

THE EXPLANATORY MEMORANDUM TO
THE CALORIE LABELLING (OUT OF HOME SECTOR) (ENGLAND)
REGULATIONS 2021

2021 No. 909

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 Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to require large businesses (businesses with 250 or more employees) to display the calorie information of non-prepacked food and drink items that are prepared for immediate consumption. Calorie information must be displayed at the point of choice for the customer, such as on menus, menu boards, online menus, and food labels. In addition to displaying the calorie information of each item, businesses are also required to display the statement ‘adults need around 2000 kcal a day’ where it can be seen by customers when making their food choices.
- 2.2 The aim of this measure is to ensure consumers have access to clear and consistent calorie information at the point of choice, in order to help them make healthier choices for their families when consuming food outside of the home. Transparency about the calorie content of meals may also encourage businesses to reformulate products and/or reduce portion sizes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 Not applicable.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Prevention, Public Health and Primary Care, Jo Churchill MP has made the following statement regarding Human Rights:
- “In my view the provisions of The Calorie Labelling (Out of Home Sector) (England) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made in order to ensure that consumers have access to information about the energy content of the non-prepacked food and drink that they consume so that they can make informed healthier choices.
- 6.2 Retained EU Regulation 1169/2011 on the provision of food information to consumers requires energy content as one of a number of mandatory particulars to be displayed on prepacked foods.
- 6.3 As an alternative to enforcement using criminal sanctions available under the Food Safety Act 1990, the Regulations enable local authorities to impose a civil sanction of a fixed monetary penalty under the Regulatory Enforcement and Sanctions Act 2008 (RESA).

7. Policy background

What is being done and why?

- 7.1 Nearly a quarter of children in England are overweight or obese when they start primary school aged five, and this rises to one third by the time they leave aged 11. Childhood obesity rates in the UK are among the highest in Western Europe. Obese children are more likely to become obese adults; currently around two-thirds of adults are overweight or obese with over one in four living with obesity. Obesity in adulthood increases an individual's risk of developing type 2 diabetes, heart disease, fatty liver disease and a number of cancers.
- 7.2 We know that regular overconsumption of a relatively small number of calories leads to individuals becoming overweight or obese. It is likely that eating out frequently, including eating takeaway meals, contributes to this gradual overconsumption of calories. Research suggests that eating out accounts for 20-25% of adult energy intake,¹ and that when someone dines out or eats a takeaway meal they consume, on average, 200 more calories per day than if they eat food prepared at home.² Data also tells us that portions of food or drink that people eat out or eat as takeaway meals contain, on average, twice as many calories as equivalent retailer own-brand or manufacturer-branded products.³
- 7.3 Eating out or getting a takeaway is common; surveys tell us that 96% of people eat out and 43% do so at least once or twice a week.⁴ Research also suggests that people are eating out more often; in 2014, 75% of people said they had eaten out or bought takeaway food in the past week⁵, compared to 69% in 2010.⁶ Consumption of fast

¹Adams J et al. (2015). Frequency and socio-demographic correlates of eating meals out and take-away meals at home: cross-sectional analysis of the UK national diet and nutrition survey, waves 1-4 (2008-12): <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4404110/>

²Nguyen and Powell. (2014). The impact of restaurant composition among US adults: effects on energy and nutrient intakes. Public Health Nutrition 17(11) 2445-52: <https://pubmed.ncbi.nlm.nih.gov/25076113/>

³Public Health England (2018). Sugar reduction and wider reformulation programme: report on progress towards the first 5% reduction and next steps: <https://www.gov.uk/government/publications/sugar-reduction-report-on-first-year-progress>

⁴Food Standards Agency. (2016). Food and You survey, wave 4: https://www.food.gov.uk/sites/default/files/media/document/food-and-you-w4-combined-report_0.pdf

⁵Food Standards Agency. (2019). Food and You survey, wave 5: <https://www.food.gov.uk/sites/default/files/media/document/food-and-you-wave-5-secondary-analysis-current-food-landscape.pdf>

food and takeaways is particularly prevalent among families, as evidence from 2016 showed that 68% of households with children under 16 had eaten takeaways in the last month, compared with only 49% of adult-only households.⁴

- 7.4 Prepacked food is required to display nutritional information, including calorie information, meaning consumers are familiar with seeing calorie content on the majority of items sold in the retail sector, such as supermarkets or convenience stores. In contrast, the out of home sector typically sells food that is not prepacked, making it difficult for people to make informed, healthier decisions when purchasing food from such businesses.
- 7.5 There is strong public demand for calorie labelling in the out of home sector. Nearly 80% of respondents to a survey by Public Health England said they think that menus should include the number of calories in food and drinks.⁷ A survey from Diabetes UK showed that around 60% of the public said that they would be more likely to eat at an establishment that offered calorie labelling on its menus.⁸
- 7.6 A Cochrane Review concluded that calorie labelling in out of home settings could help reduce calorie intake and make a useful impact as part of a wider set of measures aimed at tackling obesity.⁹ A review paper by Sinclair et al (2014) provides evidence that contextual menu labelling, as is being required through these Regulations, resulted in significantly fewer calories selected (67 kcal) and consumed (81 kcal) compared to situations with no calorie labelling.¹⁰
- 7.7 The Department of Health and Social Care has previously tried a voluntary approach to encourage more businesses to calorie label through its Public Health Responsibility Deal launched in 2011.¹¹ One of the pledges asked food businesses to provide calorie information for customers on menus and/or menu boards; in total, 45 businesses signed the pledge.
- 7.8 Subsequent studies have suggested that, among signatories of the pledge, some did not display calorie labels and many of those who did were not found to meet all the labelling recommendations.¹² Additionally, one study suggested that businesses would sign up to pledges with which they are already compliant; only 4% of signatories providing calorie labelling were judged as motivated by the Responsibility Deal.¹³

⁶ Food Standards Agency. (2010). Food and You survey:

https://www.food.gov.uk/sites/default/files/media/document/food-and-you-2010-main-report_0.pdf

⁷ Public Health England. (2018). Calorie reduction: The scope and ambition for action:

<https://www.gov.uk/government/publications/calorie-reduction-the-scope-and-ambition-for-action>

⁸ Diabetes UK. (2018). Public Views on food labelling survey: https://www.diabetes.org.uk/about_us/news/poll-food-labels-influence-spending

⁹ Crockett RA et al. (2018). Nutritional labelling for healthier food or non-alcoholic drink purchasing and consumption. Cochrane Database of Systematic Reviews: <https://pubmed.ncbi.nlm.nih.gov/29482264/>

¹⁰ Sinclair et al. (2014). The influence of menu labelling on calories selected or consumed: a systematic review and meta-analysis. Journal of the Academy of Nutrition and Dietetics, 114(9), 1375-1388:

<https://pubmed.ncbi.nlm.nih.gov/25037558/>

¹¹ Public Health Responsibility Deal: <https://www.gov.uk/government/news/public-health-responsibility-deal>

¹² Robinson E et al. (2019). Point of choice kilocalorie labelling in the UK eating out of home sector: a descriptive study of major chains. BMC Public Health 649 (19):

<https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-019-7017-5.pdf>

¹³ Durand et al. (2015). An evaluation of the Public Health Responsibility Deal: Informants' experiences and views of the development, implementation and achievements of a pledge-based, public-private partnership to improve population health in England. Health Policy 119(11), 1506-1514:

<https://www.sciencedirect.com/science/article/abs/pii/S0168851015002171>

- 7.9 Taken together, this suggests that a voluntary approach is insufficient to drive action on the scale required to make a substantive change to our food environment to help people to lead healthier lives. Therefore, this instrument sets the following requirements for mandatory calorie labelling in the out-of-home sector:

Business scope

- 7.10 Except for certain exemptions, the requirement to display calorie information extends to any business with 250 or more employees selling food in scope of the Regulations (referred to as a ‘qualifying business’).
- 7.11 To ensure large food franchises are covered by the Regulations, for the purpose of determining how many employees a business has, a franchisee's business may be treated as part of the franchisor's where the franchise agreement provides for the sale of food and the franchisor has agreed the food, appearance of the premises and business model. This does not include franchise agreements that are limited to the sale of alcohol (and the franchisee can determine what other food is provided).
- 7.12 The requirement extends to food that is sold on a website or mobile application, for example this could apply where food is sold through 3rd party delivery companies. The business responsible for the website or mobile application (the ‘remote provider’) (irrespective of the size of their business) is required to display the calorie information of food offered for sale by any qualifying business.
- 7.13 In recognition of the possibility that some institutions may have small in-house catering operations compared to the overall size of their businesses, the Regulations exempt certain institutions except where their catering services are provided by another large business (with 250 or more employees). This includes educational institutions for those over 18 years old, military establishments, criminal justice accommodation, hospitals or other medical institutions, care homes or other institutions providing social care, a canteen at a workplace providing food for its employees.

Food scope

- 7.14 Food is in scope of the Regulations if it is offered for sale in a form which is suitable for immediate consumption, is not prepacked food (there are existing nutritional labelling requirements on prepacked food) and is not otherwise specifically exempt. For the purpose of these Regulations ‘food’ includes drink and has the same meaning as given in the Food Safety Act 1990.
- 7.15 Food is considered suitable for immediate consumption where it is sold for consumption on the premises (such as a restaurant or café) or sold for consumption off the premises and does not require any preparation before it is consumed. Certain common grocery items that are sold for consumption off the premises but may not require any preparation before they are consumed (such as fresh fruit or vegetables, meats, cheeses) are exempt unless they are used as an ingredient in food, such as a takeaway sandwich.
- 7.16 Specific exemptions applying to food include:
- Temporary menu items on sale for less than 30 consecutive days and a total of 30 days in any year.
 - Food which is ‘off menu’ and made available or prepared differently to the way it is normally prepared, at the request of the customer.

- Alcoholic drinks over 1.2% alcohol by volume.
- Condiments which are provided to be added by the consumer (not including condiments which are part of the food served).

7.17 The Regulations also specify exemptions for food which is served:

- On an international aircraft, train or ferry to or from a country that is not part of the UK.
- By a charity in the course of its charitable activities.
- At an institution providing education to children under 18 years.
- To patients (not for payment) at a hospital or other medical establishment or to residents of a care home or other social care institution.

Displaying calorie information

7.18 Businesses must display the calorie content of food items in kilocalories (kcal) at the point of choice for the consumer. Where food is chosen from a menu, the energy content and size of portion must be displayed on the menu (such as a menu board, electronic menu and online menu) and, where food is selected from items on display (such as buffets and display cases) on labels corresponding with the food item.

7.19 Businesses are also required to display the statement ‘adults need around 2000 kcal a day’ on their menus where food is chosen from a menu, or otherwise on a label where it can be seen by customers when making their food choices. Children’s menus are exempt from displaying the statement referencing daily calorie needs as the calorie requirements of a child are less than that of an adult.

7.20 In recognition that some people may find viewing calorie information difficult, the Regulations permit businesses to make available a menu without calorie information on it at the express request of the customer.

Enforcement

7.21 The Regulations are to be enforced by food authorities in their local areas. In instances of non-compliance with the Regulations, enforcement officers are required to issue an improvement notice before any penalty can be levied, affording businesses an opportunity to take steps to comply with the requirements. Non-compliance with an improvement notice is an offence; in such cases enforcement officers may impose a fixed monetary penalty of £2,500 using powers under the Regulatory Enforcement and Sanctions Act 2008. This is intended to provide food authorities with a proportionate alternative means of enforcement to criminal prosecution under the Food Safety Act 1990.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

- 10.1 A public consultation was conducted between 14th September and 7th December 2018. The consultation received 1,158 responses, including feedback from businesses, trade associations, academics, health charities, local authorities and the public, amongst other interested parties. The consultation asked for views on which businesses should be required to calorie label; which food and drink items should be labelled; how calorie labels should look; how long businesses would require to implement the policy and; how it should be enforced. Documents relating to the consultation have been published on gov.uk.¹⁴
- 10.2 Consultation feedback consistently acknowledged that smaller businesses, and micro businesses in particular would find the requirement more burdensome. Therefore, the Government decided that the requirement should only apply to large businesses (those with 250 or more employees) in the first instance. Some also raised concerns over calorie labelling of temporary menu items, suggesting that this could limit innovation and see an increase in food waste. To mitigate this potential impact, the Regulations provide an exemption for those items placed on the menu for less than 30 consecutive days and less than 30 days within a calendar year.
- 10.3 The consultation sought views on how the policy could be enforced, but made no specific proposals, therefore the Government conducted a further consultation between 30th July and 9th September 2020 on proposals for how the policy should be enforced. The enforcement consultation was shared with those businesses and organisations that responded to the original consultation. This included local authorities, trading standards, health charities, academia, businesses affected by the policy and trade associations representing those businesses. The consultation sought views on methods to assess compliance with Regulations; penalties for non-compliance; and the process for issuing penalties. The consultation also fulfilled the Government's obligation to consult on its intended use of civil penalties under the Regulatory Enforcement and Sanctions Act 2008. Documents relating to the enforcement consultation have also been published on gov.uk.¹⁴
- 10.4 Overall, respondents supported the Government's proposed enforcement approach. The consultation proposed that enforcement officers would be required to issue improvement notices as the first formal action in dealing with instances of non-compliance; this was widely acknowledged as beneficial in giving businesses the opportunity to take corrective measures before a penalty is levied. To ensure penalties for non-compliance are proportionate, the enforcement consultation proposed that the Government would use the Regulatory Enforcement and Sanctions Act 2008 to enable local authorities to issue a £2500 fixed monetary penalty if the terms of an improvement notice were not met, as an alternative to the criminal penalties in the Food Safety Act 1990. Some respondents commented upon the level of the penalty being too high or too low, however the proposed approach was largely accepted.
- 10.5 Scotland, Wales and Northern Ireland have been engaged throughout the consultation process. The Welsh and Scottish Governments are considering whether to introduce similar requirements in their nations.

¹⁴ Department of Health and Social Care. Out of home calorie labelling consultation: <https://www.gov.uk/government/consultations/calorie-labelling-for-food-and-drink-served-outside-of-the-home>

11. Guidance

- 11.1 Guidance to support businesses and local authorities to implement the requirements introduced by this instrument will be published upon Parliament approving the instrument.

12. Impact

- 12.1 We assess that the impact on business, charities or voluntary bodies will include transition costs of £0.8m (made up of familiarisation costs of £0.1m, calculating energy content of products of £0.6m, and labelling costs of £0.1m) and ongoing annual costs of £0.4m (to calculate the energy content of new and modified products and the use of a calorie calculator tool).
- 12.2 The impact on the public sector is the costs for enforcement of the policy. Enforcement costs include familiarisation cost for trading standards officers (estimated at £0.02m) and annual enforcement costs at £0.1m (equivalent to £1.6m over the 25 years). However, there are NHS savings (£430m over 25 years) and social care savings (£477m over 25 years) to be gained due to the anticipated beneficial impact on public health.
- 12.3 A full Impact Assessment has been published on the gov.uk website.¹⁴¹⁴ The impact assessment estimates the policy will provide a net benefit to the economy of £5,568m over the 25-year appraisal period.

13. Regulating small business

- 13.1 The legislation applies to businesses which have 250 or more employees, so does not apply to small businesses. However, for the purpose of determining how many employees a business has, and therefore whether the calorie labelling applies, a franchisee's business may be treated as part of the franchisor's. This means that franchisees trading as a business under a franchise agreement, where the sum of employees operating under the franchise are 250+, are considered qualifying businesses for the purposes of the Regulations and therefore required to calorie label. This only applies however, where the franchisee and franchisor agree that the franchisee carries on a business activity which includes the sale or distribution of food and the food, appearance of the premises and business model are agreed by the franchisor and similar across its franchise network.

14. Monitoring & review

- 14.1 A statutory review clause is included in the Regulations that requires a review of the regulatory provisions in the Regulations to be conducted from time to time and a report published setting out the conclusions of the review. The conclusions of the review must be set out in report to be published within 5 years of the Regulations coming into force. Reviews must be carried out and reports published within every five years after that.
- 14.2 In addition, under section 67 of the Regulatory Enforcement and Sanctions Act 2008 a review must be carried out of the operation of the Regulations, and in particular to consider whether the Regulations have implemented their objectives efficiently and effectively. The conclusions of the review must be set out in a report to be published as soon as practicable after the end of three years after the Regulations come into force.

15. Contact

- 15.1 Tom Wood at the Department of Health and Social Care. Telephone: 02072106370 or email: Tom.Wood@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kevin Dodds, Deputy Director for Healthy Weight and Nutrition Branch, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Jo Churchill MP, the Parliamentary Under-Secretary of State for Prevention, Public Health and Primary Care, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.