

Response of the Royal College of Physicians of Edinburgh to UK Government Consultation on Introducing further advertising restrictions on TV and online for products high in fat, salt or sugar: consultation on secondary legislation

Less healthy food and drink products

1) For the purposes of sections 321A(1), 368FA(1) and 368Z14(1) of the Communications Act 2003, a product is a “less healthy food or drink product” if

a) it falls within one of the categories set out in the Schedule to these regulations, and

b) the score for the product when the nutrient profiling model is applied to it in accordance with the Nutrient Profiling Technical Guidance is

i) 4 or more points in the case of a product which is not a drink, or

ii) 1 or more points in the case of a product which is a drink.

2) Products within the categories set out in the Schedule are “less healthy food or drink products” whether they are sold for consumption at home or elsewhere.

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.

The Royal College of Physicians of Edinburgh (RCPE) is pleased to be able to respond to this consultation and the answers given here are based on the views of Fellows with a particular knowledge of obesity related health impacts, with additional input from colleagues in Obesity Action Scotland.

Question

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?

The RCPE considers that the regulation is clear and looks forward to the publication of useful and effective guidance to accompany the regulation.

Question

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?

We agree that this is clear and that the nutrient profiling model (NPM) is already well understood and utilised and is evidence based. We also look forward to the publication of the new NPM which has been awaited for some years now.

As outlined in the consultation response, the categories in the Schedule to the regulations are based on the government's sugar and calorie reformulation programmes or the soft drinks industry levy, narrowed to only include those product categories of most concern to childhood obesity. The proposed product categories in scope are intended to mirror those in the [promotion and placement restrictions](#) with an additional category and text in category 13 to cover the out-of-home sector.

The restrictions will apply consistently to HFSS food and drink advertisements in scope, meaning all categories will apply to food and drink advertised for purchase in out-of-home settings as well as the retail environment. Therefore, for clarity we have not explicitly included some of the previously labelled out-of-home categories, to prevent overlap. The government anticipates that further guidance will be issued to complement the regulations and will again be in line with [guidance set out in support of promotion and placement restrictions](#).

Product categories in scope of the advertising restrictions are outlined in the Schedule to the regulations and can be found in the draft regulations. The aim of this section is to consult on the wording of each category so products belonging to each are as clear as possible.

Question

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

The RCPE considers that the text is generally well-defined. We would welcome additional robust and evidence based justification and explanation of the exemption of products, for example the exemption of children's snacks, drinks and purees in category one.

Regulation 3(2) also includes the following text:

Products within the categories set out in the Schedule are “less healthy food or drink products” whether they are sold for consumption at home or elsewhere.

Question

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?

We believe that the text generally makes it clear that all products apply to both retail and out-of-home food and drink products. The RCPE welcomes the inclusion of the out-of-home food sector given its high prevalence in the UK, and the inclusion of businesses selling takeaway food through third-party apps and websites which are increasingly used by the public.

Businesses in scope

The Act provides an exemption for advertisements included in television programming services, on-demand programme services and paid advertisements placed on the internet by or on behalf of a

person who is, at the time when the arrangements are made, a 'food or drink SME'. Secondary legislation will provide a definition of a 'food or drink SME', to ensure that businesses with 249 employees or fewer that pay to advertise HFSS products will be exempt from the HFSS restrictions. This definition will also outline that a company's number of employees internationally count towards their total number of employees and that franchises are treated as part of the franchisor business and not as a separate business.

The intention in this consultation is to ensure that the definition of 'food or drink SMEs' is clear and unambiguous.

The definition of 'food or drink SMEs' has been outlined in regulation 4 with the following text:

1) For the purposes of sections 321A(3), 368FA(2) and 368Z14(2) of the Communications Act 2003, a person is a "food or drink SME" during a financial year if that person:

a) carries on one or more businesses which involve or are associated with the manufacture or sale of food or drink during the financial year, and

b) on the first day of the financial year, employs fewer than 250 people for the purposes of those businesses.

2) For the purposes of determining how many persons are employed for the purposes of a business:

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.

3) For the purposes of paragraph (2), a "franchise agreement" exists where one undertaking ("the franchisee") and another undertaking ("the franchisor") agree that the franchisee carries on a business activity which includes the sale or distribution of food or drink ("the franchise business"), and paragraph (4) applies to the franchise business.

4) This paragraph applies to a franchise business if

a) the food or drink provided in the franchise business,

b) the internal or external appearance of the premises where the franchise business is carried on, and

c) the business model used for the operation of the franchise business,

are agreed by the franchisor, and are similar to those of other undertakings in respect of which the franchisor has entered into comparable contractual arrangements.

5) Paragraph (4) does not apply to 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.

6) For the purposes of paragraph (1)(b)

a) the employees of a business are the persons who are employed for the purposes of the business;

b) “employee” means an individual who has entered into, or works under, a contract of employment, whether that contract is for full-time or part-time employment;

c) “contract of employment” means a contract of service, whether express or implied, and, if it is express, whether oral or in writing;

d) persons employed for the purposes of a business include persons who are members of staff of an associated company of the business who also work for the purposes of the business, and for these purposes

i) “associated company” means a company which is a parent undertaking or a subsidiary undertaking of the company which owns the business, and

ii) “parent undertaking” and “subsidiary undertaking” have the same meaning as in section 1162 of the Companies Act 2006.

Question

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'?

The RCPE believes the definition accurately and clearly defines this. We would welcome a firm commitment from the Government that it will review this regulation on a regular basis (this should be defined and agreed – perhaps every 2 years as in good practice) but remain flexible and also move to close any loopholes unforeseen at this stage as soon as possible. We are also aware of some concerns that food and drink SMEs are not included within these regulations given that they make up a very significant proportion of out of home retailers. We would urge the Government to revisit this matter and look to include more businesses, assessing what support it might provide to SMEs if they became subject to these regulations.

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

We agree this regulation is clear but would again wish to see it subject to regular review (again a timeline provided for transparency) to identify any loopholes.

It is our intention for a franchise to be treated as part of the franchisor business, not as separate for the purposes of determining the number of employees in a business.

Question

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

We believe this regulation clearly describes what would constitute a franchise.

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

We consider that this regulation clearly describes what would constitute a franchise agreement.

Our policy intention is to preclude large multinationals from exploiting loopholes by, for example, setting up a smaller UK company separate to the large corporation. Therefore, we intend for a company's number of employees internationally to count towards their total number of employees.

Question

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?

We agree that this regulation clearly describes the total number of employees and welcome the inclusion in the total number of employees employed outside of the UK.

Question

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

While we believe it is clear, we again would highlight concerns about the exclusion of SMEs when they make such a large contribution to calories consumed. We once again urge the Government to revisit this issue in the near future.

Question

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

We consider that the Government should consider the particular concentration of SMEs offering less healthy food and drink in more deprived areas and the impact this has on obesity and health inequalities.

Services in scope

Services connected to regulated radio

Broadcast radio is not within the scope of these advertising restrictions. In respect of the online prohibition, the Act provides a power that will allow the government to define what is meant by “services connected to regulated radio services”. The purpose of this power is to enable the government to ensure that radio, where it is distributed via the internet or where radio programmes are downloaded via the internet, is also excluded from the scope of these advertising restrictions. Audio advertisements on the online streams of regulated commercial and community radio stations, will be exempted from the prohibition, provided there are no visual accompaniments to the sound.

Services in scope of the advertising restrictions have been outlined in regulation 5 with the following text:

1) For the purposes of section 368Z14(3)(c), a service is a “service connected to regulated radio services” if it is a service

a) provided by means of the internet;

b) distributing audio items which are the same or substantially the same as items broadcast by a relevant radio service digitally or in analogue form.

2) For the purposes of paragraph (1)(b), a “relevant radio service” is a radio service, other than a radio multiplex service, regulated by OFCOM under section 245 of the Communications Act 2003.

3) A visual advertisement included in a service connected to regulated radio services, which distributes an audio item, is not to be treated as part of that service.

Question

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

We believe that the regulation could be clearer and less open to variable interpretation. We would welcome a revision here to improve clarity.

Audio only

As outlined in our consultation response, our intention is for audio-only content online, such as podcasts and internet-only radio services (where services are not regulated), to be in scope but exempt from the online restrictions. However, audio advertising which has a visual component is in scope of the restrictions. This is outlined in regulation 6 with the following text:

1) Section 368Z14(1) does not apply in relation to advertisements, which

a) are included in a service distributing an audio item by means of the internet which is not a service connected to a regulated radio service, within the meaning of regulation 5, and

b) are not visual advertisements.

Under regulation 2:

- “audio item” means an item consisting wholly of sound
- “visual advertisement” means an advertisement which consists of moving or still images, or legible text, or a combination of those things

Question

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

We consider that it may be useful to outline specific examples of what constitutes audio only.

Question

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

We consider that clarification is required in relation to whether the visual component refers to brand and/or product. Visual components may not be product-identifiable but can be brand-identifiable.

Question

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?

As above, we consider it important to have clarification in relation to whether the visual component refers to brand and/or product. Visual components may not be product-identifiable but can be brand-identifiable.

Further feedback

Question

Do you have any additional comments on the draft regulations?

The RCPE shares the concern of many public health experts that the introduction of these regulations has been delayed and also that, while welcome, they are relatively limited in scope.

Given the reach of broadcast radio, we would urge the Government to look again at the regulation of advertising on broadcast radio.