’s obesity crisis.

- 2.11. It is worth considering how the delay in implementation – with these restrictions coming in more than two years later than originally intended – impact on the Government’s projected benefits. Even if one accepts the stated figures around calorie reduction, given the speed of change in broadcast and digital advertising, the data rationale used by government will be well out of date by October 2025.
- 2.12. As we noted at the time, the Government’s data rationale was already outdated at the time of the original Impact Assessment, because it relied on ad exposure data that was already obsolete (given the rapid decline in exposure which has been occurring, and which continues to occur as children abandon TV viewing in favour of digital media – where food advertising is more scarce, and is typically targeted away from children). This data also predated Google’s independent move to cease serving HFSS ads to anyone not known to Google to be at least 18 years of age. Given Google’s sizeable share of the digital advertising ecosystem, this on its own can be expected to have materially reduced the Government’s estimate of child HFSS ad exposure – were it taken into account.
- 2.13. However, the Government has not performed this analysis. Were it to do so, we believe that it would be forced to conclude not only that its original estimate of benefits was substantially inflated based on inaccurate exposure data; but also that the estimated benefits will continue to decline materially such that, by October 2025, they will be negligible at best.
- 2.14. We believe that the Government should consider how its dismissal of industry’s proposed targeting-based solution will age by late 2025. Even in 2020, the idea that reducing child exposure to HFSS ads online required the blunt instrument approach of an online ad ban – even if clearly and effectively targeted to adult audiences only – was already stubbornly anachronistic. The idea becomes more so as it ages and as targeting capabilities become even more robust, fuelled potentially by AI and other technological developments. We continue to urge the Government to seriously engage with industry on a targeting-based approach, which would not only achieve as great a reduction in child HFSS ad exposure at a fraction of the cost, but would also likely achieve an even *greater* reduction, because it would not force online HFSS advertisers to simply move their ads to unrestricted media, where children may be incidentally exposed.
- 2.15. When the currently planned measures inevitably fail to arrest or even affect obesity levels, we fully anticipate that government will return to the subject to consider further changes. Alternatively, ahead of October 2025, the Government could engage with stakeholders, including the advertising industry,

and convene a discussion about meaningful action, delivered in partnership, on obesity. We believe that the restrictions' probable lack of impact strengthens the case for them to carry a sunset clause, so that they lapse if it is shown that they have not contributed to a reduction in obesity levels.

### **3. The brand advertising exemption and HFSS 'synonymity'**

3.1. We turn to the questions set out in the current consultation document below but, before doing so, we must consider the nature of the brand advertising exemption from the restrictions which the Government has set out. This exemption is not touched upon in this consultation, but the details remain a key concern for ISBA members. While we appreciate that some of those details should and will be dealt with by the regulator, we believe that there is an important role for government, which it must take, in making the legal and regulatory position clear.

3.2. This is important firstly because there is a concept of brands being synonymous with HFSS products already in place in the advertising Codes. Advertisements for HFSS products are already subject to media placement restrictions, and Advertising Standards Authority (ASA) guidance warns of the capacity for brand advertising to have the effect of promoting a specific HFSS product. This can happen if an ad "features branding (be it for a company, range or product) that is 'synonymous' with (i.e. very closely associated with) a specific HFSS product"; or, in the case of corporate branding, where a company brand is "synonymous with' the range or ranges of products that they manufacture or sell". ASA guidance also notes that:

"the use of branding in an ad, even if the product itself doesn't feature, could have the effect of promoting a specific HFSS product. The word 'branding' is used in its widest possible sense and can include logos, marks, characters, colours or straplines that are directly associated with a particular product, range of products or company".<sup>7</sup>

3.3. In its consultation response, the Government said that its new HFSS restrictions:

"will have a number of exemptions to balance health benefits and impact on business. They [include] ... brand advertising ... 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".

3.4. There is therefore a clear divergence between the existing rules in the advertising Codes, which contain a concept of HFSS synonymity; and the restrictions legislated for in the Health and Care Act, which the Government has

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<sup>7</sup> <https://www.asa.org.uk/advice-online/food-hfss-product-and-brand-advertising.html>



explicitly stated should be closely focused on identifiable products and not 'pigeonhole' brands as HFSS synonymous.

- 3.5. It is important that government gives a clearer steer on this, as decisions are already being made around what constitutes identifiable HFSS products. ISBA members have noted initial advice which they have received, which suggests that some bodies may be erring on the side of carrying the existing rules over to the implementation of the new ones – i.e. even though government has said that brands should not be treated as HFSS synonymous, the presence of generic packaging suggestive of particular products is being taken as there being an 'identifiable HFSS product' in an ad (for example, the use of pizza boxes, even though no actual pizza is shown).
- 3.6. The use of product packaging, and the fact that it might be taken as constituting an identifiable HFSS product, is just one example of where ISBA members are concerned that the brand exemption is unclear. Other issues include:
  - the appearance in brands' or companies' logos of products which might be taken to be HFSS (it is surely unreasonable and outside of these restrictions' remit to require companies to spend large amounts of money on possibly fundamental rebrands – thereby risking the loss of their consumer base and consumer loyalty and trust built up over years, if not decades);
  - the use of musical or audio cues which might be closely associated with a brand or company;
  - the depiction of ingredients which might go towards making what would in the end be an HFSS product (even if the ingredients might not themselves be HFSS), if the end product was the subject of the ad (a similar concern applies to recipes);<sup>8</sup>
  - the appearance of an HFSS product in the background of a brand ad – for instance, an ad where a full supermarket trolley of goods, or a Christmas spread, is visible – but where the purchasing of an HFSS product is not the subject of the ad.
- 3.7. If the Government wishes to give effect to its policy position that brands should not be pigeonholed as HFSS synonymous, then **we strongly urge that it should take action better to define the brand exemption, and make its view explicit**. If it does not do so, then it is likely that its objective of brands not being pigeonholed as HFSS synonymous, and therefore incentivising reformulation, will not carry into effect. Manufacturers' ability to raise awareness and encourage trials of healthier innovations may be restricted, impacting products' long-term viability; in turn, this may disincentivise and undermine innovation, including in reformulated or smaller-portioned products.

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<sup>8</sup> A brand may also wish to advertise the provenance of its ingredients (as, for example, British-based or sourced); we are confident that government would not wish to impede advertising in this manner of sustainable practices.

3.8. Should government take this course, we propose two options:

1) *An amendment to the regulations.* This might take the form of a new section to the Advertising (Less Healthy Food Definitions and Exemptions) Regulations 2022 dedicated to the brand exemption. Some of the language of this might mirror that used in the guidance about the HFSS promotions restrictions which recently came into force. One possible form of words is suggested in Figure 1 below. This is not intended to be exhaustive, but to illustrate the kind of guidance which we believe it is necessary for government to provide.

2) *A formal statement by the responsible Minister directed at the industry and at regulators.* This could take the form of a Written Ministerial Statement or formal letter to the regulator (once designated), published on gov.uk. We believe that this would give added force to the sentiments around HFSS synonymity previously expressed by the Government in their consultation response, greater confidence to advertisers planning marketing campaigns, and clearer notice to regulators as they set about drawing up the guidance which will implement the restrictions.

3.9. **We would emphasise the importance of the Government providing greater clarity on the brand exemption.** We understand the previous assurances which have been given by Ministers, including during the parliamentary passage of the Health and Care Act, that the focus of the restrictions is on identifiable products; but, as we pointed out during those debates, the complexity of fusing the new restrictions with the existing ones and the weight of precedent means that the Government's policy intention may not be put into effect.

3.10. We would also encourage the Government to consider the position of charities when it comes to the brand exemption. Many charities partner with brands in order to deliver important public health and awareness-raising campaigns. We cannot believe that the Government's objective is to impede those campaigns, to stifle awareness of them, or to hobble their effectiveness. We would hope that the Government would make it clear that such brand partnerships are able to continue.

**Fig. 1. Proposed amendment to Regulations covering brand advertising exemption**

**Brand advertising exemption**

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

(2) An “identifiable product” means a product which is visually identifiable as one which has met the threshold for being classified as HFSS against the 2004-05 Nutrient Profile Model.

(3) A product shall not be taken to be an “identifiable product” if:

- (a) the product does not physically appear;
- (b) only generic product packaging is shown, and where it is possible that that packaging may contain a product which is non-HFSS;
- (c) only musical or audio cues are heard;
- (d) only versions of a product are shown as part of a brand’s or company’s logo;
- (e) only the ingredients or a recipe for the final product is shown;
- (f) a product is not the sole subject of an advertisement, but instead appears in the course of an advertisement for a broader occasion or event in which a multitude of products are present.

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

## **4. Response to Consultation Questions**

### **4.1. Less healthy food and drink products**

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

4.1.1. Disagree, it is unclear. Although the method by which businesses can determine if a product is in scope is consistent with that previously applied to the HFSS promotions restrictions, as well as with the Government’s consultation response, the lack of clarity around the brand advertising exemption makes it extremely difficult for companies to determine if an ad will be caught by the



restrictions. We once again urge government to take steps to clarify the brand exemption along the lines discussed above.

*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?*

4.1.2. Disagree, it is unclear. We believe that there might be a useful amendment to the Regulations which would provide additional clarity. The Government has previously stated, and the Regulations also do so, that the Nutrient Profile Model which is to be applied to the HFSS restrictions is the 2004-5 model, and the technical guidance to be applied to that NPM is that published by the Department of Health in January 2011. A review of this NPM was carried out in 2018 and a consultation held, to which the Government has never responded. We welcome assurances given that there is no proposal to switch to a different NPM and that, if it were proposed to do so and bring other categories of product into scope, the Government would be required to publicly consult.<sup>9</sup> However, to provide certainty to industry, we would suggest adding some short wording into Regulation 3, so that it states:

“In these regulations ‘the Nutrient Profiling Technical Guidance’ means the technical guidance: working out the NP score for a food or drink published by the Department of Health on 1 January 2011, **as applied to the 2004-5 Nutrient Profile Model.**”

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

4.1.3. Disagree, it is not clear. We note that as the HFSS promotions restrictions have come into effect, guidance has been needed for industry on whether particular products fall into scope. The British Retail Consortium has repeatedly updated its guidance on this,<sup>10</sup> as views within government have changed or been amended. We believe that the Government should work closely with the BRC to ensure that this guidance reads across to the advertising restrictions. Interpretation should be consistent across the advertising and promotions restrictions, and prompt guidance on this point is absolutely critical to ensure clarity and compliance.

4.1.4. A specific question on which products fall out of scope arises when it comes to goods which are intended for medicinal purposes. Under both the promotions restrictions and the sugar reduction programme, we understand that DHSC’s view is that throat lozenges are excluded because they include certain medicinal ingredients and are intended to be consumed for medical purposes (i.e. to soothe a sore throat). It seems logical that they would therefore not be

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<sup>9</sup> Should there be any proposal to amend the products or categories of product in scope, we believe that there should also be a suitable period of public consultation.

<sup>10</sup> <https://brc.org.uk/news/food/brc-hfss-guidance-products-in-and-out-of-scope-january-2023/>

covered by the advertising restrictions. It would be useful to have this understanding confirmed.

*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 drink products?*

4.1.5. Disagree, it is unclear. We continue to question why there is an added category for sandwiches, and why the products in scope of the advertising restrictions do not precisely mirror those in the promotions and in-store/online placement restrictions. It should not be underestimated how much added cost this burdens business with – especially retailers, who have already invested millions in reorganising their stores and on internal systems for flagging which products are captured by these changes. Variation between the different restrictions is extremely unhelpful and will add to the complexity of the eventual guidance, given the different regulatory guardrails.

#### 4.2. 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’?*

4.2.1. Agree, it is clear. It is welcome that the Government has been clear on the way in which businesses which are carried on as part of a franchise agreement will be treated as part of the business of the franchisor, and not as a separate business.

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

4.2.2. Agree, it is clear.

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

4.2.3. Agree, it is clear.

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

4.2.4. Agree, it is clear.

*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?*

4.2.5. Agree, it is clear.

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

4.2.6. Agree, it is clear; however, we believe that there is an element missing in the definition of an SME, namely the question of turnover. Elsewhere in UK law (for example, in the Companies Act 2006<sup>11</sup> and in Companies House guidance<sup>12</sup>), turnover is included as part of the definition, not employee numbers alone. This is important not just for consistency's sake, but in order to close potential loopholes where a business could use a localised, 'self-employed' model with the aim of keeping 'actual' employee numbers below the 250 threshold. Making this change would support a level playing field.

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

4.2.7. Members have queried with us the position of third-party businesses which are a part of their supply chain. Naturally, companies may not have sight of the number of employees which a business in their supply chain might have, and many of those supply chain companies may grow and develop. Does the Government believe that there is a responsibility on companies to stay informed about the number of employees in different businesses within a supply chain, and does this have a bearing on their compliance with the restrictions?

#### 4.3. Services in scope

*Services connected to regular radio*

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

4.3.1. Disagree, it's not clear. Our understanding is that any audio radio advertisement, whether it has been cleared for broadcast or not (i.e. is an audio ad only on an internet streaming service), is not captured by the regulations and is therefore out of scope. The only element captured by the regulations is any associated visual element supporting a streamed radio advert. On this basis, we believe any internet-only based radio station – for example, a company-owned one such as Asda Radio – is out of scope from an audio perspective; but any visual associated with an online advert streaming on it would be captured.

4.3.2. We would welcome clarification for retailers who operate in-store radio content when it is played using an internet streaming service, as the current wording does not clearly state if it would be in scope or is part of the carve-out, as it is audio-only.

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<sup>11</sup> <https://www.legislation.gov.uk/ukpga/2006/46/section/465>

<sup>12</sup> <https://www.gov.uk/government/publications/life-of-a-company-annual-requirements/life-of-a-company-part-1-accounts>

#### 4.4. Audio only

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

4.4.1. Agree, it is clear. However, there is a point which could usefully be clarified for retailers who operate in-store radio content. For some, this is played using an internet streaming service which is therefore also available for customers to listen to via the web from any location. This service is not broadcast, as it does not have a frequency and is therefore not a 'regulated' radio station. The format of this would suggest that it is covered by the audio exemption (navigating to it online would serve the listener only a standard access page, possibly including for example the name of the presenter). Confirmation that such store-only radio is exempt would be welcome.

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

4.4.2. Agree, it is clear. However, there is a point which requires clarification when it comes to podcasts. In the consultation response, the Government indicated that podcasts are intended to be exempt from the Regulations, and Regulation 6 states that all audio items that are not visual advertisements are indeed exempt. However, "visual advertisements" are defined as a means of ad which consist of moving or still images, legible text, or a combination of the two. A podcast may contain a cover picture and may include subtitles; it is therefore possible to argue that they are not exempt. It would be welcome if government clarified the position with regards to podcasts.

*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?*

4.4.3. Please refer to comments above.

#### 4.5. Further feedback

*Do you have any additional comments on the draft regulations?*

4.5.1. ISBA members have a number of further concerns relating to the implementation of the HFSS advertising restrictions, which are detailed below.

##### *Legal certainty*

4.5.2. The focus of the Health and Care Act and of these Regulations is on identifiable products, and the exemptions which have been granted are contained only by implication – or by the fact that they are not mentioned in the law. This is an understandable approach, but it is continuing to cause legal uncertainty among advertisers. There is a clear ask from ISBA members for the exemptions from the restrictions to be positively stated in the Regulations. We would therefore

ask the Government to consider amending the Regulations to explicitly state that owned media, audio content and so on are exempt (in addition to our earlier ask regarding the brand exemption).

*Impact on retailers and brand advertisers*

- 4.5.3. The terms of these Regulations raise issues when it comes to the read-across to the in-store promotions restrictions, and the ‘transactional content’ exemption (which also is not referenced in this consultation).
- 4.5.4. First, as mirrored in Figure 1, the guidance for the promotions and placements restrictions specifies that “the restrictions will apply to products, not brands, meaning that a brand’s product range may have products in and out of scope of the restrictions”. As the in-store restrictions only apply to products, not imagery, it makes sense for this also to be the case for the advertising measures; in which case, brands should be able to continue to advertise on third-party online retail platforms, so long as an identifiable HFSS product is not present.
- 4.5.5. In the absence of such a read-across, at the moment a situation exists where brands are forbidden from paid advertising on websites such as groceries shopping platforms, while the retailers which own those platforms are allowed to advertise their own competitor products because it counts as an owned channel (which is covered by an exemption from the Regulations). It is easy to see how this combination of the owned and transactional content exemptions puts brands at a substantial competitive disadvantage in that space. It also threatens to severely impact on retailers’ income from third parties.
- 4.5.6. Government has not as yet substantially defined the transactional content exemption, beyond saying in its consultation response that grocery platforms should be exempt because customers should have access to all the information they need when they are doing their online shopping. Given the potential competition implications, it would seem prudent now to define that exemption explicitly, and to exempt retail platforms such as grocery websites from the online restrictions altogether.
- 4.5.7. There are a number of arguments to support this position. First, the advertising restrictions are primarily aimed at the marketing environment to children; children are not carrying out the family’s online shopping. Second, it might be argued that a grocery platform or online marketplace cannot be defined as a media channel. Third, in-store online advertisements were not previously considered by the consultation to be in scope. Fourth, government’s concern about features such as buttons pushing consumers to click through to buy HFSS products are now covered by the promotions restrictions. Fifth, we do not believe that there is particular evidence to support the notion that in-store online ads of this kind promote particular behaviours (as government has acknowledged is not the case with audio content, and hence has left it out of scope). When taken together with the competition implications, and the lack of definition

so far on the transactional content exemption, we believe that there is a case to be answered.

*Paid-for online advertising services in and out of scope*

4.5.8. The paid-for online advertising space is a dynamic one. The list of paid-for online media in scope, as set out in the consultation outcome, is not in the primary legislation or these proposed Regulations. It would be useful for government to consider whether to add this to the SI, or to add it to guidance to be issued by Ministers, not least given the rapidly changing tech climate. For example, companies now have to pay for verification on Twitter, or pay to host web domains. It would be useful to make clear that such necessary payments are not in scope of these restrictions – as well as providing clarity on what is.

*Incentivising reformulation and resizing*

4.5.9. The Government has explicitly stated that it wishes to continue to incentivise brands to reformulate their products; as well as doing this, brands have also sought to resize their products and hence reduce calorie consumption. Given that government has always seen the benefit of manufacturers promoting portion control, and that it can play a role in addressing the obesity crisis, it follows that brands should be able to use media to raise awareness not only of reformulated HFSS-exempt products, but also portion-controlled ranges. We would therefore urge consideration of the inclusion of portion-controlled formats within the media exemptions.

*Definition of a paid-for advertisement with regards to influencer marketing*

4.5.10. Officials will be familiar with the work which has been done by the ASA and other bodies with regard to influencer marketing, and the industry leadership which has been shown in this space. However, there remain many grey areas regarding what constitutes ‘payment’ when it comes to a brand’s relationship with an influencer, and the impact on the implementation of the HFSS restrictions.

4.5.11. One example is whether the restrictions are engaged when there is no monetary payment between the company and the influencer featuring one of their products in their posts. This may happen in a number of ways; for instance, the product may have been gifted to the influencer (not necessarily with the expectation that it would feature in a social media post). Alternatively, one can conceive of a situation where a commercial relationship does exist – for instance, between an influencer and a retailer which has multiple product lines beyond food and drink – but that relationship relates to, say, clothing and not to food and drink. If an influencer were to feature food and drink from that retailer in an entirely unrelated way, in a post which had not been paid for or covered by any gifting, would this constitute a paid-for ad under the HFSS restrictions? Our contention would be that it should not, because any commercial relationship between the brand and influencer did not relate to HFSS products.



*Review of measures' effectiveness*

4.5.12. As noted in section 1 of this response, we continue to believe that these measures will not be effective in cutting obesity. We understand that government takes a different view. However, given the burdens which are going to fall upon several sectors in implementing these changes, we believe it is reasonable that government takes steps to review the measures' effectiveness.

4.5.13. We therefore call for government to carry out a post-implementation review after five years, and once again to consider adding a sunset clause to the Regulations which will see the restrictions fall if they have not met success metrics. Clear parameters as to success should be defined now, on the basis of an agreed evidence base.

*Combined cost of these and other government policies*

4.5.14. In closing our response, we wish to re-emphasise the impact which the combination of these restrictions and other government policies is having upon the food and drink sector, and the advertising and marketing industry more widely.

4.5.15. The past few years have been a period of unprecedented instability politically and economically, from the Brexit referendum and its aftermath to the COVID-19 pandemic to the frequent changes in government and ministerial personnel. The delay to October 2025 of the HFSS advertising restrictions is one example of where policy instability has meant real costs and uncertainty for business.

4.5.16. However, this has not happened in isolation. The UK Government has also proceeded with promotions restrictions and other reporting requirements on business; meanwhile, devolved governments have brought forward their own consultations and measures on HFSS products. This has combined into an enormous burden and increased costs which are becoming untenable. The food and drink, and retail, sectors also continue to come under pressure to assist their customers and employees through the cost of living crisis; and UK economic growth remains weak.

4.5.17. It must be noted that government has loaded cost and regulatory burdens onto business, while itself failing to invest in public health. Many retailers re-invest their revenue back into keeping down the prices that the public pay for goods. If companies must continue to invest instead in meeting the cost of new regulatory burdens, then the consequences are obvious.

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