

Consultation:

DHSC/ DCMS proposals for introducing further advertising restrictions for TV and online for products high in fat, sugar and salt (HFSS)

Which? is the largest consumer organisation in the UK with more than 1.3 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Summary

- Which? welcomes these proposals from the Government to introduce further advertising restrictions on TV and online for products high in fat, sugar and salt (HFSS) to help support families and children in making healthier food choices. We agree that these are priority areas for stronger protections for children from unhealthy food marketing that current regulation and self-regulation do not address adequately.
- Our research into this issue over many years has found that HFSS foods are marketed to children through a variety of media and techniques, which are becoming increasingly integrated and, in some cases, difficult for parents and guardians who are potentially less media aware or not the target of the advertising to keep track of. Our wider work on consumer data controls¹ has highlighted the increased use of digital and people-based marketing that needs to be carefully considered.
- We support the overall approach to strengthening restrictions on TV by introducing a 9pm - 5.30am watershed for HFSS advertising using the 2004/5 Nutrient Profile Model, but think that this needs to be supported by wider controls that recognise how children now access TV on-demand and through digital channels.
- We support a mixed approach to strengthening restrictions online recognising that a watershed would improve protections in TV-like content, but does not necessarily address the sophisticated techniques used to target children particularly via social media platforms.
- Issues concerning the use of children's data by advertisers and the risks this may pose, as well as how they can be monitored, fully understood and mitigated need to be addressed alongside wider government initiatives focused on online harms.

¹ Control, Alt or Delete – the future of consumer data, Which?, June 2018

Introduction

Which? welcomes this consultation to introduce further advertising restrictions on TV and online for products high in fat, sugar and salt (HFSS).

Many children's diets are too high in fat, sugar and salt, leading to overweight and obesity and contributing to diet-related diseases in adult life including diabetes, cardiovascular disease and cancer. One in five children in England are overweight or obese before they start primary school, and by the time they leave, this increases to one in three.² Dental caries linked to diets high in sugar is also the main reason why children aged 5-9 are admitted to hospital in the UK.

The factors that influence food choices, and ultimately contribute to childhood obesity and other diet-related diseases, are complex. But there is clear evidence that food advertising influences children's food preferences and choices. Which? has therefore long advocated for effective controls over the marketing of HFSS foods to children across all types of media. Our policy research looking at the use of consumer data in digital markets has also aimed to understand how far consumers require support to rebalance power over use of their data. The inclusion of online media is therefore important given the growth and scale of digital, people-based marketing and the challenge for regulations to keep pace with technological developments.

The UK has introduced progressive restrictions over broadcast and non-broadcast advertising through Ofcom restrictions as well as the Broadcasting Code of Advertising Practice (BCAP) and non-broadcast Code (CAP) and some food companies have made additional voluntary commitments. These, however, leave too many gaps in consumer protection. Our research has found that HFSS foods are marketed to children through a variety of media and techniques, which are becoming increasingly integrated and, in some cases, difficult for parents and guardians who are potentially less media aware, or not the target of the advertising, to keep track of.

Robust regulation to restrict marketing of HFSS foods is just one government action that consumers welcome to support them make healthier eating choices easier for their families. It complements proposed restrictions on retail promotions of HFSS foods by location and price, as well as the Government's work with food companies to drive reformulation to reduce salt, sugar and calories and provide greater transparency about their products with better front of pack nutritional labelling and calorie information when eating out of home. Recent polling shows strong public support (69%) for comprehensive measures to protect children from HFSS food marketing pressure across all media.³

Our comments focus in particular on the need to ensure that children are protected from inappropriate targeting with digital advertising using their personal data, in view of the vulnerability of children and of the effectiveness of such advertising. This was highlighted in a

² Public Health England (2016) 'Child Obesity Statistics' http://www.noo.org.uk/NOO_about_obesity/child_obesity

³ YouGov Plc. Total sample size was 2078 adults. Fieldwork was undertaken between 12th - 13th February 2019. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

recent Which? policy report, *Control, Alt or Delete*⁴, which explored the use of consumer data, with special reference to the digital advertising industry. Which? also submitted comments to the Information Commissioner's Office's consultation on its Age Appropriate Design Code, highlighting the need to include food advertising to children.

Consultation questions

Media in scope (questions 1-3)

We agree with the proposal that any further advertising restrictions apply to broadcast TV and online. TV and online are the main sources of children's media consumption and TV remains very powerful as part of an integrated campaign including digital, mobile and social media. HFSS food and drink brands are advertised on these channels extensively, and current rules provide insufficient protections for children.

Our research has found that some companies will use a mix of media, both new and more traditional, as part of their campaigns. This may for example include combining TV, packaging, on-line ads, apps, promotions via social networking sites, company web-sites and sponsorship. Restrictions should also be applied to other media channels to close gaps in protections that will otherwise be exploited by advertisers.

Other media that should be covered are those which currently fall outside existing regulations including: packaging, point of sale promotions, non-broadcast sponsorship of events or sports, cinema, radio, print, schools-based marketing, outdoor and direct marketing.

Closing these gaps would further reduce children's exposure to HFSS advertising and create a consistent regulatory approach across all media which is easier for advertisers and regulators as well as parents and guardians to understand. A comprehensive approach is likely to strengthen the incentives for companies to reformulate their products or to develop their product ranges towards more healthy options.

HFSS definition (questions 4-5)

We do not fully agree with the proposals that any additional advertising restrictions apply to food and drink products in Public Health England's sugar and calorie reduction programmes, and the Soft Drink Industry Levy (SDIL), using the NPM 2004/5 to define what foods and drinks are HFSS.

Incorporating the PHE and SDIL categories as further criteria in addition to the nutrient profiling model (NPM 2004/5) creates a different regulatory basis to existing CAP and BCAP advertising regulations. The NPM 2004/5 is a workable and robust tool that has proved fit for purpose for identifying HFSS foods and drinks on TV and in non-broadcast media since 2007. We are concerned that in seeking to exempt a small number of HFSS products such as olive oil and butter from further restrictions risks unnecessary complexity for advertisers and regulators.

⁴ <https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>

While we support the ambition of the reformulation programmes, there is no evidence that incorporating the categories explicitly within the new advertising restrictions will accelerate progress in reformulation. The purpose of the sugar and calorie reduction programmes is to encourage businesses to make step-wise changes to their products across the market. Conflating the reduction programme with the advertising rules risks creating an intermediate category of foods that are still rated as less healthy but which may be advertised to children. This would disadvantage food brands that have already developed healthier products (that meet the NPM threshold), and could be misleading for parents and children.

The NPM 2004/5 is currently being revised to bring it into line with new UK dietary recommendations – in particular, lower maximum consumption of free sugars. When the revised NPM is incorporated into advertising restrictions, we expect this will help to maintain pressure on food companies to reduce the amount of sugar in their products.

The definition of HFSS foods subject to the restrictions should therefore be made using the NPM 2004/5 without modification. This should be updated when the PHE review of the model is finalised to reflect the new HFSS definition.

Broadcast consultation options (questions 6-19)

Our preferred option for strengthening broadcast rules is option 1 “plus” – a 9pm-5.30am watershed for HFSS advertising using the 2004/5 NPM, but supported by wider controls that recognise how children now access TV on-demand and through digital channels.

Children of all ages watch an average of 14 hours of television a week - three-quarters of their viewing time is on commercial channels and the largest numbers are watching between 6pm and 9pm when existing TV restrictions on HFSS advertising do not currently apply.⁵ Half of all food advertisements shown between 6pm and 9pm are HFSS.⁶ When children watch TV, 62% is watched with an adult, 13% with other children and 25% alone.

The 2004/5 NPM is a scientifically robust tool, designed to support HFSS advertising restrictions and has been applied effectively in broadcast and non-broadcast media since 2007. A 9pm watershed builds on and aligns with the established rules for children’s programming and would reduce children’s exposure to HFSS advertising by restricting it during family viewing times when children watch in largest numbers. Parents understand that content shown after 9pm may not be suitable for children and in a UK-wide poll in 2019, three-quarters (72%) supported a 9pm watershed on junk food adverts during popular family TV shows.⁷ The consultation document also includes a compelling estimate that introducing a watershed across broadcast TV and online media could remove around 8 billion calories per year from children’s (4-15 year olds’) diets by direct influence on their consumption. This is in addition to multiple indirect health benefits which cannot be modelled.

⁵ Ofcom. Children and parents: media use and attitudes report. 2017

⁶ Cancer Research UK. May 2018. Analysis of Nielsen database for TV advertising on ITV, C4, C5 and Sky One.

⁷ See ref 2.

While a 9pm watershed gives back a significant degree of control to parents or guardians about what advertising their children may see on broadcast TV, further measures are needed to take account of how children of all ages engage with TV more extensively on tablets and mobiles as well as TV sets in ways that may be difficult to keep track of.⁸

We do not support Option 2 – a ladder of advertising restrictions that would create three bandings for food products whereby products in a middle band would be subject to partial advertising restrictions before 9pm. It is not demonstrated in the consultation impact assessment that the addition of the ladder approach in Option 2 is either necessary or likely to incentivise reformulation.

Evidence from a review of the current HFSS restrictions shows that without a ladder approach, some advertisers responded by reformulating products to comply with the NPM (e.g. *Crusha* and *Yoplait*) and that some new brands were advertised on TV for the first time (e.g. *Kids Snax* and *Ella's Kitchen*).⁹ A middle category of partially restricted advertising could discourage rather than incentivise reformulation unless the threshold was decreased over time. The effect of the ladder would be to reduce the level of protection to children's health if reformulated foods, while still high in fat, sugar and/or salt, continue to be advertised to children. For example, based on the indicative thresholds suggested in the consultation, the ladder option would permit advertising of an Ambrosia chocolate fudge dessert pot, which contains 16.6g of sugar per serving – almost 70% of the maximum recommended daily intake for a child aged 7-10¹⁰.

By the Government's calculations, a proposed threshold at 1% of the total audience of 4-15 year olds allows up to 90,000 children to see HFSS advertising in an exempted channel or programme. This figure is likely to understate exposure as it does not take account of children under 4 (not captured in the BARB viewing figures). We do not believe that any exemption is justified on the grounds of proportionality when significant numbers of children are still exposed to HFSS advertising.

Online consultation options (questions 20-35)

Our research over many years has shown increasing use of digital marketing to target HFSS food and drink products to children across a variety of platforms including Facebook, Instagram and YouTube, often using immersive or manipulative techniques, such as real-world tie-ins, brand associations, direct and indirect endorsements by popular celebrities, and user-generated content. Some examples of online HFSS advertising seen by children are shown in the appendix.

In our submission to the CAP consultation (2016) we called for loopholes in the rules to be addressed. This was due to the narrow definition applied to marketing techniques covered, and to the inadequacy of a 25% child audience index to restrict advertising on channels that are viewed by large numbers of children, but which are also popular with adults, such as YouTube. We also

⁸ 55% of children aged 8-11 watch TV on devices other than a TV set, such as a tablet. Ofcom. *Children and parents: media use and attitudes report*. 2017.

⁹ *Changes in the nature and balance of food advertising to children*, Ofcom, 17 December 2008
https://www.ofcom.org.uk/data/assets/pdf_file/0028/23977/hfssdec08.pdf

¹⁰ <https://www.tesco.com/groceries/en-GB/products/301393062>

highlighted certain inconsistencies, such as licensed characters being within scope, but brand equity characters out of scope.

The way that children interact with different media has to be addressed as part of the restrictions. As the consultation document sets out, children aged 12 to 15 now spend more time online than watching broadcast TV and in 2017, 96% of 5 to 15s had access to the internet at home. 65% of 3 to 4 year olds, 75% of 5 to 7 year olds, 80% of 8 to 11 year olds and 78% of 12 to 15 year olds use a tablet. 68% of 5 to 15 year olds use a mobile phone.

Our recent research report, *Control, Alt or Delete*, identified issues for the protection of children from HFSS advertising raised by the increasing use of consumer data to target digital advertising. The report showed that the growth and scale of the digital market has brought unprecedented access to content and services.¹¹ However, the consequences of ever-increasing flow of data from consumers to advertisers are poorly understood, and many consumers feel disempowered.

We recognise that there is an important role for the Information Commissioner's proposed *Age Appropriate Design Code* to help deal with issues relating to huge growth in children's digital footprint¹² and the use of that data for marketing purposes, by providing a framework to the special protections for children required by the General Data Protection Regulation (GDPR).

The Government's new restrictions on HFSS advertising to children on TV and online should complement and align with its commitment to protecting the physical safety of children online in its plans for a new regulatory framework set out its *Online Harms White Paper*.¹³ We therefore welcome clarity that the proposed restrictions are separate to any additional longer-term changes that may result from wider activity on online harms and the government's online advertising review.

We support (Option 3) a mixed option of controls for HFSS advertising that treats different online sub-sectors differently as this could offer a combination of protections needed to address the ways in which personal data and audience profiling are used and how these influence advertising seen by children online.

On its own, a watershed restriction risks being an analogue solution to a digital problem. However, a watershed restriction does offer a valuable mechanism for restricting HFSS advertising in TV-like content, such as video advertising, that is viewed in a similar way to broadcast advertising. The ways in which children watch TV has changed since the broadcast advertising rules were introduced and streaming TV content online is increasingly popular, giving more unsupervised access to programmes and associated advertising. An online watershed has the advantages of giving a level regulatory playing field for video content between broadcast and non-broadcast media, and would be easy for regulators and parents to understand.

¹¹ The House of Lords Select Committee on Communications report: *UK advertising in a digital age* reported evidence from the advertising industry that programmatic advertising is expected to account for 80-90% of display ad spend in 2019.

¹² Children's Commissioner (2018) *Who knows what about me?* <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2018/11/who-knows-what-about-me.pdf>

¹³ DCMS. *Online Harms White Paper* (2019).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf

Other forms of HFSS marketing such as viral marketing, and advertising on social media platforms require additional measures to address weaknesses and gaps in current rules about: a) scope of marketing covered, b) the challenge of age-based audience profiles and c) the legitimacy and impact of behavioural targeting techniques which exploit children's online data. The following should therefore be taken into account:

- Current regulations apply to online content 'targeted towards' or 'directed at' children and not necessarily to the sites or platforms most popular with children and as a result are likely to have limited effect in protecting children from seeing HFSS advertising. To close this gap, regulation of digital HFSS marketing should be framed to capture the wider marketing that children are exposed to, including that on sites, platforms, apps and other digital locations that children may access, including where children are not the primary target audience.
- The current approach to audience profiling is based on an assumption that a viewer is an adult unless verified as a child. But research by the advertising industry suggests that self-reporting is unreliable, particularly as many younger children access popular channels and sites such as YouTube and Facebook by saying they are older than they are, often with their parents' permission. Inferences made by advertisers about the age of a viewer based on their online behaviour are also unreliable as many interests are shared by children and adults alike, such as music and gaming. Research has shown that preteens are particularly drawn to social media and do not always use good judgement about what they share online.¹⁴ In common with other vulnerable groups, children cannot be assumed to have given their consent to the use of their data.
- The advertising industry claims that 'digital targeting, including interest-based targeting enables advertisers to direct their online advertisements away from certain groups, such as children'.¹⁵ But equally, it enables advertisers to direct advertisements more effectively towards them. With these twin pressures to use children's data it is vital that we understand the consequences of doing so. In our response to the Information Commissioner's consultation on her Age Appropriate Design Code¹⁶, we raised concerns about the potential impacts on children of targeted advertising techniques, in particular the use of algorithms that may identify characteristics correlated with vulnerabilities. It may be necessary to broaden existing guidance - which bans targeting on the basis of sensitive characteristics and consumer vulnerabilities - to protect children from harmful advertising.
- Robust and independent monitoring of the advertising seen by children is needed to understand their exposure and identify any practices that could cause harm. This would be in line with the Government's *Online Harms White Paper* which acknowledges the need to mandate monitoring where child safety is of concern.

Exemptions may be appropriate to apply to advertisers that can demonstrate 'exceptionally high standards of evidence' that children are not exposed to HFSS advertising. This is however a constantly evolving market, with limited publicly available data to draw on to determine the appeal to children and nature of the audience. Defining exceptions to regulations and agreeing standards

¹⁴ C. Pechmann, L. Levine, S. Loughlin, et al, *Impulsive and Self-conscious: Adolescents' Vulnerability to Advertising and Promotion*, Journal of Public Policy & Marketing 24, n. 2 (2005): 202-221

¹⁵ Advertising Association. 2019. *The challenge of childhood obesity: the advertising industry's perspective*.

¹⁶ Which? Consultation response: Information Commissioner's Office's Age Appropriate Design Code. Sept 2018.

of evidence will therefore be difficult. Advertisers should be given time to respond to the stimulus to reformulate their products and promote healthier options and the potential for exemptions should be kept under review.

HFSS advertising should not be shown on sites where children are assumed to be part of the audience. The risk of a threshold approach, as we have set out in relation to broadcast restrictions, is that it can still mean that large numbers of children will be exposed to HFSS food advertising. It should be assumed that the viewing audience includes children unless it is verified as adult-only. Reversing the default position so that a viewer is assumed to be a child unless verified as an adult - and marketing is restricted accordingly - would be a more reliable and precautionary approach.

No threshold (such as 25% or 1%) is therefore appropriate to determine a 'low child audience' for either online or broadcast TV to maintain a consistent regulatory standard. Online restrictions and how they are measured should be framed around the scale, rather than merely the proportion relative to the number of adults viewing, supported by more comprehensive definitions of content that may be 'directed to' or contextually 'targeted towards' children.

Implementation and next steps (question 36)

We agree with the Government's proposal to implement the restrictions on TV and online at the same time.

This will increase the incentive for advertisers to develop healthier products if similar rules apply across all media. As food brands plan integrated marketing strategies across different media platforms, a common regulatory standard may make this easier.

Public Sector Equality Duty (question 37-39)

As advertising restrictions are a population-level measure, they offer protections to all children and their families.

There is some evidence to suggest that children in poorer households may benefit more from advertising restrictions than those in higher income households as they tend to have greater exposure food advertising due to slightly more time spent watching TV and other screen-based media. Some studies have also shown greater targeting of food advertising to lower income groups.¹⁷ Stronger protections against HFSS advertising could help reduce health inequalities among children and their families.¹⁸

Impact assessment (Annex E) selected questions for response

We disagree with the assumption that HFSS advertising campaigns displaced to non-video forms of advertising (e.g. radio, billboards and direct mail) will have less impact on children's calorie

¹⁷ Health Equity Pilot Project (HEPP) Evidence Review. The impact of interventions and policies on SES differentials in obesity and diet. 2017. European Commission.

¹⁸ Brown V, et al. The Potential Cost-Effectiveness and Equity Impacts of Restricting Television Advertising of Unhealthy Food and Beverages to Australian Children. *Nutrients* **2018**, 10(5), 622; <https://doi.org/10.3390/nu10050622>

consumption. It does not take into account the variables which determine the impact and effectiveness of an advertisement, including its execution, prominence and location. For this reason it is important that other media where children see HFSS advertising are also brought within a framework of restrictions without delay.

The government's final impact assessment should take account of health benefits beyond those already presented, in particular, prevention of mental health issues, hypertension and tooth decay. There is limited available data for modelling all of the interactions between obesity and health outcomes, but the Impact Assessment is too narrow in its consideration of the health benefits that may accrue from stronger protections for children from HFSS marketing. For example, the negative impact of obesity on children's mental health and well-being is not included.

As well as benefits for preventing overweight and obesity, there are other potential health gains from restricting HFSS advertising which should be taken into account:

- Restricting the promotion of foods high in salt, such as crisps and salty snacks, will support parents and care givers trying to establish lower-salt healthy eating habits which will reduce the risk of hypertension in childhood and later life.
- Curbing promotional pressure on children to consume sugary products such as soft drinks, confectionery, and sugary cereals will support efforts to reduce high sugar consumption which is associated with dental caries. Tooth extraction of decayed teeth is now the number one reason for hospital admissions among young children aged 5 to 9.¹⁹

Which? June 2019

¹⁹ British Dental Association. (2016). 'Sugar and children's oral health'. <https://www.bda.org/sugar>

Appendix

Box 1.

Example A. Viral marketing via social media

Companies may encourage children to develop or promote characters themselves. *Vimto's 2016 Vimtoad campaign* for example made use of Snapchat, using custom lenses to allow videos to be created. These videos could then be shared across other social media platforms such as Facebook and Twitter.



Example B. Embedded advertising in social media posts

According to Facebook, over 300 million people use Facebook Stories and Messenger Stories everyday. KFC are among a number of HFSS brands reporting brand lift from *Facebook Stories ad campaigns* such as the one illustrated below to deliver ad messages in a 'fullscreen, immersive environment'. Facebook reports consumer research in which 62% of people said they became more interested in a brand or product after seeing it in a story.²⁰ Because Stories and the ads within them are only viewable for 24 hours and do not appear in timelines or News feeds, it is difficult to effectively monitor children's exposure to this type of HFSS advertising.



Example C. Celebrity brand endorsements in social media

A promotion for *Nutella (Ferrero)* by celebrity vloggers, Zoella and Alfie Deyes across YouTube and Instagram illustrates how current audience profiling methods potentially expose large numbers of children to HFSS advertising. The campaign was cleared by the ASA in a recent adjudication despite the fact that the advertiser was unable to provide data for the size of child audience. Instead it was inferred from other data that less than 25% of the online audience was under 16. By this calculation, over 300,000 children could be exposed to HFSS advertising

²⁰ <https://www.facebook.com/business/news/introducing-facebook-stories-ads>

on Zoella's Instagram feed, out of a total of 1.2m followers.²¹



²¹ Instagram followers for Zoella. 2019. Figures from socialblade.com <https://socialblade.com/instagram/user/zoella>