



Television Advertising of Food and Drink Products to Children

Statement and Further Consultation

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Foreword

The growth of childhood obesity is a significant public health concern.

In December 2003, as part of its wider approach to the issue, the Government asked Ofcom to consider a strengthening of the regulation of food and drink advertising on television.

At that point, much was speculated but comparatively little was known about the extent to which the television advertising of food and drink products directly influenced childhood dietary preferences. Ofcom therefore began an analysis – arguably the most comprehensive undertaken anywhere in the world – of the factors which shape children’s nutrition. This sought to place television advertising in the context of other influences such as parental demographics, trends in family eating habits, school policy, public understanding of nutrition, food labelling and exercise.

Our research assessed the views and experiences of many thousands of parents, teachers, nutritionists and, of course, children. Our thinking has also been informed by detailed contributions from broadcasters, consumer bodies, health bodies, the advertising industry, Government, Parliamentarians and food manufacturers, amongst many others.

Three significant facts have emerged from this analysis and subsequent public consultation.

The first is that Ofcom’s role in tackling childhood obesity is important but limited in scope. Others, particularly parents, schools, Government and the food industry, will need to continue to provide the concerted approach required substantively to tackle child obesity.

Second, television advertising has only a modest direct effect on childhood dietary habits. Other factors in the family home, playground, school dining room and playing fields have a greater role in driving up levels of childhood obesity when compared to the role played by commercial advertising airtime.

Finally, in our view it is now clearly established that, given such advertising does have a modest influence on childhood food preferences, the case for new restrictions – which will be significant in some areas of broadcasting – has been made.

We believe our approach is proportionate and targeted at the areas of greatest risk. The new restrictions put forward today would have the effect of removing all advertisements for products that are high in fat, salt and sugar from all programmes, broadcast at any time of day or night, which hold particular appeal for children up to the age of 16. We will also work closely with our advertising co-regulators, the Broadcast Committee of Advertising Practice (BCAP) and the Advertising Standards Authority (ASA), to implement additional new rules on the content of advertisements.

We understand fully that these prohibitions would have an impact on broadcaster revenues. We will seek to work with the broadcasting industry to mitigate these adverse effects wherever possible, consistent with the objectives of the policy.

There will be some who say these proposals do not go far enough; there will also be others who say they go too far. Many people have strong views on this issue; indeed it is clear from our public consultation that some opinions are polarised to an extent that is irreconcilable.

In the absence of a full consensus we have developed what we believe to be the most appropriate approach, balancing our statutory duties, responding to the evidence – and setting out what we consider to be a wholly necessary intervention.

David Currie
Chairman

Philip Graf
Deputy Chairman

Ed Richards
Chief Executive

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Section 1

Executive Summary

Introduction

- 1.1 Ofcom is the independent regulator of television, radio, telecommunications and wireless communications services in the UK. Part of our role is to set standards for television advertising. All television broadcasters must comply with these standards in relation to any advertising they transmit. In late 2004 we transferred the responsibility for the Television Advertising Standards Code to the Advertising Standards Authority (ASA), including the functions of complaints handling and policy development. However under this co-regulatory scheme Ofcom still retains ultimate responsibility for all television advertising standards as the backstop regulator under the terms of the Communications Act 2003. In particular, Ofcom retains direct responsibility for advertising scheduling policy.
- 1.2 The relevant objectives to be secured by these standards include the protection of under-18's, and preventing the inclusion of harmful advertising. Ofcom also has a number of other duties which it must take into account including to further the interests of citizens and consumers, to maintain a sufficient plurality of providers of different television services and to secure the availability of a wide range of television services of high quality and calculated to appeal to a variety of tastes and interests. In performing these duties Ofcom must have regard, amongst other things, to the vulnerability of children. In imposing regulatory measures Ofcom has to act in a proportionate and targeted manner.

Background

- 1.3 A growing body of research¹ has generated concerns in government and society about rising childhood obesity levels and ill-health due to dietary imbalance, specifically the over-consumption of high fat, salt and sugar (HFSS) foods² and the under-consumption of fresh foods, fruit and vegetables. Both the Department of Health (DH) and the Food Standards Agency (FSA) have identified television advertising as an area where action should be considered to restrict the promotion of HFSS foods to children.
- 1.4 In December 2003, the Secretary of State for Culture, Media and Sport, Tessa Jowell MP, asked Ofcom to consider proposals for strengthening the rules on television advertising of food aimed at children.
- 1.5 In response, in early 2004, Ofcom conducted research into the role that television advertising plays in influencing children's consumption of foods that are HFSS. In publishing its research report in July 2004, Ofcom concluded that advertising had a modest, direct effect on children's food choices and a larger but unquantifiable indirect effect on children's food preferences, consumption and behaviour. Ofcom therefore concluded there was a case for proportionate and targeted action in terms of rules for broadcast advertising to address the issue of childhood health and

¹ See for instance: Annual Report of the Chief Medical Officer (3 July 2003); Obesity Statistics (12 December 2005); Tackling Obesity in England (National Audit Office, 2001)

² See for instance: *The National Diet and Nutrition Survey of Young People aged 4 to 18 years* (FSA June 2000); *The FSA's School Lunchbox Survey* (FSA May 2003).

obesity. However, Ofcom also noted that one of the conclusions from the independent research was that multiple factors account for childhood obesity. Television viewing/advertising is one among many influences on children's food choices. These other factors include social, environmental and cultural factors, all of which interact in complex ways not yet well understood. In these circumstances Ofcom considered that a total ban on food advertising would be neither proportionate nor, in isolation, effective.

- 1.6 In November 2004, the Department of Health published a White Paper reiterating the Government's view that there was 'a strong case for action to restrict further the advertising and promotion to children of those foods and drinks that are high in fat, salt and sugar' in both the broadcasting and non-broadcasting arenas. At the same time the FSA published a consultation on a scheme which would identify food and drink products high in fat, salt or sugar by means of nutrient profiling (NP). This model was intended to help Ofcom reach decisions on the restriction of television advertising for less healthy foods. In December 2005, the Food Standards Agency completed their work on an NP scheme and delivered it to Ofcom.

Consultation process

- 1.7 In March 2006, in light of its statutory duties and taking account of the prevailing evidence, Ofcom launched a public consultation on a range of different options for new restrictions on television advertising to children, including three specific packages it had identified:
- Package 1 – Timing restrictions preventing the advertising of food and drink products high in fat, salt or sugar during children's programming
 - Package 2 – Timing restrictions preventing the advertising of any food and drink products during children's programming
 - Package 3 – Volume-based restrictions on all food and drink products
- 1.8 Other options discussed in the consultation document and consulted on included voluntary self-regulation and a pre-9pm exclusion of HFSS advertising. Ofcom also invited any stakeholder to submit a fourth package of proposals if it commanded broad support across broadcasters, advertisers, retailers and manufacturers.
- 1.9 The consultation was accompanied by an Impact Assessment which included analysis of the effect of the policy packages and the other options included in the consultation document on the amount of advertising children see, their likely impact on broadcasters and other affected stakeholders and also an assessment of their likely benefits (based on analysis carried out by the FSA). The consultation was scheduled to close on 6 June 2006.
- 1.10 On 19 May, Ofcom announced that it would be publishing an update to its Impact Assessment intended to make it more straightforward to replicate the analysis undertaken by Ofcom, in particular by using the most up to date information for calendar year 2005. In order to provide consultees with an opportunity to consider the revised data and take it into account in their responses to the consultation, Ofcom announced that it would be extending the consultation period until 30 June 2006. This update to the consultation was published on 8 June 2006.

Summary of Responses Received

- 1.11 Ofcom received 1097 responses to its consultation. These comprised 114 responses from a range of interested parties including consumer bodies, broadcasters, academics, advertisers, food manufacturers and health and medical bodies and from the Office of the Children's Commissioner and Scotland's Commissioner for Children and Young People. There were a very large number of responses from private individuals.
- 1.12 Ofcom also received a proposal from the Food Advertising Unit (FAU) on behalf of the food, soft drinks and advertising industries in response to Ofcom's invitation to respondents to submit an alternative package.

Deliberative research

- 1.13 Alongside this formal public consultation, Ofcom also commissioned independent research to gauge the public's response through a programme of deliberative research. The report on the deliberative research was published on Ofcom's website on 9 October 2006.

Conclusions

Regulatory objectives

- 1.14 The Board has concluded that, in the context of its statutory duties, the aims of further regulation in relation to television advertising should be to balance the following regulatory objectives. In the light of the consultation responses and after considering all available evidence, Ofcom is extending the scope of the first objective to include all children under the age of 16. The revised regulatory objectives are to:
- reduce significantly the exposure of children under 16 to HFSS advertising, thereby reducing opportunities to persuade children to demand and consume HFSS products;
 - enhance protection for both older and younger children as well as parents by appropriate revisions to advertising content standards, so as to reduce children's emotional engagement with HFSS advertisements, and reduce the risk that children and parents may misinterpret product claims, and to reduce the potential for pester power;
 - avoid disproportionate impacts on the revenue of broadcasters;
 - avoid intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages;
 - ensure that any measures that are put in place are appropriate and sufficiently timely to enable government to observe changes to the nature and balance of food promotion by early 2007.

Regulatory measures

- 1.15 After a detailed examination of all consultation responses and the available evidence, the Ofcom Board has decided that the following elements should form part of the package of measures to restrict the scheduling of television advertising of food and drink products to children:

- Scheduling restrictions should be confined to food and drink products that are assessed as high in fat, salt or sugar (HFSS) as defined by the Food Standards Agency’s nutrient profiling scheme;
 - Advertisements for HFSS products should not be shown in or around programmes specifically made for children (which includes pre-school children). For the avoidance of doubt this measure will remove all HFSS advertising from dedicated children’s channels;
 - Advertisements for HFSS products should not be shown in or around programmes of particular appeal to children.
- 1.16 Alongside these scheduling restrictions, revised content rules will apply to all food and drink advertising irrespective of when it is scheduled.
- 1.17 Ofcom also proposes further protection for primary school children by preventing the use of celebrities and licensed characters, promotional offers and nutritional and health claims in advertisements for HFSS products in advertisements targeted at primary school children.
- 1.18 All of the measures will apply equally to programme sponsorship.

Consultation

- 1.19 In order best to meet its regulatory objective to protect both younger and older children, the Ofcom Board believes that the restriction relating to programmes of particular appeal to children should be extended to apply to **children under 16**. This extends a proposal made in our March consultation to prevent HFSS advertising appearing in programmes of particular appeal to children under 9.
- 1.20 If implemented, this measure will remove HFSS advertising from youth-orientated music programmes and some other general entertainment programmes (particularly those scheduled in the early evening).
- 1.21 The proposal to prevent programmes of particular appeal to under 16s from carrying HFSS advertising, outlined above, has a greater reach in terms of broadcasters and programmes affected than the packages proposed by Ofcom in its March consultation document. In particular, the proposal will prevent programmes on a number of music channels from carrying advertisements or sponsorship for HFSS products, reducing their total revenues by an estimated £2.4 million per year. The impact across all channels’ total revenue is estimated to be £22.6 million per year.
- 1.22 Ofcom is therefore consulting on this aspect of its proposed regulatory measures.
- 1.23 Taken as a whole, this package of restrictions would offer significant protection to children and will have a considerable impact on the amount of HFSS advertising they will see – providing a reduction of 51% for 4-9 year olds and 41% for 4-15 year olds.
- 1.24 There would be greater reductions in digital television households where children’s programmes, dedicated children’s channels and programmes of particular appeal to under-16s make up a growing share of viewing by the young.

Implementation and timing

- 1.25 Ofcom will announce the outcome of its further consultation in early January 2007. The statement will confirm the detail of the scheduling restrictions to be applied to advertising and sponsorship of HFSS products and the final wording of the revised BCAP content standards.
- 1.26 Restrictions will apply to all channels licensed by Ofcom regardless of the location of their target audience.
- 1.27 Scheduling restrictions will come into effect from the end of March 2007, although dedicated children's channels will be allowed a graduated phase-in period to the end of December 2008 for full implementation.
- 1.28 Revised content rules will come into force for new campaigns immediately on Ofcom's final decision. All existing campaigns will have to comply with the new rules from 1 July 2007.

Structure of this document

- 1.29 This document explains the rationale for the conclusions outlined above and is structured as follows:
 - Section 2 briefly outlines the history of the debate around television advertising's effect on childhood obesity;
 - Section 3 describes Ofcom's statutory duties and responsibilities;
 - Section 4 describes the work undertaken by Ofcom and the consultation process;
 - Section 5 summarises the responses Ofcom received to the issues raised in its March consultation document and its assessment. This includes a discussion of Ofcom's regulatory objectives, an assessment of potential regulatory approaches included in the consultation document including Ofcom's suggested Packages 1, 2 and 3, a pre-9pm ban on HFSS foods and industry's suggested Option 4. This section also includes discussion on nutrient profiling and the BCAP content rules;
 - Section 6 sets out the decisions reached by Ofcom on the issues described in Section 5 including decisions not to adopt certain regulatory approaches and the approach that will be taken to implementation including the treatment of channels licensed in the UK but broadcasting to overseas. This section also sets out that Ofcom considers Package 1 to be the preferred regulatory measure from those consulted on;
 - Section 7 goes on to describe and assess further options developed by Ofcom in light of consultation responses and consumer research. These include Modified Package 1, which enhances Package 1 by extending the use of indexing from 4-9 year olds to 4-15 year olds, and which Ofcom considers may better meet its regulatory objectives;
 - Section 8 describes Ofcom's preferred package of measures and outlines the outstanding issue for consultation;

- The document also contains a number of annexes which include a full summary of responses received at Annex 5, an Impact Assessment at Annex 7 and proposed wording for revised BCAP content rules at Annex 9.

Section 2

Issue for decision

Background

- 2.1 A growing body of research³ has generated social and governmental concerns about rising childhood obesity levels and ill-health due to dietary imbalance, specifically the over-consumption of high fat, salt and sugar (HFSS) foods⁴ and the under-consumption of fresh foods, fruit and vegetables. Both the Department of Health (DH) and the Food Standards Agency (FSA) have identified television advertising as an area where action should be considered to restrict the promotion of HFSS foods to children.
- 2.2 In December 2003, the Secretary of State for Culture, Media and Sport, Tessa Jowell MP, asked Ofcom to review the rules on television advertising of food aimed at children. In early 2004, Ofcom initiated research into the role that television advertising plays in influencing children's consumption of foods that are HFSS. In publishing the research report in July 2004⁵, Ofcom concluded that advertising had a modest, direct effect on children's food choices and a larger but unquantifiable indirect effect on children's food preferences, consumption and behaviour. Ofcom therefore concluded there was a case for proportionate and targeted action in terms of broadcast code rules to address the issue of childhood health and obesity. However, Ofcom also noted that one of the conclusions from the independent research was that multiple factors account for childhood obesity. Television advertising is one among many influences on children's food choices. These other factors include social, environmental and cultural factors, all of which interact in complex ways not yet well understood. Ofcom considered that a total ban on food advertising would be neither proportionate nor, in isolation, effective.
- 2.3 In November 2004, the DH published a White Paper reiterating the Government's view that there was 'a strong case for action to restrict further the advertising and promotion to children of those foods and drinks that are high in fat, salt and sugar' in both the broadcasting and non-broadcasting arenas⁶. At the same time the FSA published a consultation on a scheme for differentiating between foods by nutrient profiling (NP), together with consumer research on options for food signposting (e.g. the use of traffic light symbols to indicate whether products are a more or less healthy choice). Nutrient profiling evaluates the overall balance of nutrients in any food or drink. It scores the overall balance of nutrients in any food or drink by identifying foods that are high in fat, salt or sugar, but recognises the importance of fruit and vegetables, cereal, meat and dairy-based products in the diet. In December 2005, the FSA completed and delivered to Ofcom a nutrient profiling model specifically intended to facilitate decisions on television advertising restrictions⁷.

³ See for instance: *Annual Report of the Chief Medical Officer* (3 July 2003); *Obesity Statistics* (12 December 2005); *Tackling Obesity in England* (National Audit Office, 2001).

⁴ See for instance: *The National Diet and Nutrition Survey of Young People aged 4 to 18 years* (FSA June 2000); *The FSA's School Lunchbox Survey* (FSA May 2003).

⁵ *Child Obesity – Food Advertising in Context* (Ofcom July 2004)

http://www.ofcom.org.uk/research/tv/reports/food_ads/

⁶ *Choosing health – making healthy choices easier*, 16 November 2004,

http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4094559&chk=H29Li6.

⁷ <http://www.food.gov.uk/news/newsarchive/2005/dec/finalnutprofmod>

- 2.4 In March 2006 Ofcom proceeded to consult on a range of different options for new restrictions on television advertising to children including three packages it had identified.

Section 3

Ofcom's role

- 3.1 The Communications Act 2003 (“the 2003 Act”) gives Ofcom the responsibility for regulating communications within the UK, including the use of radiospectrum, the provision of a wide variety of telecommunications services and the licensing and regulation of broadcasters. Ofcom does not possess expert knowledge relating to health and dietary matters and therefore is reliant upon the expertise of those with that knowledge (such as the DH and FSA) when considering regulation in this social policy area. As part of its duties in relation to broadcasting, Ofcom is ultimately responsible for setting broadcast standards for advertising and the sponsorship of programmes. The relevant objectives to be secured by these standards include:
- that persons under the age of eighteen are protected (section 319(2)(a) of the 2003 Act);
 - to prevent the inclusion of advertising which may be misleading, harmful or offensive in television services (section 319(2)(h));
 - that there is no undue discrimination between advertisers who seek to have advertisements included in television and radio services (section 319 (2)(k)); and
 - to prevent the unsuitable sponsorship of programmes included in television services (section 319(2) (j)).
- 3.2 In setting such standards, Ofcom has to have regard to a number of matters including:
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes (including advertising); and
 - the likely size and composition of the audience (section 319 (4) (a) and (b)).
- 3.3 As well as setting general standards to secure these objectives, the 2003 Act permits Ofcom to set standards which prohibit certain advertisements and forms and methods of advertising or sponsorship, whether generally or in particular circumstances (section 321 (1)(b)). Ofcom has both a general responsibility with respect to advertisements and methods of advertising and sponsorship, as well as a related power to include conditions in any licence granted by Ofcom that go beyond the provisions of Ofcom's standards code. In addition, Ofcom is required from time to time to consult the Secretary of State about the descriptions of advertisements that should not be included in programme services and the forms and methods of advertising and sponsorship that should not be employed in, or in connection with, the provision of such services (section 321(5)). The Secretary of State may also give Ofcom directions as to these matters and Ofcom has a duty to comply with any such directions that are issued (section 321 (6)). Similarly, Ofcom may issue general or specific directions to its licensees in relation to advertising and in particular, exclude advertisements from a specified part of a licensed service, e.g. at different times of the day or for different types of programmes (section 322).

- 3.4 In discharging its functions, Ofcom's principal duties are to further the interests of citizens and consumers (section 3 (1) of the Communications 2003 Act) and to secure a number of other matters including:
- maintaining a sufficient plurality of providers of different television services (section 3 (2) (d));
 - the availability throughout the UK of a wide range of television services which are both of high quality and calculated to appeal to a variety of tastes and interests (section 3 (2) (c)).
- 3.5 In performing these duties, Ofcom is also required to have regard to:
- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing the best regulatory practice (section 3(3)); and, where relevant, a number of other considerations including:
 - the desirability of promoting and facilitating the development and use of effective forms of self-regulation (section 3(4)(c));
 - the vulnerability of children (section 3(4)(h));
 - the interests of different ethnic communities (section 3(4)(l)); and
 - the opinions of consumers in relevant markets and of members of the public generally (section 3(4) (k)).
- 3.6 Ofcom also seeks to abide by a set of regulatory principles which it has developed in the light of its general duties and the principles of best practice in regulation. These are published on Ofcom's website⁸, but those of particular relevance to this consultation are as follows:
- Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome;
 - Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives;
 - Ofcom will research markets constantly and will aim to remain at the forefront of technological understanding; and
 - Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation upon a market.
- 3.7 Where it appears to Ofcom that any of its general duties conflict with one another, it must secure that the conflict is resolved in the manner it thinks best in the circumstances (section 3(7)).
- 3.8 Ofcom is required to carry out an assessment of the likely impact of regulatory measures it may propose where the proposal is carried out for the purposes of or connected with the carrying out of its statutory functions and it appears to Ofcom to be important (section 7). For the purposes of this section a proposal is "important"

⁸ Ofcom's regulatory principles (<http://www.ofcom.org.uk/about/sdrp/>).

inter alia if it is a proposal which would have a significant impact on businesses in the markets for which Ofcom has regulatory functions or on the general public in the United Kingdom. We have therefore carried out a detailed Impact Assessment (IA) which is included at Annex 7.

- 3.9 Ofcom is a public authority within the meaning of section 6 of the Human Rights Act 1998. It is therefore required to interpret its statutory obligations, and act, in a way that is compatible with rights under the European Convention on Human Rights (“the Convention”). The right to freedom of expression provided for by Article 10 of the Convention includes commercial speech⁹. Any restriction on this right must be necessary in a democratic society and proportionate to the legitimate aim pursued. In this context, the relevant aim is the protection of the health of children.
- 3.10 The standards applicable under the Convention are informed by the requirements of international law, which include the United Nations Convention on the Rights of the Child 1989 which has been ratified by the United Kingdom. The UN Convention requires that in all actions concerning children undertaken by administrative authorities, such as Ofcom, the best interests of the child shall be a primary consideration (Article 3). It also provides for a right to receive information subject to such restrictions as are necessary for the protection of public health (Article 13).
- 3.11 Ofcom has also taken into account its obligations under the Television Without Frontiers (TWF) Directive (as amended). This requires positive action to be taken by regulators to protect children from the harmful effects of television advertising (Articles 16 of the TWF Directive). It also provides that each member state shall ensure that all broadcasts under its jurisdiction comply with “the rules of the system of law applicable to broadcasters intended for the public in that member state”. In this context Ofcom has had regard to Article 49 of the EC Treaty which requires that any restrictions on free movement of services must be justified and proportionate.

⁹ see *Markt Intern Verlag GmbH & Klaus Beerman v Germany* (1989) 12 EHRR 161 and *R (British American Tobacco UK Ltd & Others) v Secretary of State for Health* [2004] EWHC 2493 (Admin).

Section 4

Consultation and evidence gathering

Pre consultation research

4.1 During early 2004, Ofcom commissioned an extensive independent survey of existing research into the effects of television advertising on children's food preferences and consumption and also commissioned bespoke qualitative and quantitative research.¹⁰ In late 2005, we asked Professor Sonia Livingstone (a contributor to the original 2004 report) to update this work to take account of more recent research. This work led Prof. Livingstone to confirm her original conclusions which were that:¹¹

- multiple factors account for childhood obesity. Television viewing/advertising is one among many influences on children's food choices. These other factors include individual, social, environmental and cultural factors, all of which interact in complex ways not yet well understood. More research is needed into the multiple factors that contribute to children's diet and, within this broader picture, what is the role of food advertising/promotion. Very little is known about forms of food promotion other than in television advertising. This is a crucial gap as promotional strategies diversify;
- although experiments have identified causal relations between advertising and food choice, it remains unclear how these operate under the complex conditions of daily life at home and school. However, there is a growing consensus that advertising works. Given that most food advertising to children is for products high in salt, sugar and fat, this influence is likely to be harmful to children's health. Expert commentators are now convinced that television viewing plays a role in contributing to the problem of children's unhealthy diet;
- the experimental evidence suggests that television advertising has a modest direct effect on children's (age 2-11) food preferences and – under experimental conditions – on their food choices (behaviour). In both experimental and survey studies, the measured effects of advertising/television are small. Estimates vary, but some suggest that such exposure accounts for some 2% of the variation in food choice/obesity. Although small in statistical terms, cumulatively this may make an appreciable difference to the number of children who fall into the 'obese category', and may be no smaller than some other important influences on BMI. For example, one study suggests that the effect on BMI attributed to television viewing and advertising may be larger than the measurable effect of exercise and dietary intake;
- a growing body of well-conducted national and international surveys show a consistent association between overall television exposure and weight/obesity. This applies among children and teenagers. It remains unclear whether this association reflects the specific influence of exposure to television advertising or whether it is due to increased snacking while viewing or to a sedentary lifestyle with reduced exercise.

¹⁰ *Childhood Obesity – Food Advertising in Context* (Ofcom, July 2004)

¹¹ Sonia Livingstone, *New research on advertising foods to children – an updated review of the literature*, 22 January 2006 (See Annex 9 - <http://www.ofcom.org.uk/consult/condocs/foodads/foodadsprint/>)

Options Consulted on

4.2 In March 2006, in the light of Ofcom’s statutory duties and the prevailing research evidence, Ofcom launched a public consultation on options for new restrictions on television advertising of food to children (“the March consultation”)¹². The consultation document proposed three alternative policy packages for the regulation of the advertising of food and drink products to children and discussed other policy options for consultation. The consultation was accompanied by an Impact Assessment which included analysis of the effect of the policy packages and the other options included in the consultation document on the amount of advertising children see, their likely impact on broadcasters and other affected stakeholders and also an assessment of their likely benefits (based on analysis carried out by the FSA). The consultation was scheduled to close on 6 June 2006.

4.3 The three policy packages proposed by Ofcom were:

Package 1 – Timing restrictions on specific food and drink products¹³

This package had the following features:

- No HFSS product advertising to be shown in programmes made for pre-school children;
- No HFSS product advertising to be shown in programmes specifically made for children;
- No HFSS product advertising to be shown in programmes of particular appeal to children aged up to 9 years old¹⁴;
- No sponsorship by HFSS products of programmes affected by the above restrictions;
- Application of revised content rules¹⁵ to all food and drink advertising and sponsorship.

Package 2 – Timing restrictions on all food and drink products

This package had the following features:

- No food or drink advertising to be shown in programmes made for pre-school children;
- No food or drink advertising to be shown in programmes specifically made for children;

¹² *Television Advertising of Food and Drink Products to Children: Options for new restrictions* (March 2006) <http://www.ofcom.org.uk/consult/condocs/foodads/>

¹³ This option makes use of a differentiation model such as nutrient profiling to identify specifically those products that are high in fat, salt or sugar

¹⁴ A programme with a 4-9 yr old child audience index of 120 or more is deemed to be of particular appeal to 4-9's.

¹⁵ These rules would appear in the BCAP Television Advertising Standards Code. BCAP (Broadcasting Committee of Advertising Practice) is the broadcaster, advertiser and media community self-regulatory committee which is a part of the ASA, and a co-regulatory partner of Ofcom.

- No food or drink advertising to be shown in programmes of particular appeal to children aged up to 9 years old;
- No sponsorship by food or drinks products of programmes affected by the above restrictions;
- The above provisions would not apply to healthy eating campaigns supported or endorsed by Government;
- Application of BCAP content rules to all food and drink advertising and sponsorship.

Package 3 – Volume-based restrictions on all food and drink products

This package had the following features:

- No food or drink advertising to be shown in programmes made for pre-school children;
- The volume of food or drink advertising and sponsorship to be limited at times when children are most likely to be watching:
 - limit to 30 seconds per hour (06.00 - 09.00 and 15.00 -18.00 weekdays; 06.00 – 13.00 weekends);
 - during the evening peak (18.00 - 20.00) and weekend afternoons (13.00 - 20.00) - limit to 60 seconds per hour;
 - limit for children’s channels (except pre-school channels) of 30 seconds per hour all day.
- Application of BCAP content rules to all food and drink advertising and sponsorship.

4.4 Other approaches consulted on were:

- **Voluntary self-regulation** – the suggestion put to Ofcom by stakeholders that, bearing in mind the significant changes already observed in the nature and balance of food advertising on television, the voluntary measures already undertaken by some food manufacturers to reduce the impact of advertising on children and the existing advertising standards rules, no formal regulation was needed or justified;
- **Pre-9pm exclusion of HFSS advertising** – the option of excluding all HFSS advertising before the 9pm watershed.

Some broadcasters had suggested that requiring broadcasters to include positive messages about healthy lifestyles and better diets was a further option that could be used to offset any negative impact of HFSS advertising. However, whilst this was discussed in the consultation document, as was also made clear, it was not an option that was within Ofcom’s remit to impose.

4.5 Ofcom also invited any stakeholder to submit a fourth package of proposals which we would be prepared to consider if it commanded broad support across

broadcasters, advertisers, retailers and manufacturers, and which seemed a sensible response to the issues and to Ofcom's regulatory objectives.

Update to consultation

- 4.6 On 19 May Ofcom announced that it would be publishing an update to its Regulatory Impact Assessment. This was in response to queries from stakeholders, including those working to develop a fourth option, about the modelling work that Ofcom carried out. The update was intended to make it more straightforward to replicate the analysis undertaken by Ofcom in particular by using the most up to date information for calendar year 2005. In addition, Ofcom corrected some errors identified in the previous input data and modelling. In order to provide consultees with an opportunity to consider the revised data and take it into account in their responses to the consultation, Ofcom also announced that it would be extending the consultation period until 30 June 2006. This update to the consultation was published on 8 June 2006.¹⁶

Summary of Responses Received

- 4.7 Ofcom received 1097 responses to its consultation. These comprised 114 responses from a range of interested parties including consumer bodies, broadcasters, academics, advertisers, food manufacturers and health and medical bodies and from the Office of the Children's Commissioner and Scotland's Commissioner for Children and Young People. There were 655 responses from private individuals. In addition a further 328 responses were received consisting of a standard-form postcard issued as part of a campaign run by Sustain and the Women's Institute.
- 4.8 Ofcom also received a proposal from the Food Advertising Unit (FAU) on behalf of the food, soft drinks and advertising industries in response to Ofcom's invitation to industry to submit an alternative proposal. This submission can be found on Ofcom's website¹⁷ and is discussed in detail in Section 5.
- 4.9 Some respondents chose to make their responses confidential. All of the responses that were not confidential have been placed on Ofcom's website.¹⁸
- 4.10 In taking all comments received into account, we have had regard to the quality of the argumentation and evidence adduced by respondents when weighing the significance of the submissions. We have also had regard to the volume of responses received from individuals which we have taken into account as representing genuine and significant expressions of a general opinion.

Deliberative research

- 4.11 Alongside this formal public consultation, Ofcom also commissioned an independent research consultancy (Opinion Leader Research ("OLR")) to gauge the public's response to these proposals and to encourage open debate across the spectrum of policy options (i.e. from no action to a complete ban in all airtime) through a programme of deliberative research. This consisted of a programme of six one-day deliberative workshops with adults, four one-day deliberative workshops with teenagers (aged 12-15) and six one-hour group discussions with children (aged 8-

¹⁶ *Television Advertising of Food and Drink Products to Children: Options for new restrictions* (update June 2006) <http://www.ofcom.org.uk/consult/condocs/foodads/>

¹⁷ http://www.ofcom.org.uk/consult/condocs/foodads/responses/eh/fau_op14.pdf

¹⁸ <http://www.ofcom.org.uk/consult/condocs/foodads/responses/>

11). While deliberative research does not produce robust quantitative data and does not therefore provide a means of accurately measuring consumer responses across the general public in the UK, it is an accepted method of gaining a better understanding of how informed people are likely to regard complex subjects. The report on the deliberative research was published on Ofcom's website on 9 October 2006.¹⁹ More information on the methodology is given in the report.

¹⁹ *Regulating TV advertising of food and drink to children*, October 2006, Opinion Leader Research, http://www.ofcom.org.uk/research/tv/reports/regulating_tvadverts/

Section 5

Consultation responses and Ofcom's assessment

Introduction

5.1 This section discusses the responses to the consultation and Ofcom's views on the issues raised.

Regulatory Objectives

- 5.2 In its March consultation document Ofcom said that, in the light of its duties and current evidence, it considered that the aims of further regulation should be to balance several regulatory objectives:
- a) to reduce significantly the exposure of young children to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products. We proposed that this intervention should focus on children under 10;
 - b) to enhance protection for both older and younger children as well as parents by appropriate revisions to advertising content standards, so as to reduce children's emotional engagement with HFSS advertisements, and to reduce the risk that children and parents may misinterpret product claims and to reduce the potential for pester power;
 - c) to avoid disproportionate impacts on the revenues of broadcasters;
 - d) to avoid intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages; and
 - e) to ensure that any measures that are put in place are appropriate and sufficiently timed to enable Government to observe changes to the nature and balance of food promotion by early 2007.

Responses in relation to regulatory objectives

General

- 5.3 We asked consultees whether they agreed that Ofcom's proposed regulatory objectives were appropriate. With few exceptions, food manufacturers, broadcasters and advertisers professed acceptance of the regulatory objectives in general terms, but several stated their own focus, arguing that voluntary action had already substantially delivered the objective of reducing the impact of food advertising on young children, and that in other areas, Ofcom should attach considerable weight to the disproportionality of regulating advertising in 'adult' airtime, particularly given the impact on advertisers and broadcasters.
- 5.4 However, many other respondents took issue with the proposed objectives, arguing that Ofcom was wrong to focus proposals to restrict the scheduling and / or volume of advertising on times when younger children were the main audience, and that

Ofcom should also have regard to the vulnerability of older children. The key themes, and Ofcom’s response to them, are set out below.

- 5.5 Some respondents suggested other objectives, such as the promotion of healthy eating. We do not consider that these are valid regulatory objectives for Ofcom, given that we do not have the power to give editorial directions to broadcasters, nor do we have a statutory duty to promote public health.

Focus of regulation on younger children – first regulatory objective

- 5.6 While most broadcasting, manufacturing and advertising interests supported the proposals to focus scheduling and/or volume of advertising restrictions on children under 10, most consumer bodies, health promotion organisations, academics and public sector bodies, including the Office of the Children’s Commissioner, argued strongly that any restrictions should include times when children aged 10 and over were likely to be watching. In support of this, a number of points were made by respondents: while older children may understand the intent of advertising, they may still be susceptible to the influence of advertisements. Unlike younger children, they have the means to buy HFSS products; dietary quality declines from childhood to adolescence; obesity in children is most marked amongst the 12-15 age group; and older children’s preferences can influence those of their younger siblings.
- 5.7 A majority of participants in the deliberative research (both adults and teens) supported the principle of regulating television advertising of food and drink at times when children up to the age of 15 are watching. This is notwithstanding the fact that the youngest children are seen as the most vulnerable audience who are unable to make decisions themselves and therefore need the most protection.

Ofcom’s assessment

- 5.8 Ofcom agrees that, whilst older children may well be media literate and able to understand the intent of advertising, this does not in itself mean they are immune from the influence of advertising²⁰. Ofcom also agrees that older children are likely to have autonomous spending power and that they may also set an example to their younger siblings. Additionally we recognise the significant and growing problem of teenage obesity. Accordingly, Ofcom considers that it would be reasonable to amend the first of its regulatory objectives ((a) above) to address more clearly the potential vulnerability of older children alongside that of younger children. In reaching this view, Ofcom has taken account of its duties under the 2003 Act to have regard to the vulnerability of children, and in setting content standards for programmes (which includes advertisements) to secure that persons under the age of eighteen are protected²¹.
- 5.9 Ofcom notes that for many decades it has been generally assumed for purposes such as advertising, marketing and lifestyle purposes that the definition of a child is anyone under the age of 16. BARB, RAJAR, TNS and Nielsen, as well as other major advertising and marketing database companies, all classify children as aged 4-15 inclusive. It also notes that the FSA report “*A review of research on the effects of food promotion to children*” by Professor Hastings (2003) was concerned with children up to the age of 15. This report is a review of international research which

²⁰ This view was supported by Professor Sonia Livingstone in her “Commentary on the research evidence regarding the effects of food promotion on children”, published in 2004

²¹ Sections 3(4)(h) and 319(2)(a) of the Communications Act 2003
(<http://www.opsi.gov.uk/acts/acts2003/20030021.htm>)

commonly regards children as being less than 16 years old. Ofcom therefore considers that it is reasonable to treat children in this context as those under 16 years old.

- 5.10 Ofcom has therefore modified the first of its regulatory objectives to read ***‘to reduce significantly the exposure of children under 16 to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products’***.

Enhanced protection for younger and older children through revised content standards – second regulatory objective

- 5.11 There was general support amongst respondents for the proposal to revise content standards with some specific support for the targeting of pester power, but little analysis of the detail of this objective.
- 5.12 Only the Institute of Practitioners in Advertising (IPA) objected to the aim of protecting older children by content standards, citing the importance of parental responsibility, whilst a number of consumer and health groups agreed with the broad objective but argued that the content standards must apply at all times of day, and must differentiate between HFSS and non-HFSS foods. These latter points, which were received alongside a number of further comments about the detail of the proposed revised content rules, are discussed later in this section in paragraphs 5.130 – 5.151.

Ofcom’s assessment

- 5.13 Whilst Ofcom understands the point made by the IPA about the important role of parental responsibility, Ofcom does not accept that this is sufficient reason to negate the need to reduce younger and older children’s emotional engagement with advertising for HFSS products. Ofcom therefore remains of the view that the second of its regulatory objectives is valid and requires no amendment.

Impact on broadcasters – third regulatory objective

- 5.14 Several respondents were uneasy with, or hostile to, the notion that that the regulatory objectives should balance the health of children with the revenues of broadcasters and/or the interests of advertisers. In particular they wanted Ofcom to define what it meant by avoiding a ‘disproportionate’ impact upon broadcasters. A few suggested that Ofcom had put the interests of broadcasters above those of children. In general, consumer groups, health and medical groups, public sector bodies and members of the public were sceptical that the net loss to broadcasters would be as much as Ofcom suggested, but did not provide reasons or evidence to substantiate these assertions. Some acknowledged that broadcasters would lose revenue, but considered that this was less important than reducing the exposure of children to HFSS advertising.
- 5.15 By contrast, broadcasters provided data that tended to support the view that the likely impact on broadcasters lay at the upper end of Ofcom’s estimates of the range of possible impacts. We discuss this data in more detail in the Impact Assessment at Annex 7. The Producers’ Alliance for Cinema and Television (PACT), a group representing the interests of independent producers, suggested that the objectives laid insufficient emphasis on Ofcom’s duties to secure a sufficient quantity of high quality and original children’s programming, and did not adequately assess the benefits to children’s education of television, which parents value. PACT raised the

concern that broadcasters might respond to the reductions in revenues by investing less in children's programming. A few respondents endorsed PACT's point that if commercial broadcasters cut the amount of original production, this could reduce the plurality and diversity of children's programming and correspondingly increase the dominant position of the BBC.

Ofcom's assessment

- 5.16 Ofcom does not accept that, on a proper construction of its statutory duties, it would be appropriate for it to disregard the impact on broadcasters of a reduction of advertising revenues, arising from changes to the Code, for the sake of implementing measures aimed at reducing the impact of advertising on children. The 2003 Act gives Ofcom discretion to reach a decision in the light of what appears to it to be appropriate in all the circumstances. Ofcom is therefore required to strike a balance between its various statutory duties and objectives in a way that it considers best reflects the requirements which the 2003 Act places on it, having regard to all the circumstances and in the light of the Human Rights Act 1998 (in particular Article 10). Ofcom has approached the issue of proportionality in two ways: first, by assessing the cost of the proposed measure against the benefits which would be derived, and, secondly, by considering the absolute cost of the measure and the cost in relation to broadcasters' revenues. We discuss this and the arguments around proportionality further, in Section 6.
- 5.17 In light of this assessment, Ofcom does not agree that this third regulatory objective is invalid or needs to be amended.

Intrusive regulation of advertising in adult airtime – fourth regulatory objective

- 5.18 While representatives of broadcasting, food and advertising interests supported the view that intrusive regulation of adult airtime should be avoided, a number of respondents representing consumer or health bodies felt that the overriding consideration should be the reduction of advertising impacts on children, even if it resulted in some collateral effect on adult viewing. A number rejected Ofcom's assertion on the basis of its 2004 qualitative research that the majority of parents who expressed a view did not favour a ban on HFSS advertising extending to 9pm i.e. into adult airtime.
- 5.19 A number of participants in the OLR deliberative research expressed concern about the intrusion of regulation into adult viewing when commenting on some of the more restrictive policy options. Many however acknowledged that regulation might need to take account of the times when large numbers of children are viewing.

Ofcom's assessment

- 5.20 Ofcom does not agree that avoiding intrusive regulation in adult airtime is not a relevant consideration. In this connection, it notes that Ofcom is required in all cases to have regard to the principles under which regulatory activities should be proportionate and targeted only at cases in which action is needed, amongst other things (section 3 (3) of the 2003 Act). As such, Ofcom remains of the view that this is a valid regulatory objective which it is appropriate for Ofcom to seek to achieve and that this should be weighed in the balance alongside its other objectives.
- 5.21 Not only do the regulatory principles set out in the 2003 Act referred to above include a need to target regulation only at cases where action is needed but in fulfilling its statutory duties, Ofcom is required to interpret them in a way that is compatible with

the requirements of the Human Rights Act 1998. It is therefore obliged to fulfil its statutory functions in a way that is compatible with rights under the European Convention on Human Rights (“the Convention”). Ofcom recognises that the right to freedom of expression (Article 10 of the Convention) includes commercial speech and that any restriction on such speech must be proportionate to the legitimate aim pursued. In this case, Ofcom’s aim is the protection of the health of children. Any restrictions must therefore be tailored to achieve that aim, and must actually contribute to their fulfilment and not be over-broad in their impact. In particular, restrictions on the freedom of adults to receive information should be no greater than reasonably necessary to protect children.

Changes to nature and balance of advertising by early 2007 – fifth regulatory objective

- 5.22 There was limited discussion of this objective with most broadcasters, food manufacturers and advertisers and others arguing that the lead time for introducing rule changes would be too short on this timetable, and should be deferred until later in 2007. However, other respondents wanted Ofcom to put measures in place within the proposed timescale.
- 5.23 A number of food manufacturers and advertisers submitted comments relating to the base year from which any changes observed in 2007 should be measured against, in order to take account of the various steps that they had taken voluntarily.

Ofcom’s views

- 5.24 Ofcom remains of the view that new advertising restrictions should be implemented in early 2007, and that it is practicable to do so. Further detail on our thinking is given in Section 6.

Ofcom’s conclusions in relation to its regulatory objectives

- 5.25 For the reasons stated above, Ofcom does not agree with the views of some respondents that certain of the objectives (e.g. the impact on broadcasters, and avoiding intrusive regulation of adult airtime) should carry little or no weight. Neither does it agree with one respondent (Public Voice), which asserted that Ofcom had shown a bias in favour of the industries it regulated, and might make judgements that favoured their interests, rather than those of consumers and citizens. Clearly, however, some factors carry greater weight than others.
- 5.26 Ofcom considers that that the principal objective should be to reduce significantly the exposure of young children to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products. However Ofcom accepts that there is also a strong case for extending regulatory measures to include children aged under 16. Ofcom has correspondingly amended its first regulatory objective to reflect this (objective (a)).
- 5.27 Accordingly, after considering the responses to the consultation document, and in the light of its duties and current evidence, Ofcom has decided for the reasons cited above, that the aims of further regulation should be to balance the following objectives:
- a) to reduce significantly the exposure of children under 16 to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products;

- b) to enhance protection for both older and younger children as well as parents by appropriate revisions to advertising content standards, so as to reduce children’s emotional engagement with HFSS advertisements, and to reduce the risk that children and parents may misinterpret product claims and to reduce the potential for pester power;
- c) to avoid disproportionate impacts on the revenues of broadcasters;
- d) to avoid intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages; and
- e) to ensure that any measures that are put in place are appropriate and sufficiently timed to enable Government to observe changes to the nature and balance of food promotion by early 2007.

Assessment of potential regulatory approaches

5.28 Ofcom has carefully considered all the responses to the consultation document – including any further evidence they provided, as well as all the research, evidence and analysis obtained. It has decided in the light of these responses, as well as further deliberation and analysis, that several of the options we consulted on should not be adopted and a final decision taken on the preferred set of measures following a short consultation on a further option arising out of the consultation responses and the deliberative research (see below and proposal outlined in Section 8). We explain below Ofcom’s assessment of the policy options discussed in the March consultation document, referring to consultation responses and the analysis Ofcom has conducted as appropriate. A more detailed summary of responses to the consultation questions is set out in Annex 5. The analysis undertaken by Ofcom is set out in greater detail in the Impact Assessment at Annex 7.

5.29 The main themes from the March consultation are:

- Voluntary self-regulation;
- Positive messaging;
- Ofcom’s suggested Packages 1 – 3;
- Industry’s suggested Package 4;
- Pre-9pm ban;
- Content rules.

Voluntary self-regulation

5.30 In its March consultation document, Ofcom said that it did not consider that voluntary self-regulation was likely to meet its regulatory objectives. Among the reasons cited (see paragraphs 5.9 to 5.14 of the March document), Ofcom noted that expenditure on Core Category product²² advertising had risen in 2004 and 2005; the approach of individual food manufacturers to self-regulation varied significantly; and questioned

²² Food (including all sub-sectors), Soft Drinks (including all sub-sectors) and Chain Restaurants as categorised by Nielson Media data

whether a common industry position could be developed that would meet its criteria for targeted, consistent and effective action.

- 5.31 While a few consultees asserted that voluntary self-regulation might be capable of achieving a significant reduction in the impact of HFSS advertising on children, almost all accepted that some form of formal regulation was inevitable. Similarly, only a few people participating in the deliberative workshops believed strongly that no regulatory action should be taken; most favoured some sort of external regulation.

Ofcom's assessment

- 5.32 For the reasons stated in the March consultation document, Ofcom's view remains that voluntary self-regulation would not meet its regulatory objectives. While we acknowledge that voluntary measures have made a useful contribution towards reducing the impact of HFSS advertising on children, Ofcom believes that it is neither a sufficient nor a dependable basis for achieving an appropriate reduction in impacts that would meet our regulatory objectives. Ofcom has, in any event, taken account of reductions in HFSS advertising since 2003 by scaling back the benefits of any restrictions. A full discussion of this is contained in the Impact Assessment

Positive messaging

- 5.33 Responding to suggestions from some broadcasters that requiring broadcasters to include positive messaging (e.g. about the benefits of a balanced diet and a healthy lifestyle) could offset the negative impact of HFSS advertising, Ofcom pointed out in the March 2006 document (paragraphs 5.15 to 5.18) that there was little evidence to show what the effect of positive messaging would be, and that in any event, Ofcom had no powers to mandate positive messaging. It was not therefore within Ofcom's remit to propose as an option.
- 5.34 Nonetheless, some respondents (including a few broadcasters, some food lobbyists and a retailer) suggested that positive messaging, such as the promotion of healthy eating, and more active lifestyles should be a key component of measures to reduce the impact of television advertising on children's dietary preferences.

Ofcom's assessment

- 5.35 Given that we do not have the power to give editorial directions to broadcasters, nor do we have the duty to promote public health, we do not consider that these are appropriate regulatory steps for Ofcom and remain of the view, as set out in the March 2006 document, that a compulsory scheme would not be practicable, nor would a voluntary scheme be viable or sufficient. This reasoning should not be taken as a criticism of positive messaging, but rather as an indication that this is an issue outside Ofcom's sphere of influence.

Package 1 – Timing restrictions on specific food and drink products

- 5.36 Package 1 would exclude all advertising and sponsorship of all HFSS food and drinks from programmes made for pre-school children, from programme's made specifically for children and from programmes of particular appeal to children aged 4-9.
- 5.37 This package would require the use of a differentiation scheme such as the FSA's nutrient profiling model to identify HFSS foods. It also requires the use of audience indexing. In this case, if the audience index of children aged less than ten years old

for a particular programme exceeded 120 that programme would be deemed to be of particular interest to this group. The 120 index tool as proposed by Ofcom measures the demographic mix of the programme and specifically identifies those programmes which have an audience composition in which the proportion of children (either 4-9 years or 4-15 years) is at least 20% higher than would be found in the population in general. The tool therefore restricts advertising only around those programmes where the reduction in child impacts relative to the reduction in adult impacts delivered by the restriction is high. It is a recognised tool, already used by the broadcasting and advertising industries to, for example, identify those programmes in which alcohol advertising is not allowed.

- 5.38 The revised content rules on advertising practices would apply at all times.
- 5.39 One distinguishing feature of Package 1 is the use of nutrient-profiling based differentiation to target the restrictions to those food and drink products that are high in fat, salt or sugar (HFSS). Before considering Package 1 further we need first to consider issues relating to the use of differentiation and the nutrient profiling scheme developed by the Food Standards Agency for Ofcom's use.

Nutrient Profiling

- 5.40 The March 2006 document asked whether the best approach to reducing the impact of HFSS advertising on children would involve the use of an HFSS differentiation scheme, and if so, whether the FSA's nutrient profiling (NP) scheme was an appropriate and practical route to achieve this objective. (The use of nutrient profiling is the key distinction between Packages 1 and 2. The former would use NP to identify HFSS products, the advertising of which would be subject to scheduling restrictions. Package 2 would apply the same scheduling restrictions as Package 1, but to all food and drink products. The use of NP also distinguishes Packages 1 and 3 since Package 3 would also apply to all food and drink products, in addition, however, Package 3 would apply restrictions primarily by reference to volumes). We discuss below the views of consultees on the principle of whether a differentiation scheme should be adopted and the views of consultees on the FSA scheme and whether there is a better alternative.

Use of differentiation

- 5.41 Most consumer and health-related organisations, and some broadcasters and food manufacturers, argued strongly in favour of differentiation. Supporters argued variously that restricting advertising of healthier products would run counter to the public policy objective of promoting healthy eating and that it would unfairly penalise the manufacturers of healthy products. Allowing advertising of non-HFSS products would provide an incentive for reformulating some existing less healthy products as well as developing new healthier products. Being permitted to show advertising for healthier food and drink products to children could also help broadcasters to mitigate the loss of advertising revenue deriving from restrictions on HFSS food and drink advertising.
- 5.42 Some respondents supported differentiation in principle, but saw particular difficulties. Bodies representing the producers of nutrient-dense foods such as cheese, cereal and milk did not think that they should be 'demonised' alongside snack foods. Others pointed out that differentiation would make it difficult for food retailers to advertise a typical range of products, some of which would be less healthy than others.

- 5.43 Supporters of a non-differentiated approach were drawn mainly from the food and advertising industries. The FAU stressed that there was no consensus amongst its members on whether an appropriate form of differentiation modelling could ever be developed. Like manufacturers and advertisers, they opined that no food should be labelled ‘good’ or ‘bad’ – as it is the balance of the diet that counts - and that targeting advertising of HFSS foods would have little impact on the problem of childhood obesity if their overall diet and lifestyles remain unaffected. Some manufacturers favoured the provision of more consumer information in the form of Guideline Daily Amounts as an alternative to differentiation.

Ofcom’s assessment

- 5.44 It is unclear whether, under a regulatory regime employing differentiation of HFSS foods, manufacturers would choose to advertise more healthy products, and if so, what effect this would have on the dietary preferences of children. It is however clear that there is no policy reason why advertising of healthier foods or the promotion of healthy eating campaigns should be restricted. Accordingly, having regard to the principle of targeting regulation only at cases where action is needed, we consider that restrictions on the television advertising of healthier products should be avoided. Ofcom notes that this approach would also be conducive to the Government’s stated objective of seeing a change in the nature and balance of food and drink advertising.
- 5.45 Moreover, if advertising for healthier products is permitted, it could mitigate broadcasters’ loss of advertising revenue which would contribute towards Ofcom’s regulatory objective of avoiding a disproportionate impact on broadcasters. Accordingly, Ofcom considers that it would be an advantage for any new restrictions to differentiate between HFSS and non-HFSS products, provided that it can be done in a proportionate and sensible way.

FSA nutrient profiling scheme

- 5.46 The nutrient profiling scheme was developed by the FSA in conjunction with dietitians, nutritionists and interested stakeholders and delivered to Ofcom following extensive consultation. Bearing this in mind and noting that the scheme itself and the science upon which it is based fall outside Ofcom’s area of responsibility and expertise, Ofcom did not seek responses on matters to do with the science of the scheme but only in relation to its use as a tool for differentiation purposes. A number of responses were however received that explored these areas and in some cases, respondents made clear that they were reiterating points already made to the FSA in response to its consultation on the model.
- 5.47 The responses revealed strong consumer-side and qualified broadcaster-side support for differentiation based on the FSA approach countered by strong opposition from nearly all advertisers and food manufacturers. The only aspect on which there was any degree of consensus is that there is, currently, no credible alternative to the FSA model for differentiating between foods that are more or less healthy. A few respondents supported the principle of nutrient profiling while regarding the FSA scheme as unacceptable. Additionally, some advertisers and manufacturers proposed the use of Guideline Daily Amounts as an alternative to differentiation but this was not proposed as a basis for reducing the impact of food advertising on children. Others pointed to work in Europe by EFSA²³ to develop a

²³ The European Food Safety Authority (EFSA) is the keystone of European Union (EU) risk assessment regarding food and feed safety. In collaboration with national authorities and in

nutrient profiling scheme in the context of the EU Health and Nutrition Claims Regulation.

5.48 Respondents supporting the FSA scheme argued that:

- it would be a practical and reasonable tool to identify HFSS products and would provide a simple summary of nutritional content;
- it had been developed by an expert panel, consulted upon extensively by the FSA, and subjected to scientific scrutiny and advice from dietitians, nutritionists and interested stakeholders;
- it had been designed specifically for Ofcom to use for advertising regulation, and should not be confused with issues relating to product labelling and 'traffic light' schemes;
- the scheme had the endorsement of two Government Ministers; and
- Ofcom had made public its reliance on the FSA for expert advice.

5.49 Some supporters of the FSA model did acknowledge that there was a degree of resistance and criticism to the model from food industry stakeholders. This however was not seen as a reason to prevent or delay implementation as there was a view that the model did not need to be 'set in stone', and that it would be possible to allow for revisions to be made in the future.

5.50 A number of opponents of the FSA scheme made general comments that the model was flawed, unscientific, subjective and over-simplistic. Specific criticisms were that the model:

- would take no account of portion size, frequency or context of consumption;
- would provide no incentive to gradual reformulation since in some cases even reduced fat, salt and sugar versions of standard products would still be classed as HFSS products and would still be subject to advertising restrictions. This would mean that manufacturers could not make consumers aware of their alternative choices;
- would prevent the advertising of energy-dense but nutritious foods such as cheese, milk and cereals;
- would not allow advertisers to publicise a range of products catering for different consumer preferences. For example, while low calorie versions with added sweeteners might be allowed to advertise, standard versions with added sugar might not;
- took no account of vitamin or mineral content, nor any non-nutrient properties (such as antioxidants), nor quantity of additives;
- appeared to be based on an invalid scientific assumption that 'good' nutrients can balance out 'bad' nutrients;

consultation with stakeholders, EFSA provides independent scientific advice and communication on existing and emerging risks.

- would not allow for exceptions to be made for foods of no interest to children;
- took no account of energy expended;
- might be difficult to apply to non-UK products;
- could be inconsistent with the model being developed by EFSA.

5.51 The main concerns of participants in the deliberative workshops centred on whether any problems or loopholes with the NP tool could be exploited and that the success of this package would be dependent on its successful implementation. Some noted that views about what was healthy were constantly changing; others noted that fat, salt and sugar are not the only things that are bad for people's health and several are worried that this model implies that ingredients like additives and e-numbers are healthy, thus possibly encouraging increased consumption of them. Participants felt that a portion size of 100g would discriminate against products such as spreads and sauces which would never actually be consumed in these quantities.

Ofcom's assessment

5.52 Ofcom notes that any system for differentiating between more healthy and less healthy products may have drawbacks. As Ofcom itself does not have any expertise in nutritional profiling, we have considered whether the FSA scheme is regarded by relevant experts as credible to use as an appropriate tool for differentiation and practicable to implement.

5.53 Against this background, we note that the FSA model was developed by an expert group including dieticians, nutritionists and interested stakeholders and that it has been the subject of extensive public consultation. Ofcom therefore considers that the FSA scheme could form a credible basis for deciding between products that are HFSS and those that are not.

5.54 Ofcom accepts that any scheme for nutrient profiling will involve manufacturers and broadcasters in work to assess whether foods are HFSS or not, and that appropriate systems for advertisers and broadcasters to confirm that they have been correctly assessed will need to be developed. However, given that food manufacturers both in the UK and most other major markets already routinely analyse the content of existing and newly-developed products, the necessary information will be readily available. We also note that, as advertisers are already obliged to be able to demonstrate to broadcasters, for instance via the Broadcast Advertisers Clearance Centre (BACC) that (for example) health claims are scientifically based and valid, it will be practicable to put in place similar mechanisms to satisfy broadcasters of the appropriateness of assessments under the FSA's scheme. Accordingly, Ofcom considers that the FSA scheme would be practicable to implement.

5.55 We also note that the FSA has publicly committed to a review of the model after a year of operation. Ofcom would consider the implications of the FSA's own review once complete and, if appropriate, would take steps to adopt any revised version of the model.

5.56 In addition we note that the food and drink industry has been trying for some time to develop an alternative approach to the FSA's scheme but has been unable to reach a consensus around an alternative.

- 5.57 With regard to the EU implications, although EFSA is working on approaches to nutritional profiling, we do not expect a Europe-wide scheme to be agreed and adopted for several years. Moreover, as it is being developed for a different purpose, it may not be appropriate as the basis for differentiating between HFSS and non-HFSS products for the purposes of regulating television advertising. Ofcom has not been made aware of any other differentiation model that would provide a credible and practicable alternative to the FSA model.
- 5.58 For these reasons, we consider that, if it was decided to adopt a nutritional profiling scheme as a means of differentiating between HFSS and non-HFSS products, the FSA model would be a credible and practicable approach: that there would be scope to make adjustments to it in the light of experience and new information; and that there is currently no alternative approach that would be credible and practicable.

Response to Package 1

- 5.59 Almost all respondents from all sectors either supported the proposal to ban advertising aimed at pre-school children, or did not explicitly oppose it. Participants in the deliberative workshops also agreed with a ban on advertising to children aged 4 and under.
- 5.60 The consensus amongst health, consumer and public sector respondents was that Package 1 did not deliver a large enough reduction in child advertising impacts. Although most respondents wanted more extensive restrictions, a number acknowledged that the use of differentiation was a redeeming feature, as it allowed healthier foods to be advertised, a view shared by some broadcasters. A few food manufacturers and retailers regarded it as the least worst option for the same reason. Nonetheless, most food manufacturers were opposed to the use of differentiation, either in principle, or because they disliked the FSA model. Responses from advertising bodies rejected Package 1 as disproportionate.
- 5.61 Amongst participants in the deliberative workshops, Package 1 was seen as the most successful of the three policy packages proposed by Ofcom, mainly because it focuses on HFSS products only, so allows advertisements for non-HFSS products. This was seen as positive both in principle and because it could prompt manufacturers to reformulate foods. However, some respondents raised the concern that Package 1 would still allow HFSS advertisements during times when the largest numbers of children and young people watch television e.g. from 6pm to 8 or 9pm.

Effects of Package 1

- 5.62 The full analysis of the effects of Package 1 is described in the Impact Assessment. Table 1 below shows:
- How the reduction in HFSS impacts²⁴ varies across the different channel categories;
 - The estimated revenue loss both in absolute terms (with a range around the central estimate reflecting the uncertainty about channels ability to mitigate the effect on their revenue) and in relative terms compared with the channels' revenue;

²⁴ An impact is equivalent to one viewer watching one advertisement, which is usually normalised in terms of a 30 second advertisement. Ten impacts can equate to one viewer watching an advertisement ten times or ten viewers watching an advertisement once.

- Two measures of the significance of this package for individual channels within each category – the highest percentage revenue loss for a channel in each category and the number of channels with an estimated revenue loss of more than 5% of their total revenue (which would indicate a significant impact);
- A measure of how targeted the measure is in terms of the number of impacts that would be restricted that do not address the policy goal (i.e. non-HFSS child and adult impacts) for each HFSS child (4-9 or 4-15) impact restricted; and
- Two measures of the monetised benefits of the package (based on QALY²⁵s and VOL²⁶) derived from the FSA’s estimate of the monetised benefit of removing HFSS impacts (with a range around the central estimate for each).

Table 1: Summary of the Impact of Package 1

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Estimated revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All Channels	49	37	13.3	17.6	20.8	0.3%	15.3%
PSB	21	16	6.9	9.9	11.9	0.3%	0.6%
Children’s	100	100	4.6	5.2	5.9	4.7%	15.3%
Music	2	1	0.0	0.0	0.0	0.0%	0.3%
Others	15	12	1.7	2.4	2.9	0.1%	2.4%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
4	1.3	2.6	19	38	76	92	184	368

- 5.63 Table 1 above shows that Package 1 would lead to a **49%** or **37%** reduction in 4-9 or 4-15 HFSS impacts respectively.
- 5.64 For each 4-9 or 4-15 HFSS impact restricted, **2.6** or **1.3** other impacts respectively would be restricted. As such this is a relatively efficient regulatory measure.
- 5.65 It would have an estimated cost of **£13.3m - £20.8m pa** compared to an estimated benefit of **£19m – £76m pa** (QALY) or **£92m – £368m pa** (VOL). Just over half of this cost (**£6.6m - £11.9m pa**) would fall on PSBs which would account for about **0.3% of their revenues**. The cost to dedicated children’s channels would be just under **5% of their total revenues** with one children’s channel estimated to lose **over 15% of its total revenue**. Four channels are estimated to lose more than 5% of their revenue.

²⁵ Quality Adjusted Life Years: based on the value people place on quality and quantity of life.

²⁶ Value of Life: based on Department for Transport valuation of lives saved in road accidents.

Ofcom's assessment

- 5.66 Ofcom notes that there is general support for a ban on HFSS television advertising aimed at pre-school children, and considers that as the research clearly indicates that such young children are not capable of critically appreciating the persuasive intent of advertising, such a ban should be a core element of any new restrictions.
- 5.67 Ofcom notes that there was more support for Package 1 than others proposed by Ofcom, both amongst health, consumer and public sector respondents, and amongst broadcasters and food manufacturers. A significant minority of respondents from these latter two groups favoured the use of differentiation to target advertising restrictions against HFSS products, though not all favoured the FSA's approach. There was also clear support for differentiation amongst deliberative workshop participants.
- 5.68 As Package 1 would require the use of the FSA's nutrient profiling model to differentiate between HFSS and non-HFSS products, it would be more complicated to administer than an undifferentiated approach, at least initially, as it would be necessary for manufacturers to assess whether their products should be classed as HFSS or not, and for broadcasters to satisfy themselves that these assessments had been carried out correctly. However, this package would affect the balance of food and drink advertising by placing restrictions only on HFSS advertising thus meeting the fifth of Ofcom's regulatory objectives.
- 5.69 As indicated earlier in this section, Ofcom has concluded that its first regulatory objective should be amended to extend protection to older children alongside younger children. Accordingly, whilst Ofcom considers that Package 1, which focuses on children aged 4-9 years, would be consistent with its regulatory objectives, it may need some amendment in order better to meet the revised regulatory objectives.

Package 2 – Timing restrictions on all food and drink products

- 5.70 Package 2 would exclude advertising and sponsorship of all food and drinks from programmes made for pre-school children, from programmes made specifically for children and from programmes of particular appeal to children aged 4-9 (identified by use of the audience index described at paragraph 5.37 above). The restrictions would apply equally to HFSS and non-HFSS products.
- 5.71 The revised content rules on advertising practices would apply at all times.

Response to Package 2

- 5.72 As with Package 1, there was broad agreement amongst health, consumer and public sector respondents that Package 2 would not make a sufficient reduction to the exposure of children to food advertising. A few food manufacturers thought Package 2 was the least worst option because it did not rely on differentiation or because it would be easy to apply, but most rejected it, some because it would apply restrictions to advertising around programmes of particular appeal to children.
- 5.73 In the deliberative workshops, participants rejected Package 2 (timing restrictions on all food and drink products) in principle because it would be a blanket ban on all food and drink advertising, so penalising 'healthy' food advertisements. They also dismissed this package on economic grounds i.e. given the lack of further health benefits, they did not consider it justified to impose additional costs on broadcasters.

Effects of Package 2

5.74 The full analysis of the effects of Package 2 is described in the Impact Assessment and key points are described below.

Table 2: Summary of the Impact of Package 2

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Estimated revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All Channels	49	37	20.7	24.0	27.3	0.4%	18.5%
PSB	21	16	11.8	14.1	16.5	0.5%	0.8%
Children's	100	100	6.0	6.4	6.7	5.7%	18.5%
Music	2	1	0.0	0.1	0.1	0.0%	0.4%
Others	15	12	2.9	3.5	4.0	0.1%	3.2%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
6	1.7	3.1	<19	<38	<76	<92	<184	<368

Note: the benefits of a restriction on all food and drink advertising is expected to be close to but lower than a restriction on HFSS advertising – see Impact Assessment

- 5.75 Table 2 above shows that Package 2 would lead to a **49%** or **37%** reduction in 4-9 or 4-15 HFSS impacts respectively.
- 5.76 For each 4-9 or 4-15 HFSS impact restricted, **3.1** or **1.7** other impacts respectively would be restricted. As such, this is a relatively efficient regulatory measure.
- 5.77 It would have an estimated cost of **£20.7m - £27.3m pa** compared to benefits that are estimated to be close to but less than those for Package 1²⁷ which are **£19m – £76m pa** (QALY) or **£92m – £368m pa** (VOL). Almost 60% of this cost (**£11.8m - £16.5m pa**) would fall on PSBs which would account for about **0.5%** of their revenues. The cost to dedicated children's channels would be almost **6% of their total revenues** with one children's channel estimated to lose **over 18% of its total revenue**. Six channels are estimated to lose more than 5% of their revenue.

Ofcom's assessment

- 5.78 As a package that does not include nutrient profiling, Ofcom considers that it would be more straightforward for broadcasters and manufacturers to implement. However it would offer less scope for broadcasters to mitigate the resulting revenue loss and manufacturers would have less incentive to reformulate their products or innovate. It

²⁷ Since the benefits of a restriction on all food and drink advertising is expected to be close, but lower than a restriction on HFSS advertising.

would also not affect the balance of food promotion as it would treat healthier and less healthy products in the same way.

- 5.79 For the reasons set out above in paragraphs 5.44 – 5.45 and 5.52 – 5.58 above, Ofcom considers that the preferred policy approach should restrict the advertising of HFSS products, through the use of the FSA's nutrient profiling scheme, rather than all food and drink.

Package 3 – Volume-based reductions on all food and drink products

- 5.80 Package 3 would exclude all advertising and sponsorship of all food and drinks from pre-school programmes. It would also impose volume restrictions limiting food advertising and sponsorship to 30 or 60 seconds per clock hour, during times when children were generally viewing television in large numbers. These restrictions would apply regardless of whether products were HFSS or not. The revised content rules on advertising practices would apply at all times.

Response to Package 3

- 5.81 Package 3 attracted the least support and was unpopular with respondents from most sectors although limited evidence was adduced in support of the points of view expressed. Amongst the points made by food manufacturers were that it was unfairly restrictive. Most broadcasters and some manufacturers opposed the package as being disproportionate, though there was some support for the package from one broadcaster in a confidential response. Health and consumer groups were unanimous in rejecting it as an inadequate response to the threat posed by child obesity and also opposed the fact that this package does not incorporate nutrient profiling. Most participants in the deliberative workshops also rejected the package because it would permit some HFSS advertising; they also feared that it would drive out non-HFSS advertisements at peak times.

Effects of Package 3

- 5.82 The full analysis of the effects of Package 3 is described in the Impact Assessment and key points are described below.

Table 3: Summary of the Impact of Package 3

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Estimated revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All Channels	44	36	58.4	72.7	77.8	1.2%	12.3%
PSB	34	28	46.1	57.6	61.4	1.9%	7.1%
Children's	69	67	3.0	3.5	4.0	3.2%	12.3%
Music	16	15	0.7	0.9	1.0	0.7%	6.8%
Others	22	22	8.6	10.7	11.5	0.4%	3.4%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
6	5.0	9.2	<19	<37	<74	<90	<179	<359

Note: the benefits of a restriction on all food and drink advertising is expected to be close to but lower than a restriction on HFSS advertising – see Impact Assessment

- 5.83 Table 3 above shows that Package 3 would lead to a **44%** or **36%** reduction in 4-9 or 4-15 HFSS impacts respectively.
- 5.84 For each 4-9 or 4-15 HFSS impact restricted, **9.2** or **5.0** other impacts respectively would be restricted. As such this is a relatively inefficient regulatory measure.
- 5.85 It would have an estimated cost of **£58.4m - £77.8m pa** compared to benefits that are estimated to be close to but less than those for an equivalent HFSS package²⁸ which are **£19m – £74m pa** (QALY) or **£90m – £359m pa** (VOL). Almost 80% of this cost (**£46.1m - £61.4m pa**) would fall on PSBs which would account for about **1.9% of their revenues** and **over 7% of one of these channels' revenues**. The cost to children's channels would be just over **3% of their total revenues** with one children's channel estimated to lose **over 12% of its total revenue** and one music channel estimated to lose almost **7% of its total revenue**. Six channels are estimated to lose more than 5% of their revenue.

Ofcom's assessment

- 5.86 For this package, the simplicity of not having to apply nutrient profiling would be more than outweighed by the complexity of implementing, monitoring and ensuring compliance with volume restrictions. There would also be less scope for broadcasters to mitigate the resulting revenue loss and manufacturers would have less incentive to reformulate their products or innovate.
- 5.87 For the reasons set out above in paragraphs 5.44 – 5.45 and 5.52 and 5.58, Ofcom considers that the preferred policy approach should restrict the advertising of HFSS products, rather than all food and drink, through the use of the FSA's nutrient

²⁸ Since the benefits of a restriction on all food and drink advertising is expected to be close, but lower than a restriction on HFSS advertising.

profiling scheme. Ofcom also notes that this option would also allow some HFSS advertising in children's airtime and during programmes of particular appeal to children.

5.88 Ofcom also notes the near universal rejection of this package by respondents.

Industry Option 4

5.89 The March consultation document also invited any stakeholder to submit alternative proposals, with the proviso that they must be tailored to meet Ofcom's regulatory objectives. We noted that if a completely new proposal appeared to command broad support and seemed a sensible response to the issue and to the regulatory objectives, it might be necessary to conduct a short final consultation to determine if it had wider endorsement. With one exception, the alternative proposals (which are outlined in Annex 5) that Ofcom received failed to demonstrate the broad support we required from stakeholders and to meet Ofcom's regulatory objectives.

5.90 The exception was a proposal from the Food Advertising Unit (FAU) on behalf of the food, soft drinks and advertising industries²⁹. The FAU's industry Option 4 is intended to be a hybrid of parts of Ofcom's Packages 2 and 3, and intended to deliver approximately the same effect as both, with less harmful effects to individual broadcasters. It would prohibit any food and drink advertising within or around programmes made for pre-school children on any channel, and for any children under 10 on other channels not targeted specifically at children (e.g. ITV1, Channel 4, and Five). On channels aimed specifically at children, food and drink advertising would be limited to a maximum of 30 seconds per hour³⁰. Both HFSS and other food and drink products would be subject to the same restrictions, although there would be no restrictions on healthy eating and lifestyle campaigns. There would be no restrictions on sponsorship or brand advertising. The proposal also did not restrict advertising food and drink around programmes of particular appeal to children as it did not incorporate use of the 120 index. (A full discussion of this point is below at paragraphs 5.94 – 5.100.) In addition, the FAU stated that it was industry's view that Ofcom should take 2003 as its base year for determining significant but proportionate reduction in impacts on children, suggesting that if 2005 were taken this would ignore voluntary action already taken by advertisers in changing their advertising.

5.91 A wide range of food manufacturers and advertisers were consulted in the preparation of this proposal and this is reflected in the support for the package from both the trade associations on whose behalf it was submitted, and the support indicated by other respondents (BCCCA, CS, Kellogg's, MF, CPMK, PepsiCo, SNCMA, UB, Vimto and Wrigleys). The proposal also generated support from some broadcasters, though it was generally qualified by a concern that the proposal does not incorporate some form of differentiation which would allow the broadcasters to mitigate some of the impact of the proposals on their businesses.

5.92 As this fourth option was only proposed by manufacturers and advertisers in response to the consultation and consumer and health groups were not involved in

²⁹ The proposal by the Food Advertising Unit of the Advertising Association (FAU), on behalf of the Incorporated Society of British Advertisers (ISBA), the Institute of Practitioners in Advertising (IPA) and the Food and Drink Federation (FDF) has been posted on Ofcom's website at: http://www.ofcom.org.uk/consult/condocs/foodads/responses/eh/fau_opt4.pdf.

³⁰ This rule would also be applied to GMTV on weekend mornings when their schedule consists entirely of children's programmes.

proposing this option, there is no reaction to the package from them in the consultation responses.

- 5.93 In considering the industry's Option 4 proposal, Ofcom was made aware of some concerns of broadcasters about the use of 120 indexing and the exclusion of food and drink advertising from programmes of particular appeal to children. We discuss these below.

Use of 120 index

5.94 Broadcasters suggested that use of indexing is inappropriate because:

- it affects programmes which are aimed primarily at an adult or family audience and is therefore disproportionate;
- use of the 120 index to identify particular programmes within and around which food and drink advertising is not permitted is not practical;
- use of the 120 index and BARB data to identify programmes of particular appeal to children on smaller audience cable and satellite channels is unreliable because the BARB data on the demographic breakdown of the audience to programmes with very low viewing figures is not statistically reliable;
- because of the latter fact, the index is likely to be applied unfairly in a way which focuses on the larger audience channels while ignoring smaller audience channels;
- the effect of the 120 index exclusion is in any case largely delivered by the revised content rules.

Ofcom's assessment

5.95 Taking each of these arguments in turn: Ofcom accepts that a programme of particular appeal to children is likely to attract an audience which is more demographically mixed than a dedicated children's programme. However, because of the times that they are scheduled, these programmes often attract children's audiences of significant size. The 120 index tool as proposed by Ofcom measures the demographic mix of the programme and specifically identifies those programmes which have an audience composition in which the proportion of children of 4–9 (or 4–15 depending on the level of restriction) years old is at least 20% higher than their proportion in the population in general. As a result the tool restricts advertising only in those programmes where there is a large reduction in child impacts relative to the reduction in adult impacts delivered by the restriction.

5.96 The 120 index is a recognised tool, already used by the broadcasting and advertising industries to identify those programmes in which e.g. alcohol advertising is not allowed. The food industry and broadcasters argue that use of the 120 index is only appropriate in the regulation of products which it is illegal for children to consume (i.e. alcohol and gambling). However, this is not an argument which is currently persuasive to Ofcom; nor do we find persuasive the argument that the use of the 120 index tool is not practical in the case of food and drink advertising.

5.97 Ofcom accepts that in the case of programmes which have very low audiences, the BARB panel may not deliver a statistically robust breakdown of the demographics of the audience of an individual programme. However, this argument does not take into

account how the 120 indexing tool is used by broadcasters in practice. When broadcasters plan where to schedule the advertising that they have sold, they analyse the audience mix that their schedule is predicted to deliver. Where a programme series is predicted to be watched by an audience that is rich in children, the broadcaster 'blocks out' that programme series, preventing unsuitable advertising from being scheduled in or around it. The fact that the index is used on a predictive and judgemental basis rather than on the basis of actual measured audience delivery for particular programmes allows anomalous actual audience mix data to be disregarded. Only if a programme series consistently delivers an audience rich in children will a broadcaster apply 120 index restrictions to it. Individual one-off programmes and new series are dealt with by broadcasters on a predicted audience basis using expectations based on similar material that has been broadcast in the past.

- 5.98 On a similar basis, if there was a complaint about the inclusion of unsuitable advertising in a programme watched by a large number of children, the regulator would be expected to consider (inter alia) the predicted target audience of the programme or series and whether the judgement that the broadcaster has made on whether to schedule the advertising complained of within that particular programme was reasonable.
- 5.99 The 120 indexing tool is applied today under the provisions of the Television Advertising Standards Code to all channels, irrespective of their audience size and Ofcom is not aware of any problems that have arisen in the specific case of channels or programmes which have small audiences. Currently, Ofcom is not therefore persuaded that the 120 index is an unsuitable tool in the case of low audience channels.
- 5.100 On a similar basis, Ofcom is not aware of any arguments having been made to date by either large or small audience channels that 120 indexing as a technique is applied unfairly and enforced more strictly in the case of the larger audience channels.

Effects of Option 4

- 5.101 In assessing the effects of its proposed approach, the FAU used a different methodology from that of Ofcom. This is discussed in more detail in the Impact Assessment at Annex 7. In order to evaluate the packages on a comparable basis, Ofcom undertook detailed analysis on the same basis as all other options described in this document. The full analysis of the effects of Option 4 is described in the Impact Assessment and key points are described below.

Table 4: Summary of the Impact of Option 4

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Average revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All channels	30	21	10.1	12.0	13.9	0.2%	12.3%
PSB	14	10	7.2	8.7	10.1	0.3%	1.7%
Children's	68	67	2.9	3.3	3.7	3.0%	12.3%
Music	0	0	-	-	-	0.0%	0.0%
Others	0	0	-	-	-	0.0%	0.0%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
2	2.0	3.3	<11	<22	<44	<53	<106	<211

- 5.102 Table 4 above shows that Option 4 would lead to a **30%** or **21%** reduction in 4-9 or 4-15 HFSS impacts respectively.
- 5.103 For each 4-9 or 4-15 HFSS impact restricted, **3.3** or **2.0** other impacts respectively would be restricted. As such this is a relatively efficient regulatory measure.
- 5.104 It would have an estimated cost of **£10.1m - £13.9m pa** compared to benefits that are estimated to be close to but less than those for an equivalent HFSS package which are **£11m – £44m pa** (QALY) or **£53m – £211m pa** (VOL). Over 70% of this cost (**£7.2m – 10.1m pa**) would fall on PSBs, accounting for about 0.3% of their revenues, the remainder would fall on children's channels. The cost to children's channels would be around **3% of their total revenues** with one children's channel estimated to lose **over 12% of its total revenue**. There would be no estimated cost to music or other cab-sat channels. Two channels are estimated to lose more than 5% of their revenue.

Ofcom's assessment

- 5.105 In Ofcom's view it is clear that this package enjoys broad support from food manufacturers and advertisers, as well as qualified support from broadcasters. Other groups were not involved in preparing the proposal, and so have not had an opportunity to respond to it.
- 5.106 Ofcom noted that this option incorporated volume restrictions for dedicated children's channels rather than the total exclusion of food and drink advertising and understood the rationale for this to be that the total exclusion of food and drink advertising has a significant impact on dedicated children's channels, for whom food and drink

advertising represents a significant proportion of their revenues and who are less able than mixed genre channels to mitigate the impact of such an advertising ban³¹.

- 5.107 Ofcom did however recognise the particular circumstances of the dedicated children's channels and asked for stakeholder views on the phasing in of any advertising restrictions that apply to children's channels in its March consultation document. (For a discussion of this please see paragraphs 6.29 – 6.33).
- 5.108 As regards implementation, as this option does not include nutrient profiling it would be more straightforward for broadcasters and manufacturers to implement and could readily be extended to cover brand advertising. However, the volume restrictions would be complicated to implement and more difficult to monitor and ensure compliance with than for scheduling restrictions. Moreover, for the reasons set out above in paragraphs 5.44 – 5.45 and 5.52 – 5.58, Ofcom considers that the preferred policy approach should restrict the advertising of HFSS products, rather than all food and drink, through the use of the FSA's nutrient profiling scheme.
- 5.109 With regard to the suggestion that 2003 should be the appropriate base year from which to measure the impact of restrictions, Ofcom does recognise that there has been a reduction in the amount of food and drink advertising that children see between 2003 and 2005. This reduction has resulted from a number of factors, including voluntary actions on the part of food advertisers and broadcasters, changes in children's viewing habits, as well as other market changes. We note however that there has not been any reduction in the level of concern about the effect of food and drink advertising or the effects of childhood obesity between the two periods. We recognise that the measurement of the degree of change since 2003 is a valuable indication of the degree of progress that has already been made Ofcom however has used 2005 as the base year for its analysis as the most recent year for which data is available and therefore the best data against which to estimate the effect of advertising restrictions that will not come into effect until 2007.
- 5.110 Having analysed the proposal carefully, Ofcom notes that it would be less burdensome on broadcasters, but on the basis of the evidence and detailed analysis would deliver significantly fewer benefits than any of the other packages outlined by Ofcom, whether measured in monetary terms (based on VOL/QALY) or in terms of the reduction of advertising impacts on children aged 4-9 or 4-15. We note that this option would also allow some HFSS advertising in children's airtime and during programmes of particular appeal to children.

Pre-9pm ban

- 5.111 In the March 2006 consultation and in the June update Ofcom asked for comments on the option of a ban on the television advertising of HFSS products before 9pm. In the June update Ofcom provided updates and corrections to the modelling contained in the March 2006 consultation. This included a revised assessment based on the information then available to it of the social / health benefits of the exclusion of HFSS advertising before 9pm, as well as its costs. Ofcom invited representations, including any new evidence, on the issue of whether a pre-9pm ban would impose a proportionate impact upon broadcasters.

³¹ Because they target only one demographic audience, children, there is a much more limited range of new advertisers that they might be able to attract to the channel, and unlike mixed genre channels the advertising restrictions apply throughout the time that they are broadcasting, so they are unable to mitigate the loss by scheduling advertising at alternative times.

Response to pre-9pm ban

5.112 Most respondents from consumer groups, public health bodies, and health and medical organisations said that a pre-9pm ban on the advertising of HFSS products on television would not be disproportionate; indeed, many suggested that it would be disproportionate not to impose such a ban, since benefits to children’s health would far exceed the adverse impacts on broadcasters, advertisers, food manufacturers and television viewers (adults and children). These included, importantly, the Office of the Children’s Commissioner and Scotland’s Commissioner for Children and Young People, both of whom have a statutory responsibility for representing the views of children and young people, as well as the Food Standards Agency. Among the points made were:

- that a pre-9pm ban would remove 82% of advertising impacts, as it would restrict the large body of children’s viewing that takes place outside children’s airtime;
- that, combined with NP, it would be conducive to greater publicity for healthy foodstuffs, and hence to healthier eating;
- that it would provide a greater incentive to manufacturers to reformulate their products; and
- that it would benefit older children and adults as well as younger children.

5.113 In addition, there were a significant number of responses from individual consumers, including a large number of postcards from members of the public who had responded to consumer group campaigns, which supported a pre-9pm ban on HFSS advertising.

5.114 By contrast, broadcasters, advertisers, retailers and food manufacturers argued that a pre-9pm ban would be disproportionate, on various grounds:

- advertising only has a modest impact on children’s dietary preferences and that other factors such as lifestyle are important;
- a pre-9pm ban would significantly reduce the revenue of broadcasters and may threaten the commercial sustainability of a number of channels;
- the reduction in revenue would result in fewer commissions for independent producers of children’s channels, and UK originated content, thereby reducing plurality and diversity;
- it would deny adults access to information and advertising for HFSS products;
- it would increase the costs of advertisers by significantly restricting their ability to address adult audiences;
- HFSS advertising would carry on in other less regulated media; and
- most viewing by children outside of children’s airtime is in the company of an adult.

5.115 The option of a pre-9pm ban also featured in the OLR deliberative research. A small minority of adults wanted a total ban on advertising of HFSS products, as they felt that a partial ban would not be effective. Some also felt that adults need protecting

as well as children. However, the majority of participants rejected the idea of a complete ban, as they felt that the effect on broadcasters and manufacturers would be disproportionate to the relatively small influence of TV advertising on children's food choices

Effects of pre-9pm ban

5.116 The full analysis of the effects of a pre-9pm ban on HFSS food and drink are described in the Impact Assessment and key points are described below.

Table 5: Summary of the Impact of a Pre-9pm ban

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Estimated revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All channels	89	82	184.2	210.5	224.4	3.5%	15.3%
PSB	85	78	144.3	164.9	175.2	5.4%	9.6%
Children's	98	97	4.4	5.1	5.7	4.6%	15.3%
Music	84	80	4.5	5.1	5.7	4.0%	13.9%
Others	77	73	31.1	35.5	37.8	1.3%	6.3%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
24	5.5	11.4	42	84	168	203	406	811

5.117 Table 5 above shows that a pre-9pm ban would lead to a **89%** or **82%** reduction in 4-9 or 4-15 HFSS impacts respectively.

5.118 For each 4-9 or 4-15 HFSS impact restricted, **11.4** or **5.5** other impacts respectively would be restricted. As such this is a relatively inefficient regulatory measure.

5.119 It would have an estimated cost of **£184m - £224m pa** compared to an estimated benefit of **£42m – £168m pa** (QALY) or **£203m – £811m pa** (VOL). Almost 80% of this cost (**£144m - £175m pa**) would fall on PSBs which would account for about **5.4%** of their revenues and 9.6% of one of these channel's revenues. The cost to children's channels and music channels would be **4 to 5% of their total revenues** with one children's channel estimated to lose **over 15% of its total revenue** and one music channel estimated to lose almost **14% of its revenue**. Twenty four channels are estimated to lose more than 5% of their revenue.

Ofcom's assessment

- 5.120 Ofcom notes that a pre-9pm ban on the advertising of HFSS foods received strong support from individual respondents and from a wide range of consumer, health and medical groups. Although views were expressed on a pre-9pm ban in the context of OLR deliberative research, Ofcom has had regard to the fact that that the option was not fully explored in the workshops and that such research does not produce robust quantitative data and does not therefore provide a means of accurately measuring consumer responses across the general public in the UK. Accordingly, it has not taken into account the views of the majority of adult participants who rejected the idea of such a ban in reaching its assessment on this option.
- 5.121 Clearly, a pre-9pm ban on HFSS advertising would result in a very significant reduction in the exposure of children to HFSS advertising on television – more than the other options on which Ofcom has consulted and analysed. A pre-9pm ban would also reduce the exposure of older children and adults to HFSS advertising, which might have a modest impact on their dietary habits.
- 5.122 As an option that uses nutrient profiling, it is targeted on the regulatory objective of reducing the exposure of children to HFSS advertising and might add to the pressures on manufacturers to reformulate their foods. It might also lead to more advertising for healthier foods, which might be reflected in healthier eating. But, in terms of its effect on younger children, whose dietary habits are being formed, the research suggests that even complete elimination of such advertising would only have a modest direct effect on food preferences amongst children. Such a ban would have no direct impact on their exposure to advertising in other media and it might indirectly increase exposure if advertisements transfer from television to alternative outlets.
- 5.123 This option would have a considerable impact on broadcaster's revenues. In the light of suggestions from broadcasters that the fall-off of audiences after 9pm would significantly limit their ability to shift HFSS advertising into the later evening, we now estimate that the loss of revenue to broadcasters would be of the order of £211 million per year after mitigation. As a result Ofcom considers that there could be several consequential effects of a pre-9pm ban:
- there would be less incentive to produce and schedule children's programming, possibly resulting in less choice;
 - the reduction in revenue would exceed the amount that broadcasters spent on children's programming (both in-house and independent productions) and would be likely to affect broadcasters' ability to invest in commissioning of all types of programmes, for adult as well as child audiences. This could significantly reduce the market for independent productions of children's programmes and the amount of high quality children's programming;
 - in addition it is possible that one or more commercial television channels may decide to cease broadcasting if they no longer found it profitable to continue; and
 - it is also possible that one or more commercial television channels may decide to locate abroad to avoid the restrictions on HFSS advertising under the UK licence regime.
- 5.124 Ofcom's analysis also demonstrates that a pre-9pm ban is relatively inefficient in targeting intervention at children as it reduces 5.5 adult impacts for every 4-9 yr child

impact, or 11.4 adult impacts for every 4-15 child impact restricted. Such an intervention would represent a significant intrusion on adult viewing and limit advertisers' ability to reach a legitimate audience for their products.

- 5.125 There is not a one-for-one correspondence between the amount spent on programming content and the amount of revenue generated around that programming. However, given the potential magnitude of the reduction in PSB's advertising revenue as a result of a pre-9pm ban it would be highly likely that there would be knock-on effect on programme budgets of the PSBs across a range of genres i.e. the impact would not be confined to children's programming. Ofcom estimates that there could be a reduction in revenue of around £165m per annum across ITV, GMTV, Channel 4 and five and that this would amount to over 5% of the total revenue of these channels. It would, however, represent a much more significant proportion of their total programme budgets - Ofcom estimates that it would equate to just under 10%³² of the total amount spent by these channels across all their programming in 2005.
- 5.126 In the face of such a significant reduction in revenue, the room for manoeuvre of the PSBs would be limited: there is typically a lead time of between 6-18 months on original programme commissioning which would mean that there would be an amount of programming that the PSBs were already committed to and which could not simply be swapped for cheaper programming. Going forward, the PSBs might have to re-think the overall composition of their programme schedules e.g. possibly increasing the proportion of repeats, relying more on acquired material (e.g. imports of US content) as well as reducing the programme budgets for original commissions. In some cases, broadcasters might withdraw altogether from commissioning content in some genres and rely instead on repeats and acquisitions. In survey work for Ofcom, viewers have typically expressed a preference for UK-originated content: a reduction in the amount (and quality) of original UK commissions would therefore represent a consumer detriment.
- 5.127 There would be no incremental impact on dedicated children's channels (compared to the other scheduling policy options) because all their airtime is anyway subject to restrictions under those options.
- 5.128 Ofcom estimates that there would be an impact on the music channels and other cable-satellite channels. The amount of original content which these channels source is relatively small, although it has been a fast-growing area as channels have sought to move out of a reliance on repeats and acquired material and to develop their own channel identities. In response to the impact of a pre-9pm ban, these channels would probably scale back their plans to commission more original programming.

Comparison of Packages 1, 2 and 3, industry's Option 4 and a pre-9pm ban

- 5.129 Table 6 below summarises the key points of comparison between the regulatory approaches discussed above.

³² Total programme budgets for ITV1, GMTV Channel 4 and five amounted to £1,702m in 2005

Table 6: Comparison of Packages 1, 2 and 3, industry’s Option 4 and a pre-9pm ban

	Impacts lost		Estimated revenue loss		Highest % loss for any channel in each category	Number of channels with > 5% revenue loss	Efficiency		Benefits (£m pa)	
	4-9	4-15	(£m pa)	(%)			4-15	4-9	QALY	VOL
Package 1	49%	37%	17.6	0.3%	15.3%	4	1.3	2.6	38	184
Package 2	49%	37%	24.0	0.4%	18.5%	6	1.7	3.1	<38	<184
Package 3	44%	36%	72.7	1.2%	12.3%	6	5.	9.2	<37	<179
Option 4	30%	21%	12.0	0.2%	12.3%	2	2	3.3	<22	<106
Pre-9pm Ban	89%	82%	210.5	3.5%	15.3%	24	5.5	11.4	84	406

Note: This excludes the impact on channels licensed in the UK broadcasting to overseas markets (see Impact Assessment paragraphs 3.28-3.32)

* This table shows the central estimates of the costs and benefits – low and high estimates are shown in the discussion of individual policy options above.

Rules on advertising practices

- 5.130 In pursuance of the principle of promoting self-regulation, Ofcom contracted out its regulatory functions in relation to broadcast advertising to the Advertising Standards Authority (ASA)³³. However Ofcom must approve any Code changes recommended by the ASA’s code-making body the Broadcast Committee on Advertising Practice (BCAP).
- 5.131 Ofcom asked BCAP to develop proposals for food advertising content standards and consulted on them in the March consultation document. The changes that BCAP proposed would, amongst other things, prevent advertisers from using techniques likely to encourage poor nutritional habits or unhealthy lifestyles, or to encourage children to pester their parents to buy products. Promotional offers (including collectables), celebrities and licensed characters would not be allowed in advertisements aimed at those under 10 (referred to as Band 2 in the proposed rules) although brand equity characters³⁴ could continue to be used. Nutritional claims would have to be supported by sound scientific evidence, and could not be targeted at pre-school children. Although the rules would apply to all food and drink advertising, whatever the time of day, BCAP considered that they would prevent inappropriate advertising of HFSS products, without unduly restricting the advertising of other foods.
- 5.132 Very few respondents questioned the case for revised content rules. Broadcasters, advertisers and some food manufacturers tended to support the revisions proposed by BCAP, but argued strongly that they should not apply to sponsorship, citing differences in the way sponsorship credits were regulated. In general, consumer groups, health promotion organisations, academics and public sector bodies tended to oppose the application of content rules to all food and drink advertising, suggesting instead that the rules should apply only to HFSS food and drink advertising. Among the points they made were that applying the rules to non-HFSS advertising was wholly disproportionate as it would restrict legitimate business and have no impact on obesity levels; that it would remove an incentive to reformulate

³³ http://www.ofcom.org.uk/media/news/2004/11/nr_20041101

³⁴ Characters that have been created by the advertiser and which have no separate identity beyond their associated product or brand e.g. Tony the Tiger, Ronald McDonald

products; and that it would prevent businesses from using effective and appropriate techniques (e.g. celebrity endorsement, licensed cartoon characters) to promote 'healthier' non-HFSS products or healthy eating campaigns.

- 5.133 Amongst participants in the deliberative workshops, there was a strong desire for content regulation, specifically around misleading claims and promotional offers. BCAP's proposed revisions were generally welcomed, but there was concern about how the rules would be interpreted, and the possibility that advertisers would find ways around them. There was also a feeling that they did not provide for sufficient transparency and information in food advertising, i.e. going beyond simply not making misleading claims to requiring full nutritional information or health warnings.
- 5.134 Industry and broadcasting interests tended to support BCAP's proposal to focus certain content restrictions (e.g. the use of promotions and the use of celebrities and licensed characters) on children aged 9 and under. By contrast, consumer groups, health promotion organisations, public sector bodies and others wanted to see these content rules applying to programmes for older children as well as younger children. The primary argument put forward by these groups was that while the evidence may suggest that children around 10 are able to clearly recognise and understand the promotional intent of commercials, children under 16 remained susceptible to advertising. Also this age range is more at risk of obesity. Others noted that older children are more likely to be making their own purchasing decisions and could set an example to their younger siblings. In addition, it was suggested that it could be difficult to determine whether advertisements were targeting children under 9 as opposed to older children, making enforcement problematic compared to rules targeting all children (up to the age of 15).
- 5.135 The BCAP proposals did not include restrictions on brand advertising and sponsorship and the March consultation document explained a number of the complexities surrounding this issue. These include: definition of a relevant brand; potential unfairness on manufacturers wishing to promote healthier products using well-known brands previously exclusively associated with HFSS products; and (were brand advertising not to be restricted) the risk that manufacturers of HFSS products might seek to use brand advertising to substitute for a loss of product advertising opportunities. In responding to the consultation most advertisers, broadcasters and food manufacturers opposed any restrictions on brand advertising whilst consumer groups, health promotion organisations and academics wanted brand advertising associated with HFSS products to be restricted. Little new insight was offered into ways of defining brands that might be caught under any restriction with suggestions ranging from developing a mean nutrient profile for a brand to restrictions based on proportion of HFSS products in a range. More detail can be found in Annex 5.
- 5.136 As regards the specific drafting of the rules, many food and drink manufacturers, advertisers, broadcasters and others felt that they would significantly reduce the emotional impact of advertising on children. However, organisations representing consumer organisations and health promotion bodies criticised all or some of the rules as vague and ill-defined and expressed concern that this would open the way to interpretation that could be generous to advertisers. Specific objections were raised to the non-prohibition of brand equity characters where some consumer respondents doubted whether children could differentiate between brand and licensed characters. The Advertising Association however said that advertisers' view was that brand characters had no existence outside advertising, implying that they would be less emotionally engaging than licensed characters. See Annex 5 for specific points of detail made in relation to the proposed content rules.

BCAP response to consultation responses on content rules

- 5.137 As Ofcom's co-regulator and the originator of the proposed revised rules, BCAP undertook its own independent analysis of responses to the revised content rules³⁵ and presented a revised proposal to Ofcom. This analysis and BCAP's resulting submission to Ofcom can be found on Ofcom's website³⁶. In summary however BCAP's reaction to the two 'big themes' of the responses in relation to content rules – use of differentiation on content rules and extension of age bands – were as follows.
- 5.138 On differentiation, BCAP considered that “...neither the weight of responses nor the points raised in supported of differentiation, merit a change from the undifferentiated approach favoured by BCAP...”
- 5.139 On age bands, BCAP considered that differentiating children by age was the only practical means of restricting certain advertising techniques to children at different stages of cognitive development. They maintained that the proposals apply to all children (persons under 16 years of age) but placed additional prohibitions on specific advertising techniques in advertisements targeted at pre-school and primary-school children.
- 5.140 BCAP referred to Ofcom's 2004 research report, “Childhood Obesity – Food Advertising in Context”, which, it noted, presented wide-ranging research findings into the influence and role of food promotion and found that “*Before four or five years old, children regard advertising as simply entertainment, while between four and seven, they begin to be able to distinguish advertising from programmes. The majority have generally grasped the intention to persuade by the age of eight, while after eleven or twelve they can articulate a critical understanding of advertising*”. They noted that many other research studies come to similar conclusions.
- 5.141 BCAP considered that the existing age of 9 years as an upper limit for band 2 was difficult to justify as a child protection measure based on the research evidence available and therefore decided to change the definition of band 2 to primary school children. By proscribing the direct targeting of certain advertising techniques to primary school or pre-school children, BCAP considered that the proposals were “*targeted, proportionate, practical, supported by research and in line with the objective stated by the Secretary of State for Culture, Media and Sport and with the Government's health and child protection objectives that focus on protecting primary school aged children*”.
- 5.142 Moreover, BCAP considered, that the revised rules need not mention age bands at all and that the references to age bands in rules 7.2.3 (Promotional offers), 7.2.4 (Use of characters and celebrities) and 8.3.1 (Accuracy in food advertising) should be replaced with “targeted directly at pre and primary school children” (7.2.3 and 7.2.4) and “targeted directly at children under five” (8.3.1.c).

³⁵ Ofcom forwarded relevant points of non-confidential responses to BCAP on receipt and prepared a summary of relevant points of confidential responses.

³⁶ http://www.ofcom.org.uk/consult/condocs/foodads_new/bcap.pdf

Ofcom's assessment

Differentiation

- 5.143 Ofcom believes that the discussion of whether differentiation should apply in the context of the content rules is only relevant to some rules, specifically rule 7.2.3 relating to promotional offers, rule 7.2.4 on the use of celebrities and licensed characters and rule 8.3.1 on health claims. The remaining rules are as relevant to non-HFSS products as they are to HFSS products.
- 5.144 In considering this aspect, Ofcom has had regard to the fact that commercial freedom of expression may only be limited to the extent reasonably necessary to pursue the legitimate aim of protecting children's health. Any restrictions in the content rules therefore need to be targeted and proportionate in light of that aim. As such, Ofcom agrees that it is appropriate to apply restrictions on the most persuasive advertising techniques i.e. those referred to in 5.143 above to advertisements for HFSS products only. To apply similar restrictions to non-HFSS products would, in Ofcom's view, be a restriction of freedom of commercial expression without associated health benefits. Furthermore, having decided that it would be appropriate to use nutrient profiling to differentiate between HFSS and non-HFSS products for the purpose of developing scheduling rules there is a clear argument for the use of nutrient profiling as appropriate within the content rules. Ofcom is therefore proposing that nutrient profiling be applied to these three rules.

Age bands

- 5.145 With regard to the question of appropriate age bands for the content rules, Ofcom notes that children in their mid-teens are fully media literate, influenced by advertising, but able to recognise when they are being sold to and understand the selling message whatever techniques are used. In media literacy terms it is children of primary school age and under who are the more vulnerable group. As such, it appears reasonable to extend protection for younger children up to those of primary school age in relation to the most persuasive advertising techniques i.e. the use of licensed characters and celebrities and promotional offers.
- 5.146 In addition, preventing nutritional and health claims targeted at children of secondary school age will prevent manufacturers from communicating the nutritionally beneficial aspects of products, even if they are HFSS (e.g. "active" yoghurts) to people who are of an age to understand some elements of nutrition. It may also stop manufacturers publicising new 'healthier' versions of existing products to an audience which is capable of understanding the health claim and whose health could be benefited by the new healthier variant.
- 5.147 Ofcom is therefore minded to extend protection to primary school children in rules 7.2.3, 7.2.4 and 8.3.1.

Brand advertising

- 5.148 Ofcom notes that many respondents favour allowing some brand advertising, albeit subject to restrictions, and that a variety of different approaches for distinguishing between 'acceptable' brands and others have been suggested. Both the range of these ideas, and their relative lack of specificity, illustrate the practical problems that any regulatory solution would have to overcome in order to devise equitable and transparent rules. It is also the case that the application of nutrient profiling to the volume and scheduling and content rules makes it considerably more difficult to

impose restrictions on brand advertising as Ofcom believes that no practical solution has yet been devised to the problem of identifying HFSS as opposed to non-HFSS brands (see further discussion in the Impact Assessment). Given these practical difficulties, and the fact that it is not clear to what extent advertisers would seek to substitute brand for product advertising, Ofcom has decided not to include brand advertising in volume and scheduling restrictions at this time

Additional points

- 5.149 A number of respondents expressed concern about the precision of the rules, suggesting that they opened the way to interpretation that could be generous to advertisers. Ofcom notes however that content regulation is by its very nature subjective and rules need to be appropriately flexible to allow for contextual interpretation. It also notes that this same approach has been used successfully for many years to regulate advertising of other potentially problematic products and services, such as alcohol, lotteries, and gambling. Indeed, overly prescriptive drafting could constrain the ability to regulate. Accordingly, Ofcom believes that, in general, it would be better not to make the rules more prescriptive, but to see how they work in practice.
- 5.150 As regards other specific points:
- a) on brand equity characters, Ofcom does not attach great weight to the argument that their impact on children is significantly different from that of licensed characters. However, advertisers have made clear that considerable sums have been invested in developing and maintaining brand equity characters over long periods of time. We note that the result of the volume and scheduling rules is that advertisements using such characters will not be allowed to appear around programmes that are aimed at children or are particularly attractive to them. On balance, we do not consider that it would be proportionate to ban the use of brand equity characters in advertisements at other times;
 - b) as regards the various assertions that the drafting of the rules may give rise to unintended effects, it should be noted that the general rule that advertisers ‘must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle in children’ enables the ASA to exercise its judgement as to whether particular advertisements are acceptable, whether or not they breach a more specific rule;
 - c) Ofcom does not agree that it is necessary or desirable to refer to legislation, as it is an accepted principle that these (and indeed other) rules must comply with all applicable law. A balance has to be struck in how much extraneous guidance it is reasonable to refer to in the rules and Ofcom considers that the rules as drafted strike a reasonable balance.
- 5.151 Finally, Ofcom has always required that sponsorship credits comply with advertising content rules, and does not consider that the differences in the way they are regulated is germane to their advertising intent. Rule 9.4 of the Ofcom Broadcasting Code which states that “sponsorship credits on radio and television must comply with the advertising content and scheduling rules that apply to that medium”. The final revised content rules will therefore apply to sponsor credits.

Section 6

Ofcom's decision

6.1 This section sets out the decisions reached by Ofcom in light of its statutory duties and regulatory objectives and based on analysis presented in Section 5 and in the Impact Assessment.

Proposed packages

6.2 Based on the assessment of policy proposals contained in Section 5, Ofcom has made the following decisions, in doing so it has had regard to the degree of support received for each option and the analysis of its effects including in particular as set out in the Impact Assessment.

Package 3

6.3 There was a broad consensus amongst respondents from all sectors that Package 3 was the least desirable of the policy packages given that:

- a) the loss of revenue is significantly larger than for Packages 1 and 2, while the benefits are of a similar size;
- b) it would restrict the advertising of non-HFSS foods which is not in line with our regulatory objectives;
- c) it would leave advertising of HFSS products on some channels where child audiences are likely to grow as we move towards digital switchover;
- d) it is a relatively inefficient option that would restrict a relatively high number of non-HFSS child impacts for every child impact restricted; and
- e) it had almost no support across the range of consultation responses.

6.4 For these reasons, explained fully in Section 5 and in IA, Ofcom has decided not to adopt Package 3.

Industry Option 4

6.5 Ofcom has also decided not to adopt the industry's Option 4 proposal for the following reasons:

- a) the estimated reduction in the exposure of children under 16 to HFSS advertising of HFSS products would be significantly less than under any of the other options on which Ofcom has consulted;
- b) the monetised benefits are the lowest of all of the policy options analysed by Ofcom (although the estimated revenue lost is also the lowest); and
- c) it would restrict the advertising of non-HFSS foods which goes beyond our regulatory objectives.

6.6 Whilst this option would deliver lower costs and be relatively efficient, for the reasons explained fully in Section 5 and IA, and because it does not meet Ofcom's regulatory

objectives, Ofcom has decided not to adopt industry's Option 4. Since the case in favour of the industry's Option 4 has already been fully put by the FAU and Ofcom has taken the view that it should not be adopted, there is no need to consult further on this Option.

Package 2

- 6.7 The fundamental difference between Package 1 and Package 2 is in the use of differentiation. Package 1 would incorporate the use of a differentiation tool, specifically the FSA's nutrient profiling model as part of the regulatory measure. As indicated in Section 3 above, Ofcom has concluded that it would be an inappropriate restriction of advertisers' right to commercial freedom of speech to prevent the advertising of non-HFSS products and would serve no policy purpose. As such Ofcom believes differentiation should be an essential component of future restrictions.
- 6.8 As Package 2 does not utilise differentiation, and this is the key difference between Package 2 and Package 1, Ofcom has decided not to adopt this package.

Package 1 and pre-9pm ban

- 6.9 The key points of comparison between Package 1 and a pre-9pm ban are:
- the pre-9pm ban delivers a significantly greater reduction in child impacts than Package 1 (both 4-9 and 4-15);
 - the pre-9pm ban delivers significantly higher monetised benefits than Package 1 (both VOL and QALY)
 - Package 1 causes significantly lower revenue loss to broadcasters than the pre-9pm;
 - for Package 1, the benefits exceed the losses to broadcasters under both VOL and QALY measures, whereas for the pre-9pm ban the revenue loss exceeds the benefits based on QALY;
 - significantly more channels would lose more than 5% of their total revenues under a pre-9pm ban than under Package 1;
 - a pre-9pm ban is significantly less targeted as a regulatory tool than Package 1 in terms of the number of other impacts lost per 4-9 or 4-15 year old child impact reduced;
 - in terms of relative efficiency, in order to achieve the increased reduction in child (4-15) impacts between Package 1 (37%) and a pre-9pm ban (82%), an additional £193m pa revenue loss would be incurred by broadcasters (3.2% of total revenue). This increase in costs is greater than the increase of benefits based on QALYs (but is similar to the increase for VOL).
- 6.10 In light of its statutory duties and its human rights obligations Ofcom needs to exercise a judgement as to the proportionality both of its decision and its effect on broadcasters, television audiences, advertisers and others having regard to the

assessed benefits to children's future health³⁷. This duty does not lend itself to a formulaic approach – it requires Ofcom to make a judgement in the light of various considerations that bear upon the issue of proportionality in this case. But reaching a proportionate decision does not mean, as some have argued, that it would be appropriate to disregard the impact on broadcasters in favour of giving an absolute priority to eliminating all HFSS advertising to children.

6.11 Ofcom has taken three key factors into account when considering the proportionality of the regulatory measures:

- the efficiency of the measure in relation to its legitimate aim i.e. the protection of children;
- the relative costs and benefits of the measure;
- the absolute costs of the measure to broadcasters in relation to the modest direct link between television advertising and childhood obesity levels bearing in mind the potential impact on quality and diversity of programming.

Efficiency

6.12 Under Package 1, 2.6 adult impacts would be lost for every 4-9 child impact and 1.3 adult impacts would be lost for every 4-15 child impact. In comparison, under a pre-9pm ban, over four times as many adult impacts for every 4-9 or 4-15 child impact would be lost. Therefore it is clear that Package 1 is a more efficient and targeted regulatory measure than the pre-9pm ban.

Relative cost/benefits of the measure

6.13 The incremental costs of extending restrictions on HFSS advertising beyond Package 1 (i.e. children's airtime and the times around programmes of particular appeal to children) would be disproportionately higher. For example, whereas Package 1 would reduce the amount of HFSS advertising that children aged 4-15 would see by 37%, delivering monetised benefits of £19m-£76m pa (QALY) or £92m-£368m (VOL) at an estimated cost to broadcasters of around £18.3 million, it would cost over eleven times as much (a further £193 million) to deliver the additional reduction of 45%³⁸ and monetised benefits of £42m-£168m pa (QALY) or £203m-£811m pa (VOL) achieved by a pre-9pm ban, representing only just over twice the benefits.

Absolute cost

6.14 Package 1 is estimated to impose costs between £13.3m – £20.8m pa on broadcasters, approximately 0.3% of total revenue. A pre-9pm ban is estimated to impose costs between £184.2m - £224.4m pa on broadcasters, approximately 3.5% of total revenue. These impacts on revenue are likely in turn to have an impact on the viability of some channels and programme quality, e.g. through its effect on programme commissioning.

³⁷ Section 3(3) of the Act says that Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

³⁸

- 6.15 The pre-9pm ban would have a significant impact on a much wider range of channels than Package 1. We estimate that 24 channels (including channels from all categories and 12 music channels) may lose more than 5% of their revenue under the pre-9pm ban, compared with only four (all dedicated children's channels) under Package 1.
- 6.16 In the context of the packages which Ofcom put forward in the March consultation document, much of the comment has focused specifically on the impact on children's programming. As referred to in Section 5 there is not an automatic one-for-one correspondence between programme budgets and the advertising revenue linked to those programmes: different programmes and programme genres have complementary roles to play in terms of the overall shape and composition of a general entertainment channel's schedule and the delivery of commercial impacts for advertisers. However, the airtime around children's programming is closely linked to the delivery of a specific demographic and therefore there might be expected to be a closer link between programme budgets and the advertising revenue around those programmes. Ofcom has therefore focused on the impact on the commissioning of children's programming but it is possible that there might be some offsetting reduction in the budgets for other genres instead. Given the potential scale of the revenue reductions Ofcom would not expect this to lead to a significant impact on the commissioning of other genres.
- 6.17 In the case of Package 1, even though the effect on programme budgets is limited, restrictions could make the provision of children's programming in the UK less commercially attractive and this might have a particular effect on the commissioning of originated children's programmes. (Such impact would necessarily be on independent producers as they are now the only UK suppliers of children's programmes outside BBC Production.) However, we do not accept that such restrictions would necessarily damage plurality and choice in children's programming and prevent the public service remit in this area from being delivered. First, the requirement to broadcast originated children's programmes exists as a distinct regulatory obligation, independent of the commercial attractiveness of such programming and second, broadcasters do not hypothecate the advertising revenue earned around particular programmes to the funding of those programmes, but accept that the profitability of different parts of their schedule differs and shape their investment in the schedule around the limitations of their overall programme budget.
- 6.18 In the case of the pre-9pm ban the financial impact of such a restriction on broadcasters, even the public service broadcasters, would be of a significant level in comparison to their overall programme budgets, the greatest part of which are spent on commissioning originated UK programmes. The level of loss from a pre-9pm ban would for example significantly exceed the amount that commercial public service broadcasters spend on commissioning children's programmes and news together. Such severe restrictions may therefore compromise the delivery of PSB obligations more generally, for example the commissioning of originated UK programmes, in addition to any potential impact on children's programmes.
- 6.19 Ofcom notes that broadcasters are being asked to bear these costs as part of the broader government initiative to tackle childhood dietary imbalance, taking into account that research shows that multiple factors account for childhood obesity, that television advertising is not the most important factor, and may, at most, directly account for 2% of the variation in food choice / obesity. Bearing in mind the acknowledged uncertainties surrounding the estimated value of the costs and benefits, including the chain of assumptions required to create causal links between television advertising and obesity and taking into account the impact of regulatory

measures on programme commissioning, Ofcom considers that the absolute cost to broadcasters of a pre-9pm ban is disproportionately high.

Summary of comparison between Package 1 and pre-9pm ban

- 6.20 As indicated above, a pre-9pm ban would be an inefficient means of targeting children and would lead to a restriction of a large amount of advertising when adults make up the overwhelming majority of the audience and of advertisements that are likely to be targeted at a specifically adult audience. It would be likely to lead to such a significant loss of revenue for broadcasters as to potentially adversely affect the quantity and quality of children's and other programming and one that would not be justified by a QALY based estimate of benefits. However it would reduce very significantly the exposure of children to HFSS advertising. In Ofcom's view, having regard to these factors, and the relatively small part that advertising plays in affecting food preferences, such an intervention cannot be justified. In reaching this view, Ofcom has fully taken into account the widespread support for this option including from the Office of the Children's Commissioner, Scotland's Commissioner for Children and Young People, individuals and consumer and health bodies but considers that a pre-9pm ban cannot be justified on this basis.
- 6.21 Accordingly, Ofcom has decided not to adopt the option of a pre-9pm ban on the advertising of HFSS foods.
- 6.22 On the other hand, Ofcom considers that Package 1 represents a more efficient regulatory measure that does not impose such a high cost on broadcasters and where the benefits (QALY and VOL) exceed the costs. Ofcom therefore considers that of the packages and other options consulted on, for the reasons set out above, Package 1 is the preferred option on the basis of all the evidence it has received and analysis it has done and in light of its statutory duties and regulatory objectives.

Content rules

- 6.23 Ofcom has concluded that revised content rules should be a component of any restrictions and that they should incorporate differentiation based on the FSA's nutrient profiling model for three specific rules relating to advertising techniques (celebrities and licensed characters, promotional offers and nutritional and health claims).
- 6.24 Ofcom is also minded to extend additional protection to primary school children through preventing the most persuasive advertising techniques (celebrities and licensed characters, promotional offers and nutritional and health claims) from being targeted at them. A final decision on this will be made in light of conclusions on the final policy package. Annex 9 contains the revised content rules, reflecting Ofcom's current position.

Implementation issues

- 6.25 As part of the consultation, Ofcom asked a number of questions relating to the way in which any restrictions might be implemented. In addition to inviting views on the general approach to implementation (set out in paragraphs 5.45 to 5.46 of the March document), Ofcom also asked whether dedicated children's channels should be allowed a transition period to comply with the restrictions, and whether any such channels with a low audience share should be exempted from the provisions of Package 3.

General approach to implementation

- 6.26 Anticipating a final statement later in 2006, Ofcom suggested that the new content rules should apply to any campaign conceived after the statement date, with a grace period (of 6 months) for existing campaigns and for new campaigns already in the pipeline with expenditure already incurred. In respect of scheduling or volume restrictions, the proposal was that they would come into effect on 1 January 2007 for immediate effect.
- 6.27 Consumer groups, health promotion bodies and others supported these proposals; one suggested that no grace period was required. Additional suggestions included a proposal for a high level monitoring body. Those advertisers, manufacturers and broadcasters who commented said that more time was needed. Some suggested that implementation of the revised advertising content rules be deferred until mid-2007. Others pointed out that advertising campaigns were planned up to 18 months ahead; some argued for deferring any scheduling or volume restrictions until mid-2007 or the beginning of 2008.

Ofcom's assessment

- 6.28 Ofcom notes that it has been a matter of public knowledge and debate for some time that it intends to introduce new restrictions on food advertising and interested parties have had ample opportunity to take account of this in their business planning. In light of this, Ofcom has decided:
- the scheduling restrictions should come into force with effect from 1 April 2007,
 - the new content rules should come into force for new campaigns with effect from the date on which Ofcom's final statement is made. Ofcom is keen for this to happen as soon as possible and will be working with BCAP to finalise the new wording as soon as possible. In relation to any campaigns that are underway or in planning a further period of approximately 6 months from the date on which the new wording of the content rules is announced will be allowed. However, all television advertising will be required to comply with the new content rules on the advertising of food and drink products to children by 1 July 2007 latest.

Treatment for dedicated children's channels

- 6.29 Ofcom asked for views on whether there was a case for exempting low child audience and cable channels from the volume and /or scheduling restrictions set out in Package 3. Health promotion bodies wanted a consistent approach and feared that exemptions might represent a loophole in the regulation. While opposed to Package 3, advertisers and some food manufacturers said that they would support an exemption. The opinions expressed by broadcasters were more mixed, but supported an exemption.
- 6.30 In the consultation document Ofcom suggested that in relation to Packages 1 and 2, there should be a three-year transition period for dedicated children's channels to introduce the scheduling restrictions, and invited views on whether this would be appropriate. Most advertisers, broadcasters, and food manufacturers favoured a transitional period; in general, academics, consumer groups and health promotion bodies did not.

Ofcom's assessment

- 6.31 Having considered the consultation responses, Ofcom does not consider that it would be appropriate to exempt low audience channels from compliance with volume restrictions on HFSS advertising, for a variety of reasons: it would discriminate against channels with larger audience shares; the audience shares of smaller channels could grow over time and it would mean that children who viewed such channels might not benefit from lower exposure to HFSS advertising; advertisers might switch to these channels. However, given that Ofcom has decided not to adopt Package 3, this issue is now of no significance.
- 6.32 Ofcom remains of the view that, given that revenue from food advertising accounts for a significant proportion of the revenue of children's channels, and their lack of ability to mitigate, it would be appropriate to allow a transitional period. Bearing in mind that the overall aim of the restrictions is to reduce the impact of advertising on children, we also consider that the transition should be structured to allow a progressive reduction in the volume of such advertising on children's channels. In reaching this view, we have taken account of consultation responses, which support the view that children's channels are unlikely to be able to mitigate the loss of that revenue to the extent that Ofcom had previously considered. We set out our decision in 6.40(c).
- 6.33 For the avoidance of any doubt, Ofcom considers that the position in relation to implementation of revised content rules should be the same for dedicated children's channels as for any other channel.

Treatment of channels broadcasting to outside the UK

- 6.34 In response to the consultation a number of broadcasters licensed in the UK to broadcast children's channels in other countries ("overseas channels") submitted that those channels should be exempt from the restrictions on food advertising adopted by Ofcom. They said that if they were made subject to restrictions on food advertising, they would be in a disadvantageous position in relation to broadcasters transmitting in the same non-UK countries who are not licensed in the UK and who would therefore not be subject to the same restrictions. They further said that, there would be little or no benefit to children in those other countries as their competitor broadcasters would not adopt the same restrictions on a voluntary basis.

Ofcom's assessment

- 6.35 Ofcom's starting point is the so-called, "country of origin principle" under EC law which provides that it is primarily the responsibility of a State from whose jurisdiction a broadcaster broadcasts to regulate that broadcaster's activities. This ensures, amongst other things, that all broadcasters are properly regulated and that the 'costs' of regulation are determined by reference to the State from which a broadcaster chooses to broadcast, rather than by reference to the States to which it chooses to broadcast. This principle is enshrined in the TWF Directive (as amended); under Article 2 of TWF each member state shall ensure that all broadcasts under its jurisdiction comply with "the rules of the system of law applicable to broadcasters intended for the public in that member state". The principle is intended to ensure that all broadcasters are properly regulated and that the 'cost' of providing broadcast services is determined by the state in which the broadcaster is resident and does not vary according to which state a broadcaster broadcasts from.

- 6.36 Restrictions on free movement of services must also be justified under EC law in order to comply with Article 49 of the EC Treaty. Ofcom has therefore considered whether regulating channels aimed at overseas markets would be justified and proportionate under EC law. In addressing this question, Ofcom has taken into account the general importance of adhering to country of origin principle, which is designed to help protect the free movement of services as well as to assist with the harmonisation of EC law. Furthermore, this is a context in which EC law requires positive action to be taken by regulators, to protect children from the harmful effects of television advertising (Article 16 of the TWF Directive, which imposes a substantive obligation under EC law to take action to protect the health of minors from the effects of advertising).
- 6.37 Ofcom has also had regard to the fact that its obligations under the 2003 Act are not limited to protecting children in the UK. Ofcom has a responsibility to protect all children affected by advertising broadcast by broadcasters within its jurisdiction.
- 6.38 Ofcom has therefore taken into account the available evidence concerning children's health at both a national and European level, and the duties imposed by Article 16 of the TWF Directive and its responsibilities under the 2003 Act.
- 6.39 Ofcom is not in a position, without incurring disproportionate costs, to assess what benefits may result from advertising restrictions overseas. However, Ofcom has taken into account the international evidence that there is a link between negative health effects on children and television advertising of food and drink. Equally, Ofcom has taken into account the submissions of some of the consultees who addressed this point to the effect that not exempting overseas broadcasting would result in such broadcasters relocating. Given the constraints, we have therefore limited our analysis of the impact to examining the likely costs on broadcasters, using data provided by licensees (see the Impact Assessment at Annex 7). The analysis shows that the impact on such channels would be more significant than on UK-oriented channels, as there would be little opportunity to mitigate the lost revenue.
- 6.40 Having regard to this, and given that such channels have chosen to license in the UK, it is Ofcom's view that restrictions on food advertising to children should not be limited to broadcasters with a UK audience share. As one broadcaster has pointed out, it is open to such channels to seek licences elsewhere if they conclude that it would be more advantageous to their commercial interests to do so. Ofcom therefore proposes that the scheduling restrictions and relevant rules on advertising practices should apply to channels aimed outside the UK in the same way as they apply to channels aimed at UK audiences. As part of this, we propose that children's channels aimed outside the UK could benefit from the same phase-in period as that which UK-oriented children's channels will benefit from, provided that they demonstrate to Ofcom's satisfaction that they have robust processes in place for complying with this requirement. Ofcom's detailed proposals are set out in Section 7.

Ofcom's conclusions

- 6.41 **For the reasons set out in Section 5, and above, Ofcom has concluded that Packages 2 and 3, industry's Option 4 and a pre-9pm ban should not be adopted.**
- 6.42 It has further concluded that the following elements should form part of the package of measures to restrict the advertising of food and drink products to children:

- a) scheduling restrictions will be confined to foods that are assessed as high in fat, salt and sugar (HFSS) by reference to the FSA's NP scheme. It will be the responsibility of licensees to ensure that advertisements comply with this requirement;
- b) HFSS advertisements should not be shown in or around programmes aimed at children, or in or around programmes that are likely to be of particular appeal to children (i.e. those where the children's audience, indexed against the all-individuals audience, produces an index of 120 or greater)³⁹;
- c) dedicated children's channels will be allowed a transitional period until 31 December 2008 during which they will be permitted to continue to broadcast some HFSS advertisements. For the period from when the restrictions take effect until 31 December 2007 on each dedicated children's channel not more than 75% of the average minutage devoted by that channel to HFSS advertising in calendar year 2005 shall be allowed. For the period from 1 January 2008 until 31 December 2008 on each dedicated children's channel not more than 50% of the average minutage devoted by that channel to HFSS advertising in calendar year 2005 shall be allowed. From 1 January 2009 onwards, the scheduling restrictions will apply in full to dedicated children's channels. Ofcom will expect dedicated children's channels to ensure appropriate compliance measures to ensure compliance with its decision. On this basis, dedicated children's channels will be permitted a higher percentage of HFSS advertising in the period up to 31 December 2007 than was envisaged in the March 2006 consultation document. This will mitigate the effects of Ofcom's decision being made at the start of an "advertising year";
- d) all other channels will be required to implement the scheduling restrictions to advertising on all channels with effect from the end of March 2007;
- e) the restrictions will apply to all channels licensed in the UK, irrespective of whether they target the UK market or an overseas market;
- f) revised content rules will apply to all food and drink advertising targeted at children, irrespective of when it is scheduled, with the exception of three specific rules (celebrities and licensed characters, promotional offers and nutritional and health claims) which will apply only to advertising for HFSS products;
- g) Ofcom is minded to decide that additional protection should be offered to primary school children by preventing the most persuasive advertising techniques (celebrities and licensed characters, promotional offers and nutritional and health claims) from being targeted at them⁴⁰; The position on this will be confirmed following the further consultation that is taking place;
- h) the new content rules will come into force for all campaigns which are developed after the date on which Ofcom makes its final statement. The new rules will apply to all campaigns from a date approximately 6 months later, anticipated to be 1 July 2007.

6.43 Further, as referred to above, Ofcom considers that of the packages and other options considered, Package 1 is the preferred way forward on the basis of all the evidence it has received, the analysis it has done and in the light of its statutory

³⁹ The provisional wording of the proposed scheduling restrictions is set out in Annex 9

⁴⁰ The provisional wording of the revised content rules is set out in Annex 9

duties and regulatory objectives. However, Ofcom considers that its regulatory objectives may be even better fulfilled by some extensions to Package 1, described at Section 7 below.

- 6.44 Ofcom notes that the Government plans to review the extent to which these restrictions and action taken by advertisers and manufacturers change the nature and balance of advertising on television. Ofcom will monitor compliance with the restrictions, and will invite BCAP to keep the operation of the advertising practice rules under review.

Section 7

Further options

Background

- 7.1 As indicated in Section 6, having decided not to adopt the other options, Ofcom considers that of the packages and other options considered, Package 1 is the preferred way forward on the basis of all the evidence it has received and analysis it has done and in light of its statutory duties and regulatory objectives.
- 7.2 However, whilst Package 1 does contain elements that should form part of future restrictions on the advertising of HFSS products and in Ofcom's view, would meet its regulatory objectives, we have considered carefully whether there are any changes to Package 1 which could be made which could better fulfil Ofcom's regulatory objectives in line with the consultation responses we have received and further evidence we have obtained. In this section therefore, we consider possible changes to Package 1.

Possible options for scheduling rules

- 7.3 In identifying possible changes to Package 1, Ofcom has considered three further permutations which we have called Modified Package 1, Option 5 and Option 6. In doing so we have had regard to the responses from consultees, to the outcome of the OLR research, as well as to the revised regulatory objectives. In particular, we note that:
- a) many consultees favoured a pre-9pm ban. For the reasons set out in Section 6, we consider that a pre-watershed ban would not meet Ofcom's regulatory objectives and would be disproportionate. However, we have considered whether there are changes that could be made to Package 1 that would deliver some of the further beneficial effects associated with a pre-watershed ban, while reducing the impact of the measure on adult viewers and the broadcasters and advertisers;
 - b) many consultees wanted older children to benefit from restrictions on scheduling and revised content rules; and
 - c) the deliberative research indicated that, in addition to allowing the continued advertising of healthier foods, most participants wanted to see the scheduling restrictions extended to cover advertising around programmes aimed at or of special appeal to children up to the age of 16. Participants suggested extensions from 6pm to 8pm or 9pm, to include times when large numbers of children were likely to be watching. There was also strong support for strengthening the content rules to extend their protection to older children.
- 7.4 Against this background, Ofcom has considered three different permutations aimed at further reducing the impact of HFSS advertising on children up to 16 and in the evening schedule:
- a) Modified Package 1 would prevent HFSS advertising in pre-school children's programmes and in children's programmes. Additionally, it would prevent HFSS advertising around programmes of particular appeal to children aged 4 to 15, in contrast to children aged 4 to 9 as proposed in Package 1;

- b) Option 5 would be the same as Modified Package 1, but would also include an additional prohibition on HFSS advertising and sponsorship from 4pm to 6pm.
- c) Option 6 would be the same as Option 5, but extend the additional prohibition on HFSS advertising and sponsorship further from 4pm to 8pm.

7.5 We have estimated the likely effect of each of these permutations on the reduction in HFSS impacts, on the amount of advertising revenue at risk (both before and after mitigation measures have been taken into account, and by type of channel), and the benefits (in terms of both the techniques for assessing the Value of Life – VOL - and the quality adjusted life years – QALY). The methodology used was the same as for all the other options analysed. Ofcom's analysis of these permutations is described in detail in the IA at Annex 7 and a summary of the high level figures is given below in Table 7.

Effect of extending indexing

7.6 Common to Modified Package 1, Option 5 and Option 6 is the proposed extension of scheduling restrictions to programmes of particular appeal to children aged 4-15 instead of 4-9, as proposed in the March 2006 consultation document. The effects of this proposed change differ by channel type. Based on 2005 schedules for each channel, Ofcom has analysed which programmes index at over 120 for both 4-9 year olds and 4-15 year olds.

7.7 On ITV and Five, most programmes which index above 120 for either 4-9 year olds or 4-15 year olds are captured in children's airtime restrictions. From the perspective of these broadcasters therefore there is little practical difference between the two forms of indexing as largely the same programmes are affected by both measures. This is also true for many other channels. For children's channels the change in indexing has no effect since HFSS advertising is already excluded from the channel in its entirety. For Channel 4, and channels like Sky One, which show some programming which is of particular appeal to older children but have little specified children's airtime, the use of 4-15 indexing has a more pronounced effect than 4-9 indexing.

7.8 For some music channels however, use of 4-15 indexing has significantly different effects to use of 4-9 indexing. These channels contain no programmes that are made for children and generally have few programmes which index at over 120 for 4-9 year olds. However, some of the music channels' schedules contain a large volume of programmes which index at over 120 for 4-15 year olds. There are also some film channels which at certain times of day currently show films which attract an audience rich in 4-15 year olds. The reduction in the amount of HFSS advertising seen by children which is produced by Modified Package 1 as compared with Package 1 comes to a large extent from the effect on the music channels.

Table 7: Estimate of revenue loss by policy option (£m pa)*

Type of Channel	Package 1	Package 2	Package 3	Pre-9pm Ban	Option 4	Modified Package 1	Option 5	Option 6
All Channels	17.6	24.0	72.7	210.5	12.0	22.6	39.5	107.2
PSB	9.9	14.1	57.6	164.9	8.7	10.4	23.1	80.0
DCC	5.2	6.4	3.5	5.1	3.3	5.2	5.2	5.2
Music	0.0	0.1	0.9	5.1	0.0	2.4	2.7	3.4
Other Cab-sat	2.4	3.5	10.7	35.5	0.0	4.6	8.4	18.6

* This excludes the impact on channels licensed in the UK broadcasting to overseas markets (see Impact Assessment paragraphs 3.28-3.32)

7.9 Table 7 suggests that Modified Package 1, Options 5 and 6 all have an impact on music channels and to a lesser extent other cable and satellite channels which is considerably greater than the effect of Policy Packages 1, 2 and 3, each of which had very little effect on the revenues from music channels. Within the range of music channels available, the impact of the options analysed on individual channels varies considerably, because of the nature of their audience and programming, ranging up to 8.8% of revenue for the channel most affected by Modified Package 1. There is a similar effect on music channels produced by Options 5 and 6.

7.10 Ofcom notes that the estimated impact of the scheduling restrictions on affected music channels on average (but not for some channels) would be less than the effect on children's channels, and that music channels would have greater flexibility than children's channels to schedule HFSS advertising around programmes that are not of particular appeal to children. Ofcom therefore proposes, subject to the outcome of the further consultation (see below), that the scheduling restrictions should apply to music channels in the same way as other channels, and that there should be no exemptions and no phase-in period.

Modified Package 1

7.11 Modified Package 1 would ban HFSS advertising and sponsorship in pre-school children's programmes and in children's programmes. It would also ban HFSS advertising and sponsorship around programmes of special appeal to children aged 4 to 15, as against 4 to 9 in Package 1. It would also incorporate amended content rules designed to cover advertisements for HFSS food and drink products targeted at children up to primary school age.

Table 8: Summary of the Impact of Modified Package 1

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Average revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All channels	51	41	17.4	22.6	26.5	0.4%	15.3%
PSB	20	17	7.3	10.4	12.4	0.3%	0.7%
Children's	100	100	4.6	5.2	5.9	4.7%	15.3%
Music	41	44	2.1	2.4	2.7	1.9%	8.8%
Others	22	23	3.4	4.6	5.4	0.2%	6.3%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
9	1.4	3.0	21	42	84	101	203	405

7.12 Table 8 above shows that Modified Package 1 would lead to a **51%** or **41%** reduction in 4-9 or 4-15 HFSS impacts respectively. Because the restrictions under Modified Package 1 are focused on programmes made for children and also programmes of particular appeal to children, the restrictions are relatively efficient at removing child impacts without impacting heavily on adult impacts. For each 4-9 or 4-15 HFSS impact restricted, **3.0** or **1.4** other impacts respectively would be restricted hence the impact on broadcaster revenues is relatively limited.

7.13 It would have an estimated cost of **£17.4m - £26.5m pa** compared to an estimated benefit of **£21m – £84m pa (QALY)** or **£101m – £405m pa (VOL)**. A little less than half of this cost (£7.3m - £12.4m pa) would fall on PSBs which would account for about **0.3%** of their revenues. The cost to children's channels would be just under 5% of their total revenues with one children's channel estimated to lose **over 15% of its total revenue**. The cost to music channels would be about **1.9% of their revenue** with one music channel estimated to lose almost 9% of its revenue. Nine channels are estimated to lose more than 5% of their revenue.

Option 5

7.14 This package would exclude all advertising and sponsorship of HFSS foods during children's airtime and during programmes which are of particular interest to 4-15 year old children and also between 4pm and 6pm. It would also include the BCAP content restrictions.

Table 9: Summary of the Impact of Option 5

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Average revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All channels	56	46	30.1	39.5	46.1	0.6%	15.3%
PSB	28	23	16.8	23.1	27.3	0.8%	1.4%
Children's	100	100	4.6	5.2	5.9	4.7%	15.3%
Music	47	49	2.4	2.7	3.1	2.2%	8.8%
Others	31	32	6.3	8.4	9.9	0.3%	6.3%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
9	2.5	4.9	24	47	94	114	228	457

7.15 Table 9 above shows that Option 5 would lead to a 56% or 46% reduction in 4-9 or 4-15 HFSS impacts respectively. Because Option 5 includes some limited scheduling restrictions in adult airtime (between 4 and 6pm), the measure is rather less efficient than Modified Package 1 in terms of the effect of adult impacts. For each 4-9 or 4-15 HFSS impact restricted, 4.9 or 2.5 other impacts respectively would be restricted hence the impact on broadcaster revenues is correspondingly larger.

7.16 It would have an estimated cost of £30.1m - £46.1m pa compared to an estimated benefit of £24m – £94m pa (QALY) or £114m – £457m pa (VOL). Almost 60% of this cost (£16.8m - £27.3m pa) would fall on PSBs which would account for about 0.8% of their revenues. The cost to children's channels would be just under 5% of their total revenues with one children's channel estimated to lose over 15% of its total revenue. The cost to music channels would be about 2.2% of their revenue with one music channel estimated to lose almost 9% of its revenue. Nine channels are estimated to lose more than 5% of their revenue.

Option 6

7.17 This package would exclude all advertising and sponsorship of HFSS foods during children's airtime and during programmes which are of particular interest to 4-15 year old children and also between 4pm and 8pm. It would also include the BCAP content restrictions.

Table 10: Summary of the Impact of Option 6

	Reduction in HFSS Impacts (%)		Estimated revenue loss (£million pa)			Average revenue loss as % of total revenue	Highest % loss for a channel in each category
	4 - 9	4 - 15	Low	Central	High		
All channels	68	60	99.5	107.2	114.9	1.8%	15.3%
PSB	49	44	74.6	80.0	85.3	2.6%	2.9%
Children's	100	100	4.6	5.2	5.9	4.7%	15.3%
Music	57	56	2.9	3.4	3.8	2.7%	9.3%
Others	48	47	17.3	18.6	19.9	0.7%	6.3%

Number of channels with >5% revenue loss	Efficiency		Benefits (£million pa)					
	Other impacts per 4-15 HFSS impact	Other impacts per 4-9 HFSS impact	Quality of Life (QALY)			Value of Life (VOL)		
			Low	Central	High	Low	Central	High
11	4.0	8.0	31	61	122	148	296	592

- 7.18 Table 10 above shows that Option 6 would lead to a 68% or 60% reduction in 4-9 or 4-15 HFSS impacts respectively. Because Option 6 includes some more extensive scheduling restrictions in adult airtime (between 4 and 8 pm), the measure is significantly less efficient than Modified Package 1 in terms of the effect of adult impacts. For each 4-9 or 4-15 HFSS impact restricted, 8.0 or 4.0 other impacts respectively would be restricted hence the impact on broadcaster revenues is correspondingly larger.
- 7.19 It would have an estimated cost of £99m - £115m pa compared to an estimated benefit of £31m - £122m pa (QALY) or £148m - £592m pa (VOL). Around 75% of this cost (£75 - £85m pa) would fall on PSBs which would account for about 2.6% of their revenues. The cost to children's channels would be just under 5% of their total revenues with one children's channel estimated to lose over 15% of its total revenue. The cost to music channels would be about 2.7% of their revenue with one music channel estimated to lose over 9% of its revenue. Eleven channels are estimated to lose more than 5% of their revenue.

Comparison of Options

- 7.20 As the comparison of options in Table 11 below shows (see Impact Assessment for full discussion of table), all three of the new options would reduce the number of HFSS advertising impacts by more than the three original packages, though the reduction achieved by Modified Package 1 is only 2% more for 4-9 year olds and 4% more for 4-15 year olds than that that delivered by Package 1. As expected, the reduction in impacts is greater for Options 5 and 6, as these would restrict advertising in the early evening. The costs and benefits would also be greater.

Table 11: Summary of the costs, benefits and efficiency of the policy options

	Reduction in HFSS Impacts (%)		Estimated revenue loss*		Highest % loss for a channel	Channels with >5% revenue loss	Efficiency: other impacts per HFSS impact		Benefits* (£m pa)	
	4 - 9	4 -15	(£m pa)	(%)			4-15	4-9	QALY	VOL
Package 1	49	37	17.6	0.3	15.3	4	1.3	2.6	38	184
Package 2	49	37	24.0	0.4	18.5	6	1.7	3.1	<38	<184
Package 3	44	36	72.7	1.2	12.3	6	5.0	9.2	<37	<179
Pre-9pm Ban	89	82	210.5	3.5	15.3	24	5.5	11.4	84	406
Option 4	30	21	12.0	0.2	12.3	2	2.0	3.3	<22	<106
Modified Package 1	51	41	22.6	0.4	15.3	9	1.4	3.0	42	203
Option 5	56	46	39.5	0.6	15.3	9	2.5	4.9	47	228
Option 6	68	60	107.2	1.8	15.3	11	4.0	8.0	61	296

Note: This excludes the impact on channels licensed in the UK broadcasting to overseas markets (see Impact Assessment paragraphs 3.28 – 3.32)

* This table shows the central estimates of the costs and benefits – low and high estimates are shown in the discussion of individual policy options above.

- 7.21 If efficiency of the three new options (Modified Package 1, Option 5 and Option 6) is compared, as measured by the number of adult or non-HFSS impacts they affect, it is clear that efficiency diminishes as the scheduling restrictions are extended into the evening schedule. They range from an efficiency ratio of 1.4 for Modified Package 1, to 2.5 for Option 5 and 4.0 for Option 6. This is not unexpected – the ratio of adults to children over the evening is high - evening audiences are predominantly made up of adults which means that adult impacts would be heavily affected by an extension of scheduling restrictions. For instance, for every child under 16 watching an advertisement during Coronation Street or Emmerdale, there are about 10 adults.
- 7.22 The corollary of this is that the economic efficiency of the options also diminishes as scheduling restrictions are extended into adult airtime. While Modified Package 1 would reduce children’s impacts by 51% at an estimated cost to broadcasters (after mitigation) of £23m, the cost of the further 5% cut in children’s impacts delivered by Option 5 is an additional £9m, or 39% more than the cost of Modified Package 1. The incremental cost of Option 6 over Modified Package 1 is even higher – the extra 16% cut in children’s impacts would cost £57m more, or 348% more than the cost of Modified Package 1. As a result, the costs of Option 6 exceed the benefits on a QALY measure.
- 7.23 Having regard to all its duties, its regulatory objectives and all the evidence and analysis to date, Ofcom considers that Option 6 would not be appropriate on the grounds that the costs are disproportionate to the benefits, and that Modified Package 1 should be preferred to Option 5 on the grounds that the modest incremental benefits delivered by Option 5 (a further 5% reduction in advertising impacts) do not justify the significant additional costs, nor the intrusion of restrictions in adult airtime.
- 7.24 Comparing Modified Package 1 with Package 1, Modified Package 1 would restrict 2% more 4-9 impacts and 4% more 4-15 impacts, but would increase the total revenue loss by £5m pa. About half of this extra revenue loss arises from music channels - which move from a 1% or 2% reduction in HFSS impacts (4-9 or 4-15 respectively) to a 41% or 44% reduction in HFSS impacts. This is reflected in a large increase (from 0% to 1.9%) in the average revenue loss for Music channels (with other channel categories only showing very small increases) and one Music channel

facing an 8.8% revenue loss. Package 1 is slightly more efficient, but not to any significant extent. The benefits of Modified Package 1 are slightly higher reflecting the small increase in impacts restricted.

Section 8

Issue for consultation

Proposed option

8.1 Balancing the revised regulatory objectives of:

- a) reducing significantly the exposure of children under 16 to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products;
- b) enhancing protection for both older and younger children as well as parents by appropriate revisions to advertising content standards, so as to reduce children's emotional engagement with HFSS advertisements, and to reduce the risk that children and parents may misinterpret product claims and to reduce the potential for pester power;
- c) avoiding disproportionate impacts on the revenues of broadcasters;
- d) avoiding intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages; and
- e) ensuring that any measures that are put in place are appropriate and sufficiently timed to enable Government to observe changes to the nature and balance of food promotion by early 2007,

Ofcom's preferred package of restrictions is Modified Package 1, which amends Package 1 through extending the restriction on HFSS advertising from programmes of particular appeal to children aged 4-15 (from 4-9).

8.2 Accordingly Modified Package 1 would comprise:

- No HFSS advertising to be shown in or adjacent to programmes made for pre-school children;
- No HFSS advertising to be shown in or adjacent to programmes specifically made for children;
- No HFSS advertising to be shown in or adjacent to programmes of particular appeal to children of 4-15 years old;
- No sponsorship by HFSS products of programmes affected by the above restrictions.

8.3 Modified Package 1 would also include revised content rules.

8.4 In preferring a package which extends the restrictions to older children, Ofcom has had particular regard to those consultation responses that drew attention to research suggesting that, while older children may have a greater understanding of the persuasive intent of advertising, they remain susceptible to its influence and are more likely to be able to buy HFSS products for themselves. We also accept that where children become obese, this often becomes apparent in older children, though this is likely to be due in part to food preferences determined when they were

younger. In addition, we note that the food preferences of older children may influence those of younger siblings.

- 8.5 Ofcom's view is that the extension of scheduling restrictions to cover children aged up to 16, and to include programmes of particular appeal to such children, as well as those targeted at that age group will:
- a) reduce the volume of HFSS advertising seen by children of 4-9 years old by 51% and the volume of HFSS advertising seen by 4-15 years old by 41% compared with the position in 2005. Given that 4-15 impacts in 2005 were already 18% lower than in 2003, the outcome of Modified Package 1 would represent a substantial (52%) change in the nature and balance of food advertising to children on television from 2003 levels;
 - b) deliver benefits to children's health of the order of £42m per year (QALY) or £203m per year based on VOL measures;
 - c) have an impact on broadcasters' revenues which, while substantial, is, in Ofcom's judgement, not disproportionate;
 - d) in particular have a relatively significant impact on the revenues of music channels. In summary, the impact of Modified Package 1 on the revenues of music channels is approximately £2.5m pa or almost 2% of their revenue on average. A full analysis of this impact is set out in the Impact Assessment;
 - e) still allow some HFSS advertising during adult programming, provided that it does not occur in and around programmes of special appeal to children, but such advertising would have to comply with revised content rules to limit its appeal to children.

In light of the impact of Modified Package 1 in particular on the revenues of music channels, Ofcom is seeking views on Modified Package 1 in so far as it extends the restrictions contained in Package 1 to children up to 16.

- 8.6 Ofcom proposes a consultation period of 4 weeks for this further consultation. While this period is shorter than usual, we believe that the shortened period is justified. This is a further consultation on particular aspects of an area which has been covered in detail in the March consultation; the subject matter of this further consultation is limited and parts are of particular significance to a limited number of licensees, in particular the music channels; there is a need to issue a final statement as early as possible in 2007 in order to provide certainty on the regulatory regime and to meet the government's objective of achieving a change in the nature and balance of food advertising to children by early 2007.
- 8.7 Responses to this consultation should be submitted by 5pm on 15 December 2006 and should be limited to matters relevant to Ofcom's consideration of the consultation question raised in this further consultation. Respondents are asked not to reiterate points or responses which have already been made in response to the earlier consultation and which Ofcom has already considered. Ofcom will take all responses into account in arriving at a decision on the questions raised in this further consultation and intends to publish a final statement on the matters raised here as early as possible in 2007.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 15 December 2006**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/foodads_new/howtorespond/form, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response coversheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email foodadvertising@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Julia Richards
Floor 5
Content & Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3806
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include a direct answer to the question asked in this document, which is listed at Annex 4. It would also help if you can explain why you hold your views.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Ian Blair on 020 7981 3880.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response coversheet that this is acceptable).

- A1.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.
- A1.10 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.12 Following the end of the consultation period, Ofcom intends to publish a statement in January 2006.
- A1.13 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.14 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.15 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.16 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your coversheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation question

In light of the impact of Modified Package 1 in particular on the revenues of music channels, Ofcom is seeking views on Modified Package 1 in so far as it extends the restrictions contained in Package 1 to children up to 16.

Annex 5

Summary of consultation submissions and Ofcom's response

Introduction

A5.1 Ofcom received 1097 responses to its consultation. This summary lists the respondents and summarises the responses, some of which were confidential. In addition, the summary includes the outcome of the deliberative research.

List of Respondents

- Co-regulator
 - BCAP
 - Advertising Advisory Committee
- Academics
 - Association for the Study of Obesity
 - The British Psychological Society
 - National Union of Teachers
 - School Food Trust
 - University of Liverpool
- Advertising interests
 - Advertising Association
 - Food Advertising Unit
 - Institute of Practitioners in Advertising
 - IBSA – The Voice of British Advertisers
 - Mediavest Manchester Ltd
 - Mindshare Media Ltd
 - SVP McCann Erickson
 - Zenith Optimedia
- Broadcasters
 - Broadcast Advertising Clearance Centre

- Channel 4
- Five
- Flextech
- GMTV
- ITV
- Jetix Europe Ltd/Nickelodeon/Turner Broadcasting – joint response
- Programme Producers
 - BAFTA Children’s Committee
 - PACT
- Consumer/citizen Groups
 - Barnardo’s
 - Children’s Food Bill Coalition (Sustain)
 - The Food Commission
 - The Food Ethics Council
 - Foodaware
 - General Consumer Council for Northern Ireland
 - Kids Inc
 - National Children’s Bureau
 - National Consumer Council
 - National Family and Parenting Institute
 - National Federation of Women’s Institutes
 - Netmums
 - Ofcom Advisory Committee for Northern Ireland
 - Ofcom Advisory Committee for England
 - Public Voice
 - Trading Standards Institute
 - Voice of the Listener and Viewer
 - Welsh Consumer Council

- Which?
- Food Manufacturers and Retailers
 - Biscuit, Cake, Chocolate and Confectionery Association
 - British Cheese Board
 - British Retail Consortium
 - Cadburys Schweppes
 - Coca-Cola
 - Co-operative Group
 - Dairy UK
 - Ferrero UK Ltd
 - Food and Drink Federation
 - GlaxoSmith Kline
 - Kellogg's
 - Kraft Foods UK & Ireland
 - Masterfoods
 - McDonald's Restaurants Ltd
 - Pepsico UK
 - RHM
 - Sainsbury's
 - Snack Nut and Crisps Manufacturers Association
 - The Dairy Council
 - Unilever
 - United Biscuits
 - Vimto
 - Wiltshire Farm Foods
 - Wrigley Company Ltd
- Government/Government agencies
 - All-Party Group on Heart Disease

- Food Standards Agency
- Health Promotion Agency for Northern Ireland
- Office of the Children's Commissioner
- Safefood
- Scotland's Commissioner for Children and Young People
- Welsh Assembly Government
- Health and Medical Groups
 - British Dental Association
 - British Dietetic Association
 - British Heart Foundation
 - British Nutrition Foundation
 - Caroline Walker Trust
 - Cancer Research UK
 - Cheshire and Merseyside Public Health Network
 - Children's Clinic, Brighton
 - Consensus Action on Salt and Health
 - Diabetes UK
 - Heart of Mersey
 - Human Nutrition Research, Medical Research Council
 - International Obesity Task Force
 - Irish Heart Foundation
 - National Heart Forum
 - National Heart Alliance
 - National Oral Health Promotion Group
 - National Youth Agency
 - NHS borders, health promotion
 - Northern Ireland Chest, Heart and Stroke
 - Royal College of Physicians

- Royal Society of Health
- Scientific Advisory Committee on Nutrition
- The Nutrition Society
- UK Public Health Association
- Weight Concern
- Private Individuals
 - 655 responses were received from private individuals. The majority of these were from individuals who may have been encouraged to submit responses by campaigns by consumer groups. These responses were however taken into account as representing genuine and significant expressions of a general opinion.

Summary of responses

A5.2 The views of respondents on key themes emerging from Ofcom’s consultation exercise are summarised below. The responses to the questions concerning the Regulatory Impact Assessment are dealt with in the Impact Assessment at Annex 7. All of the responses that were not confidential have been placed on Ofcom’s website⁴¹. A list of the respondents and the abbreviations used to refer to them in this document is set out in the Glossary at Annex 6.

A5.3 Some respondents chose to make their responses confidential. We have taken their comments into account, as we have in the case of the large number of responses received from individuals responding to requests from Sustain, Which? and the National Federation of Women’s Institutes, and responses from individuals which do not appear to be linked with organised campaigns. Several organisations from different sectors responded on their own behalf, and also associated themselves with responses from coalitions or trade associations.

Regulatory objectives

A5.4 In its March 2006 document, Ofcom explained that, in considering what additional regulation might be appropriate, it needed to balance a variety of considerations, including several grounded in statute. These included the interests of children, the views and opinions of consumers, the interests of different ethnic communities, plurality and choice, the scope for self-regulation, and the complementary effect of other initiatives.

A5.5 Ofcom said that, in the light of the evidence and its duties, it considered that the aims of further regulation should be to balance several regulatory objectives:

- a) to reduce significantly the exposure of young children to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products. We proposed that this intervention should focus on children under 10;

⁴¹ See <http://www.ofcom.org.uk/consult/condocs/foodads/responses/>

- b) to enhance protection for both older and younger children as well as parents by appropriate revisions to advertising content standards, so as to reduce children's emotional engagement with HFSS advertisements, and to reduce the risk that children and parents may misinterpret product claims and to reduce the potential for pester power;
- c) to avoid disproportionate impacts on the revenues of broadcasters;
- d) to avoid intrusive regulation of advertising during adult airtime, given that adults are able to make informed decisions about advertising messages; and
- e) to ensure that any measures that are put in place are appropriate and sufficiently timed to enable Government to observe changes to the nature and balance of food promotion by early 2007.

Consultation Question: 'Do you agree that the regulatory objectives set out in paragraph 5.2 [of the March 2006 document] are appropriate?'

A5.6 We summarise the responses below as they relate to the main themes in the proposed regulatory objectives.

General comments

A5.7 With few exceptions, food manufacturers, broadcasters and advertisers accepted the regulatory objectives in general terms (AA, Cadbury, FAU, FDF, Flextech, Kellogg's, Kraft, ISBA, MC, PepsiCo, UB, Vimto and two broadcasters), but several argued that voluntary action had already substantially delivered the objective of reducing the impact of food advertising on young children, and that in other areas, Ofcom should attach considerable weight to the disproportionality of regulating advertising in 'adult' airtime, particularly given the impact on advertisers and broadcasters (FAU, IPA, Kraft). The AA supported the objectives, but said that Ofcom's proposed measures would not achieve them.

A5.8 However, as indicated below, many respondents from consumer groups, health promotion groups, academics and public sector bodies, including the Office of the Children's Commissioner, took issue with the objectives, arguing that Ofcom was wrong to focus proposals to restrict the scheduling and / or volume of advertising to times when younger children were the main audience, and should also have regard to other times when large numbers of children were watching, as well as to the vulnerability of older children. Some felt that the health benefits and costs had been underestimated (UKPH, SACN, NS, RSH) as they did not take into account the benefits to adults or dental costs for example.

A5.9 A number of respondents noted that Ofcom was not applying the precautionary principle as advocated by the FSA and the Chief Medical Officer (CASH, CFBC, NHF, Sainsburys).

A5.10 The majority of respondents from all categories agreed that there was a need to promote healthy eating and that this should not be restricted by regulation.

Focus of regulation on younger children – first regulatory objective

A5.11 Commenting on Ofcom's view that any scheduling and / or volume restrictions on HFSS advertising and revisions to content standards should be aimed at children aged 9 or under, many respondents disagreed with excluding children aged 10 and

over (AAC, ASO, Barnardo's, BMA, CASH, CCNI, CFBC, CG, CRUK, CWT, David Amess MP, DUK, FA, FSPB, HNR, HoM, HPANI, IOTF, IHF, INHA, KI, MC, NCC, NHF, NICHHS, NS, NUT, OCC, RCP, RSH, SFT, TSI, UoL, WC, Which?). Several respondents suggested that while older children may understand the intent of advertising, they may still be susceptible to its influence (AAC, Barnardo's, CFBC, CWT, HNR, SFT, WC, Which?). A number pointed out that, unlike younger children, they have the means to buy HFSS products (NCC, SFT, NCB) and that advertisers may switch to target them (Foodaware, KI, NCC). A few respondents noted that dietary quality declines from childhood to adolescence (WC) and that obesity in children was most marked amongst the 12-15 year age group (FA, ASO, Barnardos, NCC, NUT, WC). One (KI) asserted that older children's preferences can influence those of their younger siblings, while it was also suggested that Ofcom's proposals about the targeting of regulation was driven by the available tools for segmenting analysis of impacts by age groups (BDA).

A5.12 Some asserted that legal definitions of children include those under 16 (MC, HoM); that Ofcom itself defines children as under 16 (MP, NCC, NICHHS, WAG); and one noted that a child is defined as under 18 in the UN Convention of Rights of a Child (TSI, FEC).

A5.13 Broadcasting, manufacturing and advertising interests tended to support the proposals to focus restrictions on advertising on children under 10 (for example Flextech, ISBA, Pepsi, SNACMA, UB), with the exception of GSK, which made clear a preference to include children up to 13. Reasons given included: Ofcom research shows that children over 11 are less influenced by characters; the Minister for Health said that the target of regulation was primary school children; the Ofcom 2004 report shows there is media literacy for 10-12 year olds (BDAUK, NCC); the Swedish government has stated that children under 12 don't understand advertising (BSP). One noted that there is no study which looks at children's understanding of advertising and its impact (SACN).

Enhanced protection for older and younger children through revised content standards – second regulatory objective

A5.14 There was general support amongst respondents for the proposal to revise content standards but little analysis of the detail of this regulatory objective. Only the IPA objected to the aim of protecting older children by content standards, citing the importance of parental responsibility. A number of consumer and health groups agree with the broad objective but argued that the content standards must apply at all times of day, and must differentiate between HFSS and non-HFSS foods.

Impact on broadcasters – third regulatory objective

A5.15 Several respondents asserted that the regulatory objectives should not balance the health of children with the revenues of broadcasters and / or the interests of advertisers (DUK, FSPB, IOTF, NHF, RCP, RSH, SFT, UoL, Which?), and in particular wanted Ofcom to define what it meant by avoiding a 'disproportionate' impact upon broadcasters (HoM, HPNI, NOHPG, Sustain). A few suggested that Ofcom had put the interests of broadcasters above those of children (CFBC, FEC, NICHHS, Sustain). In general, consumer groups, health & medical groups, public sector bodies and members of the public were sceptical that the net loss to broadcasters would be as much as Ofcom suggested, but did not provide reasons or evidence to substantiate these assertions.

- A5.16 By contrast, broadcasters provided data that tended to support the view that the economic impact on broadcasters was at the upper end of Ofcom's estimates of the range of possible effects. We discuss this data in more detail in the Impact Assessment. One respondent suggested that information provided by the industry was questionable as it was not independent (CFBC).
- A5.17 Some respondents suggested that the proposals were disproportionate in relation to the evidence on how much advertising affects children's food intake.
- A5.18 PACT, a group representing the interests of independent producers, suggested that the objectives laid insufficient emphasis on Ofcom's duties to secure a sufficient quantity of high quality and original children's programming, and did not adequately assess the benefits to children's education of television, which parents value. PACT pointed out that the amount of first-run original children's programming had declined since 1998, despite the growth in the number of digital channels. It suggested that HFSS advertising restrictions would exacerbate this. Using data from Ofcom's March 2006 document, PACT estimated that the income lost due to a pre-9pm ban would exceed the total amount spent by public service broadcasters on original children's programming, and have a substantial effect on the independent production sector, which supplies much of this programming. It also quoted two studies which show the benefits of children's programming on pre-school children. The FAU and VLV endorsed PACT's point that if commercial broadcasters responded to revenue cuts by further reducing the amount of original production, this could reduce the plurality and diversity of children's programming, which would be dominated in the future by the BBC
- A5.19 One respondent noted that original UK children's programming was needed which reflects our cultural and social needs (VLV) and another that food advertising has decreased since 2003 whilst children's programmes have correspondingly needed to decrease (a broadcaster). Some stated that reducing programme budgets would lead to poorer quality programmes and therefore lower audiences making them less attractive to advertisers who would not provide funding – a vicious circle (three broadcasters and Kellogg's).

Intrusive regulation of advertising in adult airtime – fourth regulatory objective

- A5.20 Representatives of broadcasting, food and advertising interests supported the view that intrusive regulation of adult airtime should be avoided (Ferrero, a confidential respondent, IPA, Kraft, SNACMA), and one noted that revised content standards would apply before 9pm (HPANI). One broadcaster noted that only half of children's viewing in adult airtime according to Ofcom research was to commercial channels, that the ratio of children to adults watching at those times was very low and that children watching programmes in the early evening would be in the company of an adult. It suggested that regulation should prevent advertisements targeting a 'child demographic' whilst allowing advertising that targeted an adult demographic.
- A5.21 Several other respondents felt that the overriding consideration should be the reduction of advertising impacts on children (BHF, CRUK, DUK, HoM, MC, RSH, Which?). Another noted that the objective of avoiding intrusive regulation of adult airtime does not acknowledge that most of children's viewing takes place during this time (UKPHA, CASH, NCC); one (NCC) noted that the Government's White Paper had pointed to the need for restrictions both during children's airtime and when large numbers of children are watching. A decrease in impacts delivered during children's airtime could be cancelled by an increase in impacts during family viewing time (NICHs, NHF).

- A5.22 A number rejected Ofcom's suggestion that qualitative research indicated that parents surveyed did not favour a ban on HFSS advertising extending to 9pm (BHF, BMA, CRUK, FEC, Netmums, NCC, NHF, NICHS, RSH). Several drew attention to the BHF survey, which claimed that 68% of parents agreed with a pre-watershed ban on HFSS advertisements. Some noted the Which? survey which showed 79% of parents want to restrict adverts for unhealthy foods at times when children are most likely to be watching (Which?, DUK, HoM).
- A5.23 Some respondents (CFBC, NCC WAG) criticised the proposed use of the BARB index of 120 to define programmes of special appeal to children, as it would not catch advertising around adult programmes that large numbers of children were watching. Some (DUK, NHF, WAG) referred to the Which? study, which showed that the five commercial television programmes attracting the largest child audiences were outside children's airtime and would not be assessed as being of special appeal to children by reference to the BARB index of 120.
- A5.24 One respondent suggested that the concept of "family viewing time" be used instead of adult or children's viewing time and that HFSS adverts should carry a symbol (KI).

Changes to nature and balance of advertising by early 2007 – fifth regulatory objective

- A5.25 Food manufacturers and advertisers said that, given that the Government had called in 2003 for changes to the nature and balance of advertising, this was the more appropriate point from which to measure changes (UB, Kellogg's). On this basis, some said, any subsequent review would provide a more accurate picture of changes since the Government announced its policy objective. Most broadcasters, food manufacturers and advertisers and others also argued that the lead time for introducing rule changes would be too short, and should be deferred until later in 2007 (AA, Co-op, Ferrero, Flextech, GMTV, Kellogg's, MD, and four broadcasters). However, other respondents wanted Ofcom to put measures in place within the proposed timescale (CCNI, DUK, NICHS, RSH, Which?).

Positive messaging

- A5.26 Some respondents suggested that the promotion of healthy eating (CFBC, Sustain, CASH, two broadcasters), more active lifestyles (Sainsbury) and the reformulation of products (Kraft) should be a key component of measures to reduce the impact of television advertising on children's dietary preferences. One noted that a FSA review concluded commercial marketing can improve healthy eating (CCNI) and two broadcasters noted that children's exposure to positive messages had not been quantified. A confidential respondent suggested that media owners could undertake to place a defined number of spots per day in promotional airtime advocating healthy lifestyles and a balanced diet. However Ofcom pointed out in the March 2006 consultation (paragraphs 5.15 to 5.18) that there was little evidence to show what the effect of positive messaging would be, and that Ofcom had no powers to mandate positive messaging.

Balancing the regulatory objectives

- A5.27 In its March 2006 consultation, Ofcom said that it considered that the aims of further regulation should be to balance the proposed regulatory objectives (see paragraph A5.5 above). As indicated above ('Impact on broadcasters'), many consumer groups, health promotion organisations, and public sector bodies did not consider that Ofcom was giving sufficient weight to the interests of children. One respondent

(PV) asserted that Ofcom had shown a bias in favour of the industries it regulated, and might make judgements that favoured their interests, rather than those of consumers and citizens and another that Ofcom's stakeholders should have been ranked in order of priority (KI).

Voluntary self-regulation

Consultation question: Do you agree that voluntary self-regulation would not be likely to meet Ofcom's regulatory objectives or the public policy objectives?

- A5.28 A number of advertisers and food manufacturers stated that voluntary action had or could contribute substantially to the objective of reducing the impact of food advertising on young children and cited many examples of the measures they had taken or campaigns they had adopted (AA, BACC, Coca Cola, FAU, FDF, Ferrero, GSK, IPA, Jetix, Kellogg's, Nickelodeon, Sainsbury, Turner, UB, two broadcasters and a confidential respondent), while a few other respondents acknowledged that self-regulation had made some contribution (CASH, NS). However, most advertisers, broadcasters and food manufacturers regarded some form of external regulation as inevitable (AA, ACE, APHG, CS, GSK, Pepsico, UB), as evidenced by the support that many gave to alternative proposals from the FAU ('the industry Option 4'). They also suggested that 2003 should have been used as the base year against which the impact of self-regulation should have been measured. Kellogg's noted that whilst advertising expenditure had decreased, obesity had risen.
- A5.29 Consumer groups, health promotion organisations, public sector bodies and individual respondents who commented (BDA, BMA, C4, CCNI, CRUK, CWT, DUK, NCC, NHSB, NICHS, NOHPG, NS, IOTF, OCC, RSH, SF, SFT, UKPHA, UoL, VLV, WAG, WC, Which?) were virtually unanimous in their agreement that voluntary self-regulation would not meet Ofcom's regulatory objectives or the public policy objectives. ACE noted that there was no guarantee that self regulation would have continued in the long run. A few opined that vague wording in codes, a lack of monitoring and proper sanctions showed that past examples of self-regulation did not work (BMA, DUK, CFBC).
- A5.30 Only a few people participating in the deliberative workshops believed strongly that no regulatory action should be taken; most favoured some sort of external regulation.

Pre-9pm ban

Consultation question: Do you agree that the exclusion of all HFSS advertising before 9pm, would be disproportionate?

- A5.31 Most respondents from consumer groups, public health bodies, and health and medical organisations (APGHD, ASO, Barnardo's, BDA, BHF, BMA, CASH, CCNI, CFBC, CMPHN, CRUK, CWT, DUK, FA, FEC, FSA, HNR, HoM, HPNI, IFA, IOTF, MC, NCB, NCC, Netmums, NFWI, NFPI, NHA, NHF, NICHS, NOHPG, NS, NYA, RSH, SACN, SFT, TSI, UKPHA, UoL, WAG, WC, Which?) said that a pre-9pm ban on the advertising of HFSS products on television would not be disproportionate (again the lack of a definition of proportionality was questioned – CFBC); while one said that there were arguments on both sides (BDA) and another suggested that it should be considered alongside other options (ACE), many suggested that it would be disproportionate not to impose such a ban. The Office of the Children's Commissioner and Scotland's Commissioner for Children and Young People both supported a pre-9pm ban.

- A5.32 Among the points made were that a pre-9pm ban would remove 82% of advertising impacts, as much children's viewing took place outside children's airtime (CMPHN, NS); that research suggested that parents are in practice 'less than successful' in monitoring children's television consumption (NHA); that, combined with NP, it would be conducive to greater publicity for healthy foodstuffs, and hence to healthier eating; that the majority of parents were in favour of this option (BMA, CR, CCNI, Which?, RSH, NHF, NICHS); that there was a precedent for this in broadcasting standards (SFT); that benefits to children's health would far exceed the adverse impacts on broadcasters, advertisers, food manufacturers and television viewers; the benefits were underestimated as no account was taken of benefits to adults; that it would provide a greater incentive to manufacturers to reformulate their products; and that it would benefit older children and adults as well as younger children. One noted research which stated that the more restrictive any policy is in reducing broadcast promotion to children so its effectiveness will disproportionately increase (SACN).
- A5.33 The great majority of individual consumer responses, some but not all of them in response to campaigns organised by Which?, the Women's Institute and Sustain, also supported the principle of a pre-watershed ban. Many of these responses did not cite further reasoning for their support of such a ban.
- A5.34 On the other hand, advertisers, broadcasters, retailers and food manufacturers (AA, AAC, BCCCA, BACC, BRC, CFBC, Coca Cola, CS, DC, FAU, FDF, Ferrero, Flextech, GSK, IPA, Kellogg's, KI, Kraft, MD, PACT, Pepsico, SNACMA, UB, ZO, two confidential respondents and eight broadcasters) agreed that a pre-9pm ban would be disproportionate, on various grounds: it would significantly reduce the revenue of broadcasters; the reduction in revenue would result in fewer commissions for independent producers of children's channels; it would deny adults access to information and advertising for HFSS products; it was up to parents to guide their children; it would reduce the incentive to reformulate products; children spend less time in front of the television and more on other forms of media; most viewing in adult time would be in the company of an adult; and it would increase the costs of advertisers, by making it impossible to address adult audiences. One respondent suggested that it would make HFSS foods more attractive to children as they would be seen as 'adult' (BSP). Two other respondents (NHSB and BPS) also considered that, on balance a pre-9pm ban would not be reasonable, given the rights of adults and the fact that HFSS advertising could continue in other media and one suggested that instead of competing on TV, HFSS producers would compete on price by reducing their prices so that HFSS foods are cheaper and more appealing (IPA). A few suggested that advertisers would switch to other less regulated forms of media (FAU and two broadcasters). In addition some respondents felt it to be disproportionate in relation to the quantified impact of advertising on children's dietary habits.
- A5.35 Overall, participants in the deliberative workshops felt that a pre-9pm HFSS ban would impact adult viewing too much and most wanted Ofcom to adopt a more moderate response permitting food and drink advertising during the times at which large numbers of children do not watch television. Whilst 9% of adult participants voted in favour of a pre-9pm HFSS ban in their pre-workshop questionnaires, support for this option diminished upon further discussion. When asked towards the end of the workshops to suggest alternative options they would like Ofcom to consider, participants did not mention a pre-9pm HFSS ban. The majority of adults at the workshops also rejected the idea of a complete ban, as they felt that the effect on broadcasters and manufacturers would be disproportionate to the relative influence of TV advertising on children's food choices.

Pre-school ban

Consultation Question: Do you agree that all food and drink advertising and sponsorship should be excluded from programmes aimed at pre-school children?

A5.36 Almost all respondents, from all sectors, either supported the proposal, or did not explicitly oppose it. A few however felt that advertising of healthy foods to pre-school children should be allowed (BRC, CR, DUK, HoM, MF, UKPHA, Vimto, ME and three broadcasters) and one confidential respondent noted that the Minister for Health had said that concerns were aimed at primary school children. Participants in the deliberative workshop also agreed with a ban on advertising to children aged 4 and under.

Rules on advertising practices

A5.37 Since Ofcom delegated its functions to make and enforce advertising standards under the Deregulation and Contracting Out Act 1994, the rules on advertising practice have been the responsibility of the Broadcasting Committee on Advertising Practice (BCAP), which forms part of the Advertising Standards Authority (ASA)⁴². The existing rules on advertising to children and young people restrict advertising of gambling, alcohol, matches, slimming products and other goods and services.

A5.38 Each of the three policy packages explained in Ofcom's March 2006 document included proposals to revise these rules. The aim of the revised advertising standards would be to reduce the level of children's emotional engagement with food and drink advertisements. These provisions would apply also to sponsor credits⁴³. Government sponsored or endorsed healthy-eating campaigns would not be exempted from these rules. In summary, the main provisions of the rules consulted on in March are as follows:

- a) food and drink advertisements must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle in children;
- b) advertisements for food and drink must not advise or ask children to buy, or ask their parents to buy, the products. There must be no appearance of encouraging children to pester others to buy the products on their behalf;
- c) promotional offers (including collectables and giveaways) in food and drink advertisements must not be targeted at children under 10;
- d) food and drink advertisements must not encourage children to eat or drink the product only to obtain a promotional offer;
- e) celebrities must not be used in food and drink advertisements whose content is targeted directly at children under 10. This would prevent advertisers from drawing on the authority and trust that children might vest in these characters;
- f) licensed characters must not be used in food and drink advertisements whose content is targeted directly at children under 10. This would prevent advertisers

⁴² Ofcom retains its powers to approve standards changes proposed by BCAP, but has agreed with BCAP that it will only initiate changes itself in exceptional circumstances. The Memorandum of Understanding between BCAP, ASA and Ofcom can be seen at http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/.

⁴³ Rule 9.4 of the Ofcom Broadcasting Code states that "sponsorship on radio and television must comply with the advertising content and scheduling rules that apply to that medium".

from using licensed characters (e.g. film or cartoon characters) that might make it difficult for younger children to distinguish between programmes and advertising;

- g) advertisers would remain free to use brand characters (that is those solely associated with a particular brand) on the grounds that they do not carry the same authority as licensed characters;
- h) nutrition claims must be supported by sound scientific evidence, and must not give a misleading impression of the health benefits of the product as a whole;
- i) no nutritional or health claims may be targeted at pre-school children (under 5 years); and
- j) advertisements must not condone or encourage excessive consumption of any food or drink.

A5.39 In our March 2006 document, we asked consultees a number of questions about the proposals to amend advertising practices. We supplied BCAP with copies of all the non-confidential responses to these proposals, as well as a summary of confidential responses, and invited their views. In addition, Ofcom itself analysed the responses to these proposals in detail. The consultation questions, responses from consultees, the views of those in the deliberative workshops and BCAP's response are summarised below.

Application of standards to all food and drink

Consultation question: Do you agree that revised content standards should apply to the advertising or sponsorship of all food and drink advertisements?

A5.40 Only two respondents (ME and one confidential respondent) questioned the case for revised rules. Many respondents opposed the application of content rules to all food and drink advertising, suggesting instead that the rules should apply **only** to HFSS food and drink advertising (ASO, BHF, BRC, CASH, CFBC, Co-Op, DUK, HoM, HPANI, IOTF, KI, HNR, NCB, NCC, NFPI, NFWI, NHF, NICHS, NHOPG, NUT, NS, NUT, NYA, OCC, , RSH, Sustain, UoL, WC, WCC, Which? three confidential respondents and three broadcasters). Among the points they made were that applying the rules to non-HFSS advertising was wholly disproportionate as it would restrict legitimate business and have no impact on obesity levels; that it would remove an incentive to reformulate products; and that it would prevent businesses from using effective and appropriate techniques (e.g. celebrity endorsement, licensed and cartoon characters) to promote 'healthier' non-HFSS products (BHF, BRC, Cadburys, CFBC, CS, MD and three broadcasters).

A5.41 However, a number of respondents supported rules that would not differentiate between HFSS and non-HFSS foods (AA, AAC, ACE, BCCA, BDA, BMA, BPS, BNF, CWT, FAU, FDF, Ferrero, GSK, IOTF, IPA, ISBA, Kraft, MC, a confidential respondent, MF, Pepsico, SACN, Sainsbury, SF, SNACMA, TSI, UB, four broadcasters, Vimto, as well as two members of Ofcom's ACE - John Hooper & Jessica Mann). Most of these respondents tended simply to support the rules proposed by BCAP and did not put forward specific arguments as to why they should apply to all foods. SFT stated that there was no evidence that positive messaging works. Safeguard thought that rules were needed in the absence of EU legislation on health and nutrition claims.

- A5.42 BCAP noted that roughly the same number of respondents supported the differentiated approach as the undifferentiated approach. It considered that neither the weight of responses nor the points raised in support of differentiation merited a change from the undifferentiated approach.

Applicability of rules to sponsorship

Consultation question: Do you agree that revised content standards should apply to the advertising or sponsorship of all food and drink advertisements? – (Application of the rules to sponsorship)

- A5.43 In general, food manufacturers, advertisers and some broadcasters (AA, BACC, BCCCA, CS, FAU, FDF, Ferrero, Flextech, IPA, ISBA, Kellogg's, Pepsico, SNACMA, UB, five confidential respondents) objected strongly to the suggestion that the revised BCAP content rules should apply to sponsorship. A number pointed out that sponsor credits were not treated as advertising for minutage purposes, that advertising messages were specifically prohibited from credits and that responsibility for regulating sponsorship credits remained with Ofcom, rather than the co-regulatory system. They suggested that it was therefore inappropriate to apply the provisions of the Broadcast Advertising Code to sponsor credits. Two noted that this was a matter being considered by DoH's Food and Drink Advertising and Promotion Forum and should not be part of the consultation (UB, SNACMA) and one noted that Ofcom had not measured child exposure to sponsorship in the research (a confidential respondent). Another broadcaster highlighted that only certain products e.g. cars, food, alcohol sponsor programmes due to the length of the campaign and therefore the amount of money needed to fund these promotions so there would be a disproportionately higher effect on revenues if these products were prohibited (a confidential respondent).

Age bands

Consultation question: Do you consider that the proposed age bands used in those rules aimed at preventing targeting of specific groups of children are appropriate?

- A5.44 Industry and broadcasting interests (AA, BACC, C4, CS, FAU, FDF, IPA, ISBA, Kellogg's, Kraft, three confidential respondents, ME, NOHPG, two broadcasters, Pepsico, SF, SNACMA, TSI, UB, Vimto) tended to support BCAP's proposal to focus certain content restrictions (e.g. the use of promotions and the use of celebrities and licensed characters) on children aged 9 and under. Supporters argued that it was appropriate to provide more protection for children aged 9 and under (ISBA, Kraft, Pepsico, SNACMA, UB), and that there was little evidence that older children needed protection (FAU, ISBA, Kellogg's). The FAU commented that it was their belief that Caroline Flint, Minister for Health, was looking primarily for the protection of primary school children. A few respondents suggested that the content rules should apply to older children - under 12s (BDA, BPS) or under 13s (GSK, NHSB).
- A5.45 By contrast, consumer groups, health promotion organisations, public sector bodies and others (ASO, Barnardos, CASH, Co-op, CWT, BMA, DUK, HoM, IOTF, KI, MC, HNR, NCC, NICHS, NHA, NHF, NUT, NS, OCC, RSH, SFT, SACN, Sustain, UKPHA, UoL, Which?) wanted to see the content rules applying to programmes for older children as well as younger children. AAC also called for the risks to older children to be fully considered. The primary argument put forward by these groups was that while the evidence may suggest that children around 10 are able to clearly recognise and understand the promotional intent of commercials, children under 16 remained susceptible to advertising. Others noted that that older children are more

likely to be making their own purchasing decisions and could set an example to their younger siblings. In addition, it was suggested that it could be difficult to determine whether advertisements were targeting children under 9 as opposed to older children, making enforcement problematic. Some noted that the legal definition of a child was of one who is under 16 (CCNI, CFBC, NICHHS) and that Ofcom and advertising regulation applied to children under 16 (WCC and Which?). One suggested that the age groups were only introduced because of the way viewing data was segmented (BDAUK).

- A5.46 In the deliberative workshops, the 8-11 year old children consulted said they supported a ban on promotional offers and giveaways in advertisements as they recognised their appeal, but believe most of the giveaways are ‘rubbish’ and that most are promoting unhealthy food. Adults at the deliberative workshops questioned the logic behind the distinction between under- and over-10s, and also question how this could be applied in practice. Many participants struggled to understand the rationale behind Rule 8 as they question whether claims are currently targeted at under-5s, or whether under-5s can recognise nutritional messages.
- A5.47 BCAP noted that roughly the same number of respondents considered the proposed age bands to be suitable as those that considered them unsuitable. Noting that many of these who considered that the proposed age bands were wrong wanted banding to cover all children aged under 16. BCAP noted that many of the rules would already apply to under 16s, but agreed that there was merit in extending Band 2 (proposed to cover children under 9) to cover all children of primary school age.
- A5.48 Accordingly, BCAP has proposed revisions to the content rules. While general references to children in the content rules as consulted on in the March document apply to all children under 16, BCAP has proposed that rules 7.2.3 and 7.2.4 (promotional offers and use of celebrities and characters) which were previously expressed as applying to advertisements targeted at children in Band 2 should apply to all advertisements targeted at children of primary school age as opposed to children under 9 only.

Drafting of proposed content standards

Consultation question: Do you consider the proposed content standards including their proposed wording to be appropriate, and if not, what changes would you propose, and why?

- A5.49 A significant number of food and drink manufacturers, advertisers, broadcasters and others supported the rules as drafted (AA, AAC, BACC, BPS, Coca Cola, CS, FAU, FDF, Flextech, GSK, IPA, Kellogg’s, Kraft, Pepsico, NHS Borders, SNACMA, TSI, UB, seven confidential respondents and Vimto, as well as two members of ACE). Broadcasters and advertisers tended to feel that the rules as drafted would have a significant impact on the content of food and drink advertising and that Ofcom had not fully taken this into account in developing policy packages or in the Impact Assessment. BCAP and the AA noted that the rules had been devised with the express intention that they could be adopted for non-broadcast advertising, and warned that any change might jeopardise that process.
- A5.50 However, organisations representing consumer organisations and health promotion bodies (ACE, KI, NOHPG, NS, OCC, MC, SFT, Sustain, Which?) criticised all or some of the rules as vague and ill-defined. Concerns were expressed that it would be hard to know when they had been broken (MC) and that it would allow less healthy foods to be promoted as part of a balanced diet (SFT). Some respondents

(NHF, NICHS, RSH, UoL) felt that it was misleading to imply that the revisions were substantial, when only relatively minor amendments were proposed to existing rules. One noted that the rules should reflect European rules on nutritional claims (CASH).

A5.51 Amongst participants in the deliberative workshops, there was a strong desire for content regulation, specifically around misleading claims and promotional offers. BCAP's proposed revisions were generally welcomed, but there was concern about how the rules would be interpreted, and the possibility that advertisers would find ways around them. There was also a feeling that they did not provide for sufficient transparency and information in food advertising, i.e. going beyond simply not making misleading claims to requiring full nutritional information or health warnings.

A5.52 A number of respondents made specific comments regarding the draft rules:

- a) on diet and lifestyle (paragraph 7.2.1 of the draft rules), some were concerned that the word 'encourage' was too vague (ACE, CASH, NOHPG, Sustain). Others suggested that it should mean that any HFSS advertising being shown at times when children may be watching (SFT), and that the rule should ban any suggestion that HFSS products were tastier than non-HFSS products (Sustain, CFBC). One retailer suggested that eating of healthy foods between meals should not be prohibited;
- b) on pressure to purchase (7.2.2), some felt that they failed to address subtle forms of encouragement to pester or should be made more forceful (NOHPG, Sustain, Which?), while one suggested that exceptions should be made in relation to healthier foods (SFT). A confidential respondent suggested that the note relating to affordability might prevent retailers advertising on the basis of low pricing;
- c) on the use of promotional offers (7.2.3), several respondents wanted to make clear that advertisers should not be allowed to promote the eating or drinking of a product to obtain a promotional offer (HoM, NHF, NICHS, RSH, UoL), while others wanted the rule to apply to offers likely to appeal to children, even if not directly targeted at them (NCC, Sustain). One felt that it was unlikely to succeed, as children would not be able to distinguish clearly between the product and the promotional offer, and would also put pressure on parents to purchase products in order to obtain collectables. Several respondents stated that the word "only" should be deleted from 7.2.3 (b). A confectionery manufacturer (Ferrero) wanted a distinction to be drawn between giveaways, and products that always contained a sweet;
- d) on the use of characters and celebrities (7.2.4), some respondents wanted a total ban (NS), in some cases extending to brand characters, either in advertisements for all children (ACE, MC, NCC, NHF, NICHSA, NOHPG, HoM, RSH, Sustain, UoL, Which?), or for younger children (CASH). ACE and NOHPG doubted whether children could differentiate between brand and licensed characters and the CFBC said that continuing to use brand characters represented a loophole. Some respondents stated that characters and celebrities should be permitted to be used for healthy eating campaigns (CFBC, NOHPG, MD, OCC, two confidential respondents). The AA, however, said that advertisers were of the view that brand characters had no existence outside advertising, implying that they would be less emotionally engaging. It also noted that the Irish Government had accepted the argument that brand generated characters are different and pointed out that banning brand characters from television advertisements, but not from retail outlets, would mean an end to the present level playing field. One

advertising stakeholder (ME) suggested that there was no evidence to support the proposed ban;

- e) on food and dietary supplements (8.3), some respondents (CASH, NS) wanted advertisers to encourage the need for varied and balanced diets and active lifestyles; another (SFT) suggested that the rules should refer to guidance from DEFRA, the FSA and the Joint Health Claims Initiative, and that all health claims should be vetted and any unhealthy aspects of particular foodstuffs described. A confidential respondent suggested that note 2 might have broader repercussions than intended. For example, it might prevent advertisements from showing incidental depictions of HFSS products, such as adults eating popcorn while watching a DVD;
- f) on accuracy in food advertising (8.3.1), a few respondents (CCNI, NOHPG, CFBC) felt that no nutrition claims should be permitted in respect of HFSS products; some others (CASH, NCC) that the rules should reflect all relevant aspects of EU law. The BMA stated that nutritional labelling and health claims should be regulated;
- g) on excessive consumption (8.3.2), two respondents (NOHPG, Sustain) wanted a definition of 'excessive'; Sustain suggested that without this, the rule would be too vague to enforce; and
- h) on comparisons and good dietary practice (8.3.3), two respondents (CASH, NS) wanted advertisements to show any product within the context of a balanced meal rather than a 'variety of other foods', while a confidential respondent noted that the rule could prevent HFSS products from being shown to demonstrate a healthy labelling scheme..

Nutrient Profiling

A5.53 Nutrient profiling (NP) has been suggested as the means of distinguishing HFSS products from non-HFSS products. This is the key distinction between Packages 1 and 2 – the former would use NP to identify HFSS products, the advertising of which would be subject to scheduling restrictions. Package 2 would apply the same scheduling restrictions as Package 1, but to all food and drink products, as would Package 3. We asked consultees a number of questions about NP. The questions and consultees' responses are set out below.

Arguments for and against differentiation

Consultation question: Do you consider that it is desirable to distinguish between foods that are high in fat, salt or sugar and those that are healthier in order to achieve the regulatory objectives, or could an undifferentiated approach provide a reasonable alternative?

A5.54 Most consumer and health related organisations, and some broadcasters and food manufacturers argued strongly in favour of differentiation. Supporters (nine confidential respondents, ACE, APGHD ASO, BDA, BHF, BMA, BNF, BPS, CASH, CCNI, CHAMPS, Co-Op, CRUK, CWT, DUK, FA, FSA, KI, Kraft, HoM, HPANI, MC, NCC, NCB, NFPI, NFWI, NHF, NHSB, NICHSA, NOHPG, NS, NYA, OCC, RSH, SACN, Sainsbury, SF, SFT, Sustain, TSI, UKPHA, UoL, Flextech, Vimto, WAG, WC, WCC, Which?) argued variously that restricting advertising of healthier products would run counter to the public policy objective of promoting healthy eating and that it would unfairly penalise the manufacturers of healthy products. Allowing

such advertising would provide an incentive for reformulating existing less healthy products as well as developing new healthier products. It might also help to mitigate the loss of advertising revenue to broadcasters. One suggested that there should be an exception for foods requiring preparation as these products would not be of interest to children.

- A5.55 Some respondents supported differentiation in principle, but saw particular difficulties. Bodies representing the producers of nutrient-dense foods such as cheese, cereal and milk (DC, Dairy UK, BCB, one broadcaster) did not think that they should be ‘demonised’ alongside snack foods as the model took no account of vitamins or minerals. Others such as Sainsbury’s pointed out that differentiation would make it difficult for food retailers to advertise a typical range of products, some of which would be less healthy than others. Some manufacturers favoured the provision of more consumer information in the form of Guideline Daily Amounts as an alternative to restrictions.
- A5.56 Supporters of a non-differentiated approach were drawn mainly from the food and advertising industries (AA, CS, FDF GSK IPA, ISBA Kellogg’s, Masterfoods, ME, Mindshare, RHM, SNACMA, UB, two confidential respondents, ZO). The FAU and BACC stressed that there was no consensus amongst its members on whether an appropriate form of differentiation modelling could ever be developed. Like other manufacturers and advertisers, they opined that no food should be labelled ‘good’ or ‘bad’ and that targeting advertising of HFSS foods would have little impact on the problem of childhood obesity if their overall diet and lifestyles remain unaffected. Other opinions expressed were that, unless there was a complete ban on food and drink advertising, manufacturers could be tempted to develop products that substituted undesirable additives or preservatives for fat, salt or sugar and that a partial ban would favour a limited number of manufacturers with the resources to reformulate foods.
- A5.57 The main concerns of participants in the deliberative workshops centred on whether any problems or loopholes with the NP tool could be exploited and that the success of this package is dependent on its successful implementation. Some noted that views about what was healthy were constantly changing; others noted that fat, salt and sugar are not the only things that are bad for people’s health and several are worried that this model implies that ingredients like additives and e-numbers are healthy, thus possibly encouraging increased consumption of them. Participants felt that a portion size of 100g would discriminate against products such as spreads and sauces which would never actually be consumed in these quantities. However, in principle, workshop participants strongly supported the use of nutrient profiling as participants saw no need for any new regulation to affect promotion of ‘healthy’ food and drink.

Arguments for and against the FSA’s NP scheme

Consultation question: If so, do you consider the FSA’s nutrient profiling scheme to be a practical and reasonable basis for doing so? If not, what alternative would you propose?

- A5.58 Responses from consumer groups, health promotion bodies, public sector organisations and others (AAC, APGHD, ASO, BDS, BHF, BMA, CASH, CMPHN, Co-Op, CR, CWT, DUK, FA, FSA, HoM, HPANI, IOTF, KI, MC, HNR, NCB, NCC, NHF, NHSB, NICHSA, NOHPG, NFPI, NFWI, NS, NUT, NYA, OCC, UKPHA, RSH, SACN, SF, SFT, Sustain, TSI, UoL, Vimto, WA, WC, WCC, Which? and three confidential respondents) supported the use of the FSA model. They noted that it

had been subject to extensive consultation by the FSA and subject to scientific scrutiny and advice from nutritionists, dieticians and stakeholder interests, and that it had been designed specifically for Ofcom and would be a practical and reasonable tool to use. While noting that the food industry was critical of the model, proponents did not see this as a reason for delay – they argued that there would be scope for revisions in the light of experience.

- A5.59 Opponents included food manufacturers, advertisers and some broadcasters (AA, ACE, BCB, BCCCA, Coca-Cola, CS, DC, Dairy UK, FAU, Ferrero, FDF, GSK, Kellogg's, Kraft, IPA, ISBA, MC, Pepsico, SNACMA, UB, six confidential respondents as well as some individual respondents). While some asserted generally that the FSA model was 'flawed', 'subjective' or 'over-simplistic', specific criticisms were that the model did not take into account portion size, frequency or context of consumption, energy expended, impact on body size; that it penalised nutrient dense foods such as dairy products and cereals and foods high in natural sugars (BRC); that it was based on an invalid scientific assumption that 'good' nutrients can balance out 'bad' nutrients; and that it did not consider vitamin or mineral content, nor any non-nutrient properties (such as antioxidants), nor the quantity of additives. A few suggested that the FSA guidance looked at energy dense foods which were different to HFSS foods (NS and SACN).
- A5.60 Some respondents felt that the FSA model would have odd consequences – the 'pass' or 'fail' approach would dis-incentivise a gradual approach to reformulation, since it would prevent manufacturers encouraging consumers to adopt 'healthier' versions of existing products, or to show advertisements for both 'original' and (for example) lower calorie versions. It would also prevent advertising of adult-oriented products of no interest to children. There might also be problems in applying the model to non-UK products.
- A5.61 As regards alternatives, a number suggested the use of Daily Guideline Amounts or that Ofcom should wait until the NP model being developed by the European Food Standards Agency (EFSA) in connection with the EU Nutritional and Health Claims Regulation was ready, so as to avoid inconsistencies. One confidential respondent said that it would provide EFSA with its own NP model, and said that it was based on World Health Organisation and National Dietary guidelines, but did not provide further details. Kraft said that it had developed its own category and serving-based system, but acknowledged that it might be too complex for wider industry adoption. A key feature of this model was the need to identify a standard serving size for each product, and to determine calories limits per serving. Pepsico noted that in the US it had developed a system to identify foods that provide positive nutritional benefits.

Policy packages

- A5.62 Ofcom invited views on three possible packages of measures in its March 2006 document (see below), but also offered consultees the opportunity to propose a fourth package, either a permutation of one or more of the three packages, or a completely new package. Consultees were asked which of the three policy packages they would prefer to be incorporated into the advertising code, and for what reasons. As an alternative, they were invited to indicate whether a combination of different elements of the three packages would be suitable, and if so, which elements they would favour in an alternative package. The packages, the questions that were asked, and the responses of consultees are set out below.

Consultation questions: Which of the three policy packages would you prefer to be incorporated into the advertising code and for what reasons?

A5.63 A significant number of consumer groups, health promotion organisations, public sector bodies and academics (ACE, Barnardo's, CASH, CCNI, CWT, DUK, FA, FC, FEC, HoM, HPNI, IHF, IOTF, KI, MC, MD, NCC, NICHS, NOHPG, NS, OCC, RCP, RSH, SCCYP, SACN, SF, SFT, Sustain, UKPHA, UoL, WAG, WC, WCC, Which?) rejected all three packages as an inadequate response to the threat posed by child obesity and maintained that a pre-9pm ban was the only option they preferred. Most advertisers and some food manufacturers and broadcasters also rejected each of the three packages, asserting that their effects would be disproportionate (AA, BACC, CS, FAU, Ferrero, Flextech, IPA, ISBA, two confidential respondents, Kellogg's, ME, NHF, Pepsico) and favoured a further option put forward by the FAU (see below).

Package 1

A5.64 Package 1 would exclude all advertising / sponsorship of all HFSS food and drinks (as defined by the FSA's NP scheme) from children's airtime and from programmes of special appeal to children aged 4-9. The revised BCAP rules on advertising practices would apply at all times.

A5.65 As with Packages 2 and 3, the consensus amongst health, consumer and public sector respondents was that Package 1 did not deliver a large enough reduction in advertising impacts, in part because the target age range was too young (NHF, NCC, NICHS, SACN). A number acknowledged that Package 1 had some merit (such as the use of NP) (BCB, BDA, BPS, Co-op, NHSB, Sustain), but most wanted more extensive restrictions. A few advertisers, broadcasters, food manufacturers regarded it as the least worst option for the same reason (AA, four broadcasters, Kraft, MC, two confidential respondents, Vimto), though some wanted changes. Nonetheless, most food manufacturers were opposed to the use of NP, either in principle, or because they disliked the FSA model. Responses from advertising bodies rejected Package 1 as disproportionate.

A5.66 Amongst participants in the deliberative workshops, Package 1 was seen as the most successful of the three options, mainly because it focuses on HFSS products only, so allows adverts for non-HFSS products. This was seen as positive both in principle and because it could prompt manufacturers to reformulate foods. However, it was not seen as a sufficient solution, because it would still allow HFSS adverts during times when the largest numbers of children and young people watch television, from 6pm to 8 or 9pm. Participants suggested extensions from 6pm to 8 or 9pm, but did not discuss extending the timings further into daytime television. They also suggested extending the HFSS ban detailed in Package 1 to target all children (under 16) rather than just under-10s as proposed in that package.

Package 2

A5.67 Like Package 3 below, Package 2 would exclude all advertising / sponsorship of all food and drinks from pre-school programmes, as well as from children's airtime and from programmes of particular interest to children (i.e. where the viewing index for 4-9 year olds is greater than 120). The restrictions would apply equally to HFSS and non-HFSS products. The revised BCAP rules on advertising practices would apply at all times.

A5.68 Most consumer groups, health promotion organisations, public sector bodies and academics rejected Package 2 along with the other packages. A few respondents favoured this package: two (BDA and BNF) thought that it would be simplest to

implement, and therefore might offer the quickest gains; another (TSI) said that it was the best of the three, but still preferred a pre-9pm ban. One (NHF) said that it was not legitimate, as it did not distinguish between HFSS and non-HFSS products and that it would restrict the promotion of healthy foods (CFBC). Some food manufacturers (GSK, MF, RHM) thought Package 2 was the least worst option because it did not rely on NP, but most rejected it, some because it would apply restrictions to advertising around programmes of particular appeal to children.

- A5.69 In the deliberative workshops, participants rejected Package 2 (timing restrictions on all food and drink products) in principle because it would include a ban on all food and drink advertising, so penalising 'healthy' food advertisements. They also dismissed this package on economic grounds - given the lack of further health benefits, they did not consider it justified to impose additional costs on broadcasters.

Package 3

- A5.70 Package 3 would exclude all advertising / sponsorship of all food and drinks (regardless of whether they were HFSS products or not) from pre-school programmes. It would also impose volume restrictions limiting food advertising / sponsorship to 30 or 60 seconds per clock hour, during times when children were generally viewing television in large numbers. These restrictions would apply regardless of whether products were HFSS or not. The revised BCAP rules on advertising practices would apply at all times.
- A5.71 Package 3 attracted the least support, and was unpopular with respondents from most sectors, although limited evidence was adduced in support of the points of view expressed. Among those commenting specifically on this option, food manufacturers (Ferrero, MD, a confidential respondent, RHM, Vimto) said that it would have disproportionate effects on them, while some broadcasters said that it would have disastrous effects on their revenue. Health and consumer groups disliked the fact that this package did not distinguish between HFSS and non-HFSS foods (HoM, NCC, NHF, NICHS). One noted that if the price of advertising slots increased they would only be purchased by the biggest producers and this would be a barrier to entry for smaller companies (CFBC). Among the very few who favoured Package 3, one broadcaster said that it was the best of the three, but should use 2003 data to measure the reduction in impacts, while another body (VLV) said that it would be most effective of the three at tackling the times when children watched television. By contrast, one (Which?) thought that it could increase the amount of food advertising shown.
- A5.72 The deliberative research showed some support for Package 3 because the time slots it would cover are when the largest numbers of children are watching and so people felt it would be more effective. The increased health benefits it delivers compared to the other packages were also appealing, particularly to the teens (aged 12-15). However, most rejected Package 3 because in principle it would still permit HFSS adverts during children's programmes. In practice people also believed the higher spending power of manufacturers of less healthy foods would allow them to pay more for advertising meaning that if Package 3 were implemented it would indirectly push out non-HFSS adverts and leave only the 'worst' HFSS adverts at peak times.

Other proposals

- A5.73 We also invited stakeholders to submit alternative proposals, either as a combination of elements of the three policy packages, or as a new package tailored

to meet the regulatory objectives, and falling between the voluntary self-regulation and pre-9pm bans. We noted that if a completely new proposal appeared to command broad support and which seemed a sensible response to the issue and to the regulatory objectives, it might be necessary to conduct a short final consultation to determine if it has wider endorsement. With one exception, the alternative proposals that Ofcom received in response to the consultation document failed to demonstrate broad support from broadcasters, advertisers, manufacturers and retailers.

Proposals made

A5.74 In response to the question about whether consultees would prefer an option that combined elements of the three packages, most consumer groups, health promotion organisations, public sector bodies, academics and individuals argued strongly for a pre-9pm ban on HFSS advertising, a proposal discussed in paragraphs 5.31 – 5.35 above. However, some suggested alternative versions of Package 1, arguing variously for additional volume reductions to apply up to 9pm (SF), the application of scheduling and content rules to older children (KI, NCC), the application of a different NP model (Kraft), or a hybrid of Packages 1 and 3 (four broadcasters). In addition an independent dietician suggested that a levy system on advertising could be imposed to provide funding for positive advertising and the promotion of healthier diets and lifestyles. In addition a broadcaster suggested that media owners could meet a 50 per cent quota reduction in delivered impacts against HFSS products. In no case did respondents seek to demonstrate that their proposals would command the broad support of stakeholders.

Industry Option 4

A5.75 The exception was a proposal from the FAU on behalf of the food, soft drinks and advertising industries⁴⁴. The FAU package is intended to be a hybrid of parts of Ofcom's policy packages 2 and 3, delivering approximately the same effect as both, with less harmful effects to individual broadcasters. It would prohibit any food and drink advertising within or around programmes made for pre-school children on any channel, and for any children under 10 on other channels not targeted specifically at children (e.g. ITV1, Channel 4, and Five). On channels aimed specifically at children, food and drink advertising would be limited to a maximum of 30 seconds per hour⁴⁵. Both HFSS and other food and drink products would be subject to the same restrictions, although there would be no restrictions on healthy eating and lifestyle campaigns. There would be no restrictions on sponsorship or brand advertising, or on advertising food and drink around programmes of particular appeal to children up to 9 years old.

A5.76 The rationale for this policy package is set out in the FAU submission, which argues that:

- The exclusion of nutrient profiling reflects the food industry's general opposition to the use of the FSA's nutrient profiling scheme. The food industry states that it is not opposed to the principle of differentiation and is committed to working with

⁴⁴ The proposal by the Food Advertising Unit of the Advertising Association (FAU), on behalf of the Incorporated Society of British Advertisers (ISBA), the Institute of Practitioners in Advertising (IPA) and the Food and Drink Federation (FDF) has been posted on Ofcom's website at: http://www.ofcom.org.uk/consult/condocs/foodads/responses/eh/fau_opt4.pdf.

⁴⁵ This rule would also be applied to GMTV on weekend mornings when their schedule consists entirely of children's programmes.

the European Food Standards Agency to develop a scientifically acceptable solution. However, in the current absence of such a solution the food industry prefers to live with broader restrictions rather than to apply the FSA scheme;

- The FAU accepts the principle that no food and drink advertising should be scheduled around programmes made for pre-school children;
- The FAU also accepts the general principle of limiting the amount of food and drink advertising that children see, but aims to achieve this in a way which recognises the particular circumstances of channels which are targeted specifically at children and therefore have a particularly limited ability to mitigate the effects of a total ban on food and drink advertising to children. Food and drink advertising is thus excluded completely from children's programmes on general interest channels, but volume restrictions are applied to children's channels;
- The proposal recognises the particular circumstances of GMTV which in effect is treated as a general interest channel on weekdays but a children's channel at weekends. This is because of the particular constraints associated with its 3.5 hour per day licence which it is argued reduce the channel's ability to mitigate any revenue loss arising from a total ban on food and drink advertising to children;
- No restrictions are applied to programmes of particular appeal to children of 4 - 9 years old on the grounds that the audience targeted by such programmes is predominantly adult or family in composition and that the application of restrictions to such programmes would therefore be disproportionate. In addition the industry has reservations about the practicability and fairness of the use of 120 indexing as a means of identifying such programmes, in particular for the smaller audience channels where it is claimed that the small audience sizes for individual programmes often result in BARB figures for the demographic composition of the audience which are not statistically robust. There is a concern that in practice the 120 index would be applied more strictly to the larger audience PSB channels than to smaller audience channels. The industry also argues that the role of the 120 index is largely met by the BCAP content rules which constrain the triggers that may directly engage the interest of young children;
- Sponsorship is excluded on the grounds that it has not hitherto been part of the advertising regime and that Ofcom has specifically reserved the administration and regulation of sponsorship to itself;
- The FAU argues that the BCAP content proposals will have a significant effect in reducing the attractiveness of food and drink advertising to children, that Ofcom's impact analysis has not taken this into account, and that the volume and scheduling proposals should therefore be scaled back to take account of the effect of the content rules.

A5.77 The proposal was supported in their consultation responses by the great majority of food manufacturers and advertising agencies (MV, BACC, ISBA, Zenith Optimedia, Pepsico, Masterfoods, BCCCA, Mindshare, ME, UB, SNACMA, FDF, FAU, IPA, Kelloggs, CS, Wrigley). It was also supported by some broadcasters. The support is in general expressed without any further discussion of the option itself. There were also a limited number of responses, all of them confidential, from one food

manufacturer and 5 broadcasters which supported the proposal in principle but argued that it should be modified by the incorporation of nutrient profiling.

- A5.78 Other stakeholders were not in a position to comment on the proposal as it was made in a consultation response. However, in view of the publicly expressed support of many consumer and health groups for a pre-9pm ban on HFSS advertising, Ofcom would suggest that this option is unlikely to attract support from these groups.

Brand advertising and sponsorship

- A5.79 The consultation document explained that the issue of brand advertising was complex for a number of reasons. These included (were there to be some prohibition on brand advertising): definition of a relevant brand; potential unfairness on manufacturers wishing to promote healthier products using well-known brands previously exclusively associated with HFSS products; and (if brand advertising were not to be restricted) the risk that manufacturers of HFSS products seeking to use brand advertising to substitute for a loss of product advertising opportunities. We asked consultees whether they considered that the packages should include restrictions on brand advertising and sponsorship; if so, what criteria would be most appropriate to define a relevant brand; if not, whether consultees saw any issue with the prospect of food manufacturers substituting brand advertising and sponsorship for product promotion.

Consultation question: Do you consider that the packages should include restrictions on brand advertising and sponsorship? If so, what criteria would be most appropriate to define a relevant brand? If not, do you see any issue with the prospect of food manufacturers substituting brand advertising and sponsorship for product promotion?

- A5.80 Amongst those who commented, most advertisers, broadcasters and food manufacturers (AA, BACC, BRC, FAU, FDF, Flextech, several broadcasters, Kellogg's, Kraft, IPA, ISBA, MC, ME, Sainsbury's, SNACMA and two confidential respondents) opposed any restrictions on brand advertisers. Amongst the reasons stated were that the objective of brand advertising is not to drive sales or promote a product and there is therefore no reason to restrict it (ISBA, a broadcaster); it would impact on healthy eating campaigns (two broadcasters); brand advertising helped responsible manufacturers to educate their customers (Kellogg's); it would be difficult to devise objective and practicable criteria (AAC, four confidential respondents), and they would penalise companies with brands crossing HFSS and non-HFSS foods (two broadcasters); brand advertising was a useful source of revenue (a broadcaster). In any case, the substitution of brand for product advertising was likely to be rare (ISBA). A number noted that sponsorship is under discussion by the Department of Health's Food and Drink Advertising and Promotion Forum (Ferrero, Pepsico, SNACMA, UB, a confidential respondent, Masterfoods). Again a number pointed out that sponsor credits were not treated as advertising for minutage purposes and one stated that Ofcom had not measured the number of child impacts on sponsorship (a broadcaster).
- A5.81 However, most consumer groups, health promotion organisations, public sector bodies and academics (ACE, ASO, BDA, C4, CASH, DUK, Five, HPANI, IOTF, KI, MC, NHF, NICHSA, NOHPG, NS, and a confidential respondent, RSH, SACN, SF, SFT, Sustain, TSI, UoL, UKPHA, Which?) wanted brand advertising associated with HFSS foods to be restricted, as did two food manufacturers and retailers (Co-op and Vimto). Reasons offered included the desirability of an holistic approach (IOTF, NS), and the risk that allowing brand advertising to continue could create a loophole,

given the difficulty of distinguishing clearly between brand and product advertising (CASH, MC, NHF, RSH, SF, Sustain, Which?).

- A5.82 Some respondents suggested ways of defining brands that could continue to be advertised. Suggestions included allowing brands advertising that encouraged healthy lifestyles (Kraft), or developing criteria for brand that could be advertised, based on the mean nutrient profile of products in a brand (UKPHA), or on the percentage of revenue derived from HFSS products (BDA, CASH, MC, Sustain), or in association with the FSA (HoM, NHF, NICHS, NIPHA, RSH, UoL, Which?). Some suggested restrictions based on the proportion of products in a product range which were exclusively or predominantly HFSS (a broadcaster), or were strongly associated with HFSS products (CASH, DUK, NOHPG, SFT, Sustain). Others favoured restrictions but did not offer specific solutions (a broadcaster, NHSB). One noted that allowing brand advertising would provide a source of revenue to replace HFSS advertising (a broadcaster).

Implementation issues

- A5.83 As part of the consultation, Ofcom asked a number of questions relating to the way in which any restrictions might be implemented. Consultees' responses are summarised below under the questions.

General approach to implementation

- A5.84 Anticipating a final statement later in 2006, Ofcom suggested that the new content rules should apply to any campaign conceived after the statement date, with a grace period (of 6 months) for existing campaigns and for new campaigns already in the pipeline with expenditure already incurred. In respect of scheduling or volume restrictions, the proposal was that they would come into effect on 1 January 2007 for immediate effect. Ofcom invited comments on this approach.

Consultation question: Ofcom invites comments on the implementation approach set out in paragraph 5.45 to 5.46 [of the March 2006 document]

- A5.85 Some consumer groups, health promotion bodies and others (NHSB, SFT) supported these proposals; one suggested that proposed grace period was not necessary (UoL); another that it was too long (DUK, SFT). However, some respondents suggested that while the content rules could be implemented sooner, a longer grace period was required for the scheduling rules (ISBA, two members of ACE). Two suggested that the implementation timetable should run from the publication of the consultation document (NHF and NCC).
- A5.86 Most advertisers, manufacturers and broadcasters who commented (ISBA, Co-op, FAU, FDF, Flextech, Kellogg's, ME, Pepsico, SNACMA, three confidential respondents, UB) said that more time was needed. A number pointed out that advertising campaigns were planned a long way ahead (FAU, a broadcaster, ME); some argued for deferring any scheduling or volume restrictions until mid-2007 (FAU, IPA, Kellogg's, five confidential respondents) or the beginning of 2008 (a confidential respondent, MC). Two other manufacturers (GSK, Vimto) regarded the transition period as fair. Additional suggestions included a proposal for a high level monitoring body (KI, SFT, SF), and appropriate criteria by which the success of the restrictions could be measured (IPA).

- A5.87 A few also noted that the consultation process so far had taken nearly two and a half years, and suggested that it would now be unfair to expect industry to comply with a strict timetable.
- A5.88 An independent dietician noted that plans should be made for the evaluation of the impact of any change in obesity and that baseline data should be collected.

Treatment for dedicated children's channels

- A5.89 Ofcom also asked a number of questions about the treatment of children's channels. Consultees' responses are set out below under the relevant questions.

Consultation question: Do you consider a transitional period would be appropriate for children's channels in the context of the scheduling restrictions, and if so, what measure of the "amount" of advertising should be used?

Consultation question: Where you favour either Package 1 or 2, do you agree that it would be appropriate to allow children's channels a transitional period to phase in restrictions on HFSS / food advertising, on the lines proposed?

- A5.90 As to whether there was a case for a transitional period would be appropriate for children's channels in the context of the scheduling restrictions, consumer groups, health promotion organisations, public sector bodies and academics (CASH, CFBC, CWT, IOTF, NICHs, SFT, UoL) who commented generally opposed the idea, as did one manufacturer (Vimto). Those who were prepared to contemplate a transitional period wanted it kept short (ACE, BDA, NHSB, NS, SACN, SF, TSI). However, most advertisers, broadcasters, food manufacturers and some others (AA, BACC, FAU, FDF, Flextech, six confidential respondents, GSK, Kellogg's, KI, IPA, MC, ME) favoured a transitional period. A confidential respondent noted that these channels already carried spare capacity and Kellogg's noted that they have less ability to substitute this advertising with other products. However, a number suggested changes. One broadcaster suggested that instead of the 50% reduction for years one and two with full implementation in year three, that the percentage reductions should be 75% in year one, 50% in year two and 20% in year three. Some advertising and food interests (FAU, ISBA and Pepsico) suggested that the focus should be on "dedicated children's viewing" rather than "children's channels" – the result of this would be to include some of the terrestrial broadcasters within the transitional arrangements. Two other respondents saw no need to offer a transitional period to dedicated children's channels.
- A5.91 Several broadcasters wanted the practical difficulties they faced taken into account in determining the length of any transitional period – one broadcaster of children's channels said that it would need to restructure its advertising sales planning, programme commissioning strategy and related business operations. If this could not be accommodated, it would need to consider relocating outside the UK, undermining the effectiveness of any regulation (a confidential respondent). Another said that they were already struggling under the burden of the Television without Frontiers Directive. Others noted that children's channels were less able to substitute HFSS foods for other products or to move adverts to another part of the schedule (FAU and two broadcasters). Another pointed out that that child impacts for children's channels are much lower than those arising from child impacts during adult airtime on terrestrial channels.

Consultation questions: Do you consider that there is case for exempting low child audience satellite and cable channels from the provisions of Package 3?

Do you agree that there should not be a phase-in period for children's channels under Package 3?

- A5.92 Consumer groups, health promotion organisations, public sector bodies and academics (ACE, BDA, CASH, CFBC, DUK, HoM, IOTF, Kellogg's, KI, MC, NOHPG, NS, SACN, SF, SFT, UoL) generally opposed any exemptions for small channels, arguing for a consistent approach that would not dilute the health benefits and would avoid the risk of loopholes and arguments of discrimination. Opinions amongst advertisers, broadcasters and food manufacturers varied; some argued against an exemption on grounds of consistency (a confidential respondent, GSK); others (AA, BACC, GSK, ME, NHSB, a confidential respondent) supported an exemption, on the grounds that it would be consistent with the regulatory objectives.
- A5.93 By the same token, several consumer groups, health promotion organisations, public sector bodies and academics (CASH, CFBC, CWT, HoM, IOTF, NOHPG, NS, SFT, UoL) opposed a transitional period for children's channels if Package 3 was adopted, as did one other respondent (ME), citing the need to all treat children's channels equally. One broadcaster opined that it was discriminatory towards bigger channels which were 'easier to regulate'.

Other issues

Treatment of UK-based channels targeting overseas audiences

- A5.94 Some broadcasters were concerned at the impact on channels licensed in the UK but targeting overseas market. One said that its channels would be at a competitive disadvantage to locally-licensed channels; others that it would not significantly reduce the exposure of children overseas to HFSS advertising, as their competitors would still be advertising such products (two confidential respondents). They also questioned whether UK authorities had the power to implement restrictions on channels targeted overseas – one pointed out that the FSA had no authority outside the UK; another said that Ofcom had assessed neither the regulatory impact on such channels, nor the likely benefits. It said that it derived a greater proportion of overseas advertising revenue from HFSS products than it did in the UK.

Annex 6

Glossary of respondents

Consultation respondents

AA	The Advertising Association
AAC	Advertising Advisory Committee
APGHD	All-Party Parliamentary Group on Heart Disease
ACE	Ofcom Advisory Committee for England
ACNI	Ofcom Advisory Committee for Northern Ireland
ASO	Association for the Study of Obesity, Newcastle University Medical School
BACC	Broadcast Advertising Clearance Centre
BCB	British Cheese Board
BCCCA	Biscuit Cake Chocolate and Confectionery Association
BDA	British Dental Association
BDAUK	British Dietetic Association UK
BMA	British Medical Association
BRC	British Retail Corporation
BSP	The British Psychological Society
CASH	Consensus Action on Salt and Health
CC	Children’s Clinic, Brighton
CCNI	Consumer Council of Northern Ireland
CFBC	Children’s Food Bill Coalition
CMPHN	Cheshire and Merseyside Public Health Network
Co-op	The Co-operative Group
CR	Cancer Research
CS	Cadbury Schweppes
CWT	The Caroline Walker Trust
DC	The Dairy Council
DUK	Diabetes UK
FEC	Food Ethics Council
FAU	Food Advertising Unit
FC	Food Commission
FA	Foodaware: the Consumer’s Food Group
FSA	Food Standards Agency
FSPB	Food Safety Promotion Board, Ireland
GSK	GlaxoSmithKline
HNR	Human Nutrition Research, Medical Research Council
HoM	Heart of Mersey
HPANI	Health Promotion Agency for Northern Ireland
IHF	Irish Heart Foundation
INHA	National Heart Foundation, Ireland
IOTF	IASO International Obesity Task Force
IPA	Institute of Practitioners in Advertisers
ISBA	Incorporated Society of British Advertisers
KI	Kid’s Inc.
MC	Mary Creagh MP
MD	McDonald’s Restaurants Limited
ME	McCann Erickson Advertising Ltd
MV	MediaVest Ltd
NCB	National Children’s Bureau
NCC	National Consumer Council

NFPI	National Family and Parenting Institute
NFWI	National Federation of Women's Institutes
NHA	National Heart Alliance (Ireland)
NHF	National Heart Foundation
NOHPG	National Oral Health Promotion Group
NHSB	NHS Borders, Health Promotion
NICHS	Northern Ireland Chest Heart & Stroke
NS	The Nutrition Society
NUT	National Union of Teachers
NYA	National Youth Agency
OCC	Office of the Children's Commissioner
PACT	Producers' Alliance for Cinema and Television
Pepsico	Pepsico International
PV	Public Voice
RCP	Royal College of Physicians
RHM	RHM Group Limited
SCCYP	Scotland's Commissioner for Children and Young People
SF	safefood
SFT	School Food Trust
SNACMA	Snack Nut & Crisp Manufacturers Association
Sustain	The alliance for healthy food and farming
TSI	Trading Standards Institute
RCN	Royal College of Nurses
RSH	Royal Society of Health
SACN	Scientific Advisory Committee on Nutrition
TSI	Trading Standards Institute
UB	United Biscuits
UKPHA	UK Public Health Association
UoL	University of Liverpool
VLV	Voice of the Listener and Viewer
WAG	Welsh Assembly Government
WC	Weight Concern
WCC	Welsh Consumer Council
Which?	The Consumers' Association

Annex 7

Impact assessment

This document is published separately.

Annex 8

Race impact assessment

- A8.1 In accordance with the Race Relations Act 1976 (as amended) and section 3(4)(1) of the Communications Act 2003, Ofcom has carried out a race impact assessment on the policy options, having regard to guidelines issued by the Commission for Racial Equality (CRE), which pose the following questions in relation to new policy proposals:
- Will the proposed policy involve, or have consequences, for citizen-consumers?
 - Could these consequences differ according to people's racial group? (e.g. because they have particular needs, experiences or priorities)
 - Is there any evidence that any part of the proposed policy could discriminate unlawfully, directly or indirectly, against people from some racial groups?
 - Is there any evidence that people from some racial groups may have different expectations of the policy in question?
- A8.2 Clearly, the policy options discussed in the consultation document are intended to have consequences for citizen-consumers, as they are intended to contribute to a wider exercise to promote better diets and healthier lifestyles. There is no evidence that any of the policy options would discriminate unlawfully, directly or indirectly against people from some racial groups.
- A8.3 In fact, there is evidence that the policy options would benefit people from ethnic minorities. Ofcom's review of available research found that children who are of Asian descent are four times more likely to be obese than those who are white, and that women of Black Caribbean and Pakistani descent are at particularly high risk⁴⁶. Given that people from these ethnic minorities have been shown to be particularly susceptible to obesity, Ofcom believes that the policy options it has set out should have a beneficial impact on children from these groups. As indicated elsewhere in the impact assessment and consultation document, the effect of changes to advertising regulation are likely to be modest in isolation, and will need to be supported by other measures to promote better diets and healthier lifestyles.
- A8.4 As regards the possibility that people from some racial groups may have different expectations of the policy options, this was factored into the independent deliberative research where ethnicity was taken into account as part of the recruitment process for the qualitative workshops.

⁴⁶ Saxena, S., Ambler, G., and Majeed, A. (2004) Ethnic group differences in overweight and obese children and young people in England: a cross sectional survey. *Archives of Disease in Childhood*, 89, pp 30-36. www.fetalneonatal.com/cgi/content/abstract/archdischild;89/1/30. See also House of Commons Health Committee (2004) Obesity Third Report of Session 2003-2004 Volume 1, para 38, p.16. London: The Stationery Office Limited.

Annex 9

Television advertisements – rules on scheduling and advertising practices

A - Rules on the Particular Separation of Advertisements and Programmes

Additions to the current rules are underlined; deletions are scored through

Specific Separation Requirements 4.2

GENERAL NOTES:

- (i) The term ‘adjacent’ where used in these rules refers to a break immediately before or after the programme in question.
- (ii) The term ‘children’s programmes’ means programmes made for children below the age of 16.
- (iii) Channels devoted to children’s programmes, or whose programmes are or are likely to be of particular appeal to children, will be unlikely to be able to carry at any time advertising of the kind restricted under 4.2.1 and 4.2.2 below. Such channels should also take particular note of 4.2.3 and 4.2.4. Thus, for instance, dedicated children’s channel’s may not carry any advertising products or services restricted under 4.2.1(b) below, namely: lotteries, pools and food or drinks assessed as high in fat, salt or sugar.
- (iv) For the avoidance of doubt, any given timing, programme category or age band restriction subsumes any other less severe restriction. Thus, a ‘post 9pm’ subsumes both a ‘post 7.30 pm’ as well as the restriction on scheduling in or adjacent to children’s programmes or programmes likely to have a significant child audience. Similarly, a prohibition on transmission in ‘children’s programmes’, includes e.g. programmes made for pre-school children. Particular care needs to be exercised where a programme for, or likely to be of interest to, children is transmitted late in the evening or in the small hours, as for example at Christmas. Where such a programme is transmitted after 9pm, no advertisement carrying a timing restriction may be transmitted in or around that programme.

Children and young people 4.2.1

(a) The following may not be advertised in or adjacent to children’s programmes or programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18:

- (i) alcoholic drinks containing 1.2 per cent alcohol or more by volume;

(See also 4.2.5 below)

(See note (iii) below on identification of programmes of particular appeal)

- (ii) bingo;

(iii) religious matter subject to the rules on Religious Advertising in the BCAP Television Advertising Standards Code;

(iv) slimming products, treatments or establishments.

(b) The following may not be advertised in or adjacent to children's programmes or programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16:

(i) lotteries;

(ii) pools.

(iii) foods or drinks that are assessed as high in fat, salt or sugar in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005.

(c) The following may not be advertised in or adjacent to children's programmes or programmes which are of particular appeal to children under 10:

(i) female sanitary protection products.

(d) The following may not be advertised in or adjacent to children's programmes:

(i) drinks containing less than 1.2 per cent alcohol by volume when presented as low or no-alcohol versions of an alcoholic drink;

(ii) liqueur chocolates;

(iii) matches;

(iv) medicines, vitamins and other dietary supplements;

(v) trailers for films or videos carrying an 18- or 15- certificate;

NOTES:

(i) Full details of the FSA's nutrient profiling scheme are available on the FSA website at: <http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>

(ii) The restrictions above include sponsorship of the programme.

(iii) Particular appeal – See ASA Advertising Guidance Note 5 - Audience indexing: identification of programmes likely to appeal to children and young people.

(iv) Depending on content and, in particular, on the extent and nature of any portrayal of violence or sexual activity, an alternative timing restriction such as post 7.30pm, post 9pm or even later may often be appropriate for material in category (d)(v), particularly that which is 18 rated.

(v) Again subject to content, this does not preclude the scheduling in or adjacent to children's programmes of advertisements containing brief extracts from films where these are used in connection with promotional offers derived from films for other types of product or service.

B - Food and soft drink advertising and children

Additions to the rules proposed in the March document are underlined; deletions are scored through

Notes:

1. *The rules in 7.2 must be read in conjunction with the other rules in this Code, especially section 8.3, 'Food and Dietary Supplements'. References to food apply also, where relevant, to beverages.*

2. *These definitions apply in rule 7.2:*

- *'Children' refers to persons under 16 years of age below the age of 16.*
 - Pre-school (Band 1)*
 - 5 to 9 years (Band 2)*
 - 10 to 15 years (Band 3)*
- *Licensed Characters - those characters that are borrowed equities and have no historical association with the product.*
- *Equity Brand Characters – those characters that have been created by the advertiser and have no separate identity outside their associated product or brand.*
- *HFSS products – those food or drink products that are assessed as high in fat, salt or sugar in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005. Full details of the FSA's nutrient profiling scheme are available on the FSA website at: <http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod>*

7.2.1 Diet and lifestyle.

Advertisements must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle in children.

Notes:

(1) *This rule does not preclude responsible advertising for any products including those that should be eaten only in moderation.*

(2) *In particular, advertisements should not encourage excessive consumption of any food or drink, frequent eating between meals or eating immediately before going to bed.*

(3) *It is important to avoid encouraging or condoning attitudes associated with poor diets, for example, a dislike of green vegetables.*

(4) *Portion sizes or quantities of food shown should be responsible and relevant to the scene depicted, especially if children are involved. No advertisement should suggest that a portion intended for more than one person is to be consumed by a single individual or an adult's portion, by a small child.*

(5) *Advertisements for food should not ~~encourage inactivity or sedentary pastimes or disparage or ridicule~~ suggest that an inactive or sedentary lifestyle is preferable to physical activity.*

7.2.2 Pressure to purchase

Note: Please see also 7.3^[Revised numbering] (*Pressure to purchase*)

(a) Although children may be expected to exercise some preference over the food they eat or drink, advertisements must be prepared with a due sense of responsibility and should not directly advise or ask children to buy or to ask their parents or other adults to make enquiries or purchases.

Notes:

(1) *This extends to behaviour shown: for example, a child should not be shown asking for a product or putting it into the parent's trolley in the supermarket.*

(2) *Phrases such as "Ask Mummy to buy you" are not acceptable.*

(b) Nothing in an advertisement may seem to encourage children to pester or make a nuisance of themselves.

(c) Advertisements must not imply that children will be inferior to others, disloyal or will have let someone down, if they or their family do not buy, consume or use a product or service.

(d) Advertisements must neither try to sell to children by appealing to emotions such as pity, fear, loyalty or self-confidence nor suggest that having the advertised product somehow confers superiority, for example making a child more confident, clever, popular, or successful.

(e) Advertisements addressed to children should avoid 'high pressure' and 'hard sell' techniques, i.e. urging children to buy or persuade others to buy. Neither the words used nor the tone of the advertisement should suggest that young viewers are being bullied, cajoled or otherwise put under pressure to acquire the advertised item.

(f) If an advertisement for a children's product contains a price, the price must not be minimised by the use of words such as "only" or "just".

Note:

Products and prices should not be presented in a way that suggests children or their families can easily afford them.

7.2.3 Promotional offers

Promotional offers should be used with a due sense of responsibility and promotional offers for HFSS food and drink must not be targeted directly at primary school children ~~in band 1 or band 2~~.

(a) Advertisements featuring promotional offers linked to food products of interest to children must avoid creating a sense of urgency or encouraging the purchase of excessive quantities for irresponsible consumption.

(b) Advertisements should not seem to encourage children to eat or drink a product only to obtain a promotional offer: the product should be offered on its merits, with the offer as an added incentive. Advertisements featuring a promotional offer should ensure a significant presence for the product.

(c) Advertisements for collection-based promotions must not seem to urge children or their parents to buy excessive quantities of food. They should not directly encourage children only to collect promotional items or emphasise the number of items to be collected. If

promotional offers can also be bought, that should be made clear. Closing dates for collection-based promotions should enable the whole set to be collected without having to buy excessive or irresponsible quantities of the product in a short time. There should be no suggestion of “Hurry and buy”.

(d) If they feature large pack sizes or promotional offers, e.g. “3 for the price of 2”, advertisements should not encourage children to eat more than they otherwise would.

(e) The notion of excessive or irresponsible consumption relates to the frequency of consumption as well as the amount consumed.

7.2.4 Use of characters and celebrities

Celebrities and licensed characters popular with children must be used with a due sense of responsibility. They may not be used in advertisements for HFSS products targeted directly at primary school children in band 1 or band 2.

Notes:

(1) Advertisements must not, for example, suggest that consuming the advertised product will enable children to resemble an admired figure or role-model or that by not doing so children will fail in loyalty or let someone down.

(2) This prohibition does not apply to advertiser-created equity brand characters (puppets, persons or characters), which may be used by advertisers to sell the products they were designed to sell.

(3) Persons such as professional actors or announcers who are not identified with characters in programmes appealing to children may be used as presenters.

(4) Celebrities and characters well-known to children may present factual and relevant generic statements about nutrition, safety, education, etc.

8.3 FOOD AND DIETARY SUPPLEMENTS

Notes:

(1) The rules in 8.3 must be read in conjunction with the relevant legislation including the [Food Labelling Regulations 1996](#) (as amended) and especially Schedule 6. They apply to all advertising for food products. If an advertisement is targeted at children, Section 7 of this Code also applies.

(2) Public health policy increasingly emphasises good dietary behaviour and an active lifestyle as a means of promoting health. Commercial product advertising cannot reasonably be expected to perform the same role as education and public information in promoting a varied and balanced diet but should not undermine progress towards national dietary improvement by misleading or confusing consumers or by setting bad examples, particularly to children. Advertisements should not, for example, encourage inactivity or sedentary pastimes or disparage or ridicule physical activity.

8.3.1 Accuracy in food advertising

(a) Nutrition claims (e.g. “full of the goodness of vitamin C”) or health claims (e.g. “aids a healthy digestion”) must be supported by sound scientific evidence. Advertising must not give a misleading impression of the nutritional or health benefits of the product as a whole and factual nutrition statements should not imply a nutritional or health claim that cannot be supported. Ambiguous wording that could be understood as a nutritional claim must be

avoided. For example, “goodness” should not be used as a synonym for “wholesomeness” and, if a claim relates to taste, that should be made clear, e.g. “It tastes good” not “It is good”. The scientific meaning of the word “energy”, i.e. calorific value, should not be confused with its colloquial meaning of physical vigour

(b) Nutritional claims and health claims should relate to benefits that are significant and relevant to groups likely to be strongly interested in the advertisement. Claims should be presented clearly and without exaggeration

(c) No nutritional or health claim for a HFSS food or drink product may be targeted directly at primary school children in ~~band 1~~

(d) The fact that a food product is a good source of certain nutrients does not justify generalised claims of a wider nutritional benefit

Notes:

(1) Claims of nutritional or health benefits should be considered in the context of a balanced diet or lifestyle or both.

(2) A wide range of guidelines that offers best-practice advice for nutritional claims and healthy eating is available. For example, DEFRA Guidelines for the Use of Certain Nutrition Claims in Food Labelling and Advertising include a recommendation to avoid “% fat free” claims (issued November 1999). Appropriate consideration and uniform application of such guidelines is needed from the relevant pre-clearance and adjudicatory bodies.

(3) Licensees may also find the [Joint Health Claims Initiative Code of Practice](#) useful.

8.3.2 Excessive consumption

Advertisements must not encourage or condone excessive consumption of any food

Notes:

(1) Interpretation of this rule should be by reference to generally accepted nutritional advice. It would clearly not be inconsistent with shots of someone enjoying a chocolate bar; it would, however, preclude someone being shown eating whole boxes of chocolates in one sitting.

(2) Portion sizes or quantities of food shown should be suitable for the occasion and the people portrayed, especially if children are involved. Advertisements should not suggest that a portion intended for more than one person is to be consumed by a single individual or an adult’s portion, by a small child.

(3) If they feature large pack sizes or promotional offers, e.g. “3 for the price of 2”, advertisements should not encourage people to eat more than they otherwise would.

(4) The notion of excessive consumption relates to the frequency of consumption as well as the amount consumed.

8.3.3 Comparisons and good dietary practice

Advertisements must not disparage good dietary practice. Comparisons between products must not discourage the selection of options such as fresh fruit and vegetables, which accepted dietary opinion recommends should form a greater part of the average diet

Notes:

(1) Advertisements should not seem to contradict or ignore good dietary practice.

(2) To reflect generally accepted good dietary practice, a reasonable variety of other foods should be shown if the advertised product is presented as part of a meal.

(3) Food products not intended as substitutes for meals should not be presented as such.

8.3.4 Oral health

Advertisements must not encourage or condone damaging oral health care practices

Note:

For instance, advertisements must not encourage frequent consumption throughout the day, particularly of potentially carcinogenic products such as those containing sugar. This rule has children's dental health particularly in mind.

8.3.5 Dietary supplements

(a) Advertisements must not suggest that it is necessary or therapeutic for the average person to augment their diet or that dietary supplements can enhance normal good physical or mental condition

(b) Advertisements must clearly establish those groups of people likely to benefit from a particular form of supplement

Note to 8.3.5(b):

Only certain groups are likely to benefit from particular vitamin or mineral supplements. They might include people on a restricted dietary regimen, those eating unsupplemented, low-energy diets, women of child-bearing age (particularly if they are planning to have a baby, are pregnant or lactating), growing children and some individuals over 50.

Annex 10

Glossary of terms

ASA: The Advertising Standards Authority (ASA) is the independent body set up by the advertising industry to police the rules laid down in the non-broadcast advertising codes. In pursuance of the principle of promoting self-regulation, Ofcom contracted out its regulatory functions in relation to broadcast advertising content to the ASA and BCAP (see below), thus bringing under one roof the regulation of both broadcast and non-broadcast advertising.

BARB: Broadcasters' Audience Research Board Ltd. This body is responsible for providing estimates of the number of people watching television any one time including data on which channels and programmes are being watched, at what time, and what type of people are watching. The data is available for reporting a national level and at ITV and BBC regional level and covers all analogue and digital platforms.

BCAP: Broadcast Committee of Advertising Practice. The Committee of Advertising Practice (CAP) is the industry body within the ASA organisation responsible for developing the UK's non-broadcast advertising Codes. A sister committee, BCAP (Broadcast Committee of Advertising Practice), was formed to write and enforce the codes of practice that govern TV and radio advertising when Ofcom contracted broadcast advertising regulation to the ASA. The committee comprises representatives of broadcasters licensed by Ofcom, advertisers, advertising agencies, direct marketers and interactive marketers.

BMI: Body Mass Index – a formula which relates a person's body weight to height and which is used to identify obesity levels

CAP: See BCAP above

Cab-sat: Cable or Satellite broadcaster, broadcasting in the multi-channel environment.

CHD: Coronary heart disease

CMO: Chief Medical Officer - the UK Government's principal medical adviser and the professional head of all medical staff in England

Core Category products: Food (including all sub-sectors), Soft Drinks (including all sub-sectors) and Chain Restaurants as categorised by Nielsen Media data

CRR: Contract Rights Renewal – an arrangement to protect advertisers' contract terms with ITV required by the OFT in response to concerns over market power in the sale of airtime following the merger of Carlton and Granada

DH: Department of Health

Dietary Reference Values: a series of estimates of the amount of energy and nutrients needed by different groups of healthy people in the UK population

Dose Response Function: links the changes in body weight to a change in energy balance from, in this instance, substituting HFSS foods by more healthy alternatives

DTT: Digital Terrestrial Television

Equity brand characters: characters that have been created by the advertiser and which have no separate identity beyond their associated product or brand e.g. Ronald Macdonald, Tony the Tiger

FDF: The Food and Drink Federation, a trade association representing the UK food and drink manufacturing industry

FMCG: Fast Moving Consumer Goods – low value, high sales volume products in everyday use: e.g. foods, cleaning products, toiletries etc.

FSA: Food Standards Agency – Government advisory body on food standards and nutrition

GDA: Guideline Daily Amounts are a guide to showing recommended daily levels of different nutrients needed to maintain health

HFSS products: products which are high in fat, salt or sugar

Licensed characters: those characters with no historical association with the product and that are borrowed equities, e.g. characters from films that may be licensed by film distributors to food manufacturers or fast food retailers as a marketing tool

NAR: Net Advertising Revenue

Nielsen Media Research: an research source of advertising activity data for industry

Nutrient profiling: evaluating the overall balance of nutrients in any food or drink

Nutrient profiling model: a system that scores the overall balance of nutrients in any food or drink by identifying foods that are high in fat, salt or sugar, but recognises the importance of fruit and vegetables, cereal, meat, and dairy-based products in the diet

PSB: Public service broadcaster (BBC, ITV, GMTV, Channel 4, five)

QALY: A Quality Adjusted Life Year takes into account both quantity and the quality of life generated by healthcare interventions. It is estimated by assigning every life-year a weight on a scale where one represents full health and zero represents death.

SAP: Station Average Price – the estimated cost of audience delivery for advertisements on a TV station, based on advertising cost per thousand for a specific audience category

Television impact: An impact is equivalent to one viewer watching one advertisement, which is usually normalised in terms of a 30 second advert. 10 impacts could be 1 person watching 10 advertisements or 1 advertisement 10 times, or 10 people watching one advertisement.

TWF Directive: Television Without Frontiers Directive – this EC Directive sets down the legal framework for broadcasting in the EU, and amongst other things specifies the overall amount of advertising that a broadcaster is allowed in any one day

VOL: Value of life estimate - using Department of Transport methodology developed in its Valuation of Benefits of Prevention of Road Accidents and Casualties 2003 which incorporates medical costs, lost output and human cost (based on willingness to pay)

WHO: World Health Organisation