

**EXPLANATORY MEMORANDUM TO**  
**THE COMMUNICATIONS ACT 2003 (RESTRICTIONS ON THE ADVERTISING**  
**OF LESS HEALTHY FOOD) (EFFECTIVE DATE) (AMENDMENT)**  
**REGULATIONS 2022**

**2022 No. 1311**

**1. Introduction**

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (“DHSC”) and is laid before Parliament by Command of His Majesty.

**2. Purpose of the instrument**

2.1 The purpose of this instrument is to delay the introduction of the restrictions on advertising of less healthy food and drink on television and online set out in sections 321A, 368FA and 368Z14 of the Communications Act 2003 (‘the advertising restrictions’). This instrument will do this by amending the date of implementation for the advertising restrictions from 1 January 2023 to 1 October 2025.

2.2 The purpose of the advertising restrictions, which were inserted into the Communications Act 2003 by the Health and Care Act 2022 (section 172 and schedule 18), is to introduce statutory restrictions on the advertising of products determined as ‘less healthy’ before 9pm on television and UK regulated on demand programme services, and in paid-for spaces online.

2.3 Due to a delay to Royal Assent of the Health and Care Act 2022, and recognition that industry needs more time to prepare for the restrictions, in May 2022, Government announced a year delay to the implementation of these restrictions to 1 January 2024 and Government did not publish the necessary consultation or lay the SI needed to implement the regulations in January 2023. Industry and the regulators have therefore not prepared for this legislation to come into force in January 2023. Without postponing the implementation date from 1 January 2023, the law would come into effect without the necessary secondary legislation to underpin it and with industry unprepared. Therefore, this SI is absolutely necessary to ensure that the statute book remains practical and workable.

2.4 However, feedback from industry and the regulators is now clear that there is insufficient time to prepare for implementation on the previously announced date of 1 January 2024. This is because ahead of implementation there are a number of steps that need to be taken including: a Government consultation on draft regulations that are required to set out the details of the advertising restrictions, such as the definition of product categories in scope of the advertising restrictions and the definition of the exemptions for small and medium enterprises, audio only content and services connected to regulated radio; the subsequent making of such Regulations; a consultation from the statutory regulator (Ofcom) on the designation of a frontline regulator; the possible designation of a frontline regulator by Ofcom; and publication of guidance to support business compliance with advertising restrictions, following consultation on such guidance from the frontline regulator. Through discussions with key stakeholders it is clear that this process cannot be delivered by January 2024.

2.5 Therefore, after taking into consideration growing concerns from businesses about having sufficient time to fully digest the final guidance and from the Government and the regulators to be published as appropriate before implementation on 1 October 2025. It will also allow industry more time to reformulate their products ahead of the restrictions coming into force.

### **3. Matters of special interest to Parliament**

3.1 None.

### **4. Extent and Territorial Application**

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

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

### **5. European Convention on Human Rights**

5.1 The Parliamentary Under Secretary of State (Minister for Primary Care and Public Health) Neil O'Brien MP has made the following statement regarding Human Rights.

“In my view the provisions of the Communications Act 2003 (Advertising of Less Healthy Food Restrictions) (Commencement)(Amendment) Regulations 2022 are compatible with the Convention rights.”

### **6. Legislative Context**

6.1 The Communications Act 2003 was amended by the Health and Care Act 2022 (section 172 & Schedule 18) to introduce advertising restrictions on television, on demand programme services and online. The Health and Care Act received Royal Assent on 28 April 2022.

6.2 This instrument is being made to delay the implementation of the advertising restrictions, by 33 months, from 1 January 2023 to 1 October 2025.

6.3 On 16 May 2022, DHSC announced to Parliament a twelve-month delay to the introduction of the advertising restrictions, in order to give industry more time to prepare for implementation of the restrictions<sup>1</sup>. Since then, the necessary consultations have been unable to be carried out. Therefore, on 9 December 2022, DHSC announced to Parliament an additional delay to the implementation to 1 October 2025. This instrument seeks to enact that delay before the current implementation date of 1 January 2023 comes into effect.

6.4 Between 9 December 2022 and 1 October 2025, a further statutory instrument will be made in order to set out the details of the advertising restrictions that are required under the Communications Act 2003 to define “less healthy food” and define small and medium sized business to the purposes of the restrictions.

---

<sup>1</sup> HC Deb 16 May 2022 vol 714 cc 34-36WS

## 7. Policy background

### *What is being done and why?*

- 7.1 This instrument is being made to delay the implementation date of the advertising restrictions to 1 October 2025. The advertising restrictions are due to come into effect on 1 January 2023. This instrument substitutes that date with a new date of 1 October 2025. As outlined in paragraph 2.4, this delay provides time for a number of steps which are required prior to the restrictions coming into effect. The required steps include: the Government consulting on draft regulations setting out the details of the advertising restrictions that the Communications Act 2003 provides will be set out in regulations; the making of these regulations to provide further detail about the advertising restrictions; a consultation from Ofcom on the designation of a frontline regulator; the possible designation of a frontline regulator by Ofcom; and publication of guidance to support business compliance with advertising restrictions, following consultation on such guidance from the frontline regulator.
- 7.2 As outlined in paragraphs 2.3-2.5, a delay in implementation is necessary due to a delay in the Health and Care Act 2022 receiving Royal Assent, which had a consequential impact on the timetable for the aforementioned consultations, regulations, and guidance. The Government also decided to delay implementation of the advertising restrictions due to a growing recognition that industry required further time to prepare after digesting final regulations and guidance. This is something that industry have been asking for, in representations to ministers but also in correspondence to officials. This delay will also allow industry time to reformulate their products ahead of the restrictions coming into force.

### *Explanations*

#### *What did any law do before the changes to be made by this instrument?*

- 7.3 The Communications Act 2003 includes standards related to broadcast rules, set out in statute for the regulator, Ofcom to maintain. These new advertising restrictions will supplement these standards and will require Ofcom to include statutory standards to prohibit the advertising of 'less healthy' food and drink on television and UK-regulated on-demand programme services (ODPS) between 05:30am and 9pm. Furthermore, the advertising restrictions also amend the Communications Act 2003 to add a prohibition for the advertising of 'less healthy' food and drink in paid for content online and on non-UK regulated ODPS. Without this instrument, both of these prohibitions would come into force 1 January 2023.
- 7.4 Pending the entry into force of the advertising restrictions, there are currently no similar restrictions in force in law on the advertising of less healthy food and drink in England, Wales, Scotland, and Northern Ireland. These advertising restrictions are in addition to existing non-statutory measures which are included in the Broadcasting Committee of Advertising Practice and Committee of Advertising Practice (BCAP and CAP) codes, aim to limit the advertising of less healthy products on children's TV, programmes of specific appeal to children and in non-broadcast media with a high child audience (over 25%). These existing measures do not go far enough to protect children from seeing a significant amount of unhealthy food adverts on TV, and do not account for the increasing amount of time children spend online. Analysis

conducted to inform the Government's Impact Assessment<sup>2</sup> of the advertising restrictions found that under current restrictions children were exposed to 2.9 billion less healthy food and drink TV impacts and 11 billion less healthy food and drink impressions online in 2019.

- 7.5 The advertising restrictions inserted into the Communications Act 2003 aim to reduce exposure of children to less healthy food and drink advertising and therefore, reduce excess consumption of less healthy food and drink products. These products contribute significant sugar or calories to children's diets, are heavily promoted and therefore are of the most concern for childhood obesity.
- 7.6 There is a two-stage approach to determine whether a product is less healthy for the purpose of the advertising restrictions. First, products will need to fall into a list of categories, which will be detailed in secondary legislation. The 2011 technical guidance to the 2004/5 Nutrient Profiling model is then applied to the product, and if it scores 4 or more for food or 1 or more for drinks then the product will be classified as 'less healthy' and thus have its advertising restricted.

Why is it being changed?

- 7.7 A delay to Royal Assent of the Health and Care Act 2022 have had a consequential impact on the timetable for subsequent consultations, regulations, and guidance. Further detail on these items are included in section 2.3 - 2.5, 7.1 and 7.2.

What will it now do?

- 7.8 This instrument will delay the implementation of the advertising restrictions. The advertising restrictions are due to come into force on 1 January 2023. The advertising restrictions now come into force on 1 October 2025, as a result of the amending instrument.

## **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 There is no legal duty to consult before exercising the powers to delay the implementation date of the advertising restrictions under the Communications Act 2003. Therefore, we have not consulted on the regulations to delay the implementation of the advertising restrictions.

## **11. Guidance**

- 11.1 The Communications Act 2003 imposes a duty on the appropriate regulatory authority for the advertising restrictions to draft guidance setting out their functions for

---

2

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/996232/impact-assessment-hfss-advertising.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996232/impact-assessment-hfss-advertising.pdf)

enforcement of the advertising restrictions. The appropriate regulatory authority must publish the guidance, review and revise this from time to time and share this guidance with those they think are likely to be affected by it. If Ofcom do not delegate the responsibilities of the appropriate regulatory authority, for instance to a designated frontline regulator, Ofcom will be considered the appropriate regulatory authority and must draft and disseminate this guidance.

- 11.2 This delay will help ensure that industry have appropriate time with the final guidance on the advertising restrictions before they come into effect.
- 11.3 However, guidance is not required in respect of the instrument to delay implementation of the advertising restrictions.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because this instrument is being made only to delay the implementation date of the advertising restrictions by 33 months.
- 12.4 Businesses affected by this instrument, namely food and drink retailers, broadcasters, online platforms and the advertising industry, were informed of the initial delay in May 2022 and mainly welcomed the decision, which would provide them with further time to prepare for implementation. They were informed of the additional delay on 9 December 2022.
- 12.5 Government has been clear this delay will ensure smooth implementation of the restrictions.
- 12.6 A full Impact Assessment for the advertising restrictions was produced in 2021 and is published on the gov.uk website.<sup>3</sup> This showed the Net Present Value of £1,585m over a 100-year period from the advertising restrictions is fuelled by the reduction in calories consumed. Costs are estimated at £673m over 25 years, whilst the monetised benefits are estimated at £2,258m over 100 years. The costs of obesity to individuals, society and the NHS are huge and the benefits from reducing calorie intakes across the population are therefore substantial.
- 12.7 This instrument will enact a delay to the implementation of the advertising restrictions. As a result, the full impact of benefits and costs of the restrictions will take that additional time to start accruing. This includes the health benefits associated with the policy. However, this postponement provides time for the publication of consultations, regulations and guidance that will support robust implementation and therefore generate the resultant health benefits. Businesses may benefit from the additional time to plan and implement the advertising restrictions and the delay to the costs associated with the implementation of the restrictions. Costs to the public sector of enforcing the policy (£9m) will also be delayed.
- 12.8 The advertising restrictions are part of a wider package of policies designed to reduce obesity rates and meet the government's ambition to halve childhood obesity by 2030. No one policy delivers against the commitment to halve childhood obesity by 2030.

---

<sup>3</sup> <https://www.gov.uk/government/consultations/further-advertising-restrictions-for-products-high-in-fat-salt-and-sugar>

12.9 As well as reducing child exposure to and consumption of less healthy products, a key intention of this policy is that it incentivises industry to reformulate less healthy food and drinks so that these healthier products are no longer captured by the restrictions. We have already seen reformulation of foods coinciding with implementation of some of the wider obesity package policies and a delay is unlikely to have a significant impact on this work to make food healthier. Reformulation can take a long time, and this delay is likely to be welcomed by industry as it allows time for this process to occur. Industry have also been asking for an additional delay to these restrictions.

### **13. Regulating small business**

13.1 The legislation does not apply to activities that are undertaken by small businesses.

### **14. Monitoring & review**

14.1 This instrument does not include a statutory review clause because this instrument only changes the implementation date of the advertising restrictions.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Neil O'Brien MP has made the following statement: "It is not appropriate in the circumstances to make provision for review in this instrument, as the purpose of the instrument is to simply delay the implementation of the introduction of further restrictions on the advertising of less healthy products on television and online".

### **15. Contact**

15.1 Thari Fernando at the Department of Health and Social Care Telephone: 020 7972 1689 21689 or email: thari.fernando@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sean Povey, Deputy Director for Strategies and New priorities, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under-Secretary of State for Primary Care and Public Health, Neil O'Brien MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.