

## Section 2

# Background

## Summary

2.1 This section describes the Government's concerns about the links between obesity, ill-health and premature death, especially in relation to children, which led to its request to Ofcom to consider proposals for strengthening the rules on television advertising of foods that are high in fat, salt or sugar. This section also explains the considerations that Ofcom, as a statutory regulator, must take into account in deciding how to fulfil its responsibilities to regulate television advertising. Finally, the section summarises the current rules on broadcast advertising that are relevant to food products, and how these are implemented by Ofcom's co-regulatory partner, the Advertising Standards Authority.

## Links between diet and ill-health

2.2 A growing body of research considered by Government over recent years led the Chief Medical Officer (CMO) to conclude in 2002 that:

*'the risk factor which is causing the most concern for the future health of our country is obesity. Many developed countries – including our own – are heading for an 'epidemic' of overweight and obesity. This will cause many lives to be lost prematurely in the future to heart disease, diabetes mellitus and cancer. Action is needed to help and support people – particularly children – to reshape their diet.'*<sup>11</sup>

2.3 The Department of Health's (DH) 2002 Survey of Children and Young People found a steady upward trend in the mean Body Mass Index (BMI) of children, with the most marked increases between children aged 6-15 and amongst young adults aged 20-24. The Health Survey for England (2002) found that over a fifth of boys (21.8%) and over a quarter of girls (27.5%) aged 2-15 were either overweight or obese. More recently, Scotland's Child Health Surveillance Programme found that of Scottish children born in 2001, 20.7% were overweight by the time they reached 3.5 years of age, 8.6% were obese, and 4.1% were severely obese<sup>12</sup>.

2.4 The CMO has suggested that obesity results in an increased risk of premature death and ill-health, as obese people are more susceptible to heart disease and strokes, angina, type 2 diabetes, osteoarthritis and back pain, diseases of the gall bladder and some cancers<sup>13</sup>. A National Audit Office study from 2001 estimated that obesity was responsible for about 9,000 premature deaths each year in England alone<sup>14</sup>. The House of Commons Health Committee noted that it is not necessary to actually be

<sup>11</sup> *Annual Report of the Chief Medical Officer*, Chief Medical Officer, 3 July 2003, (2002 CMO report) [http://www.dh.gov.uk/PublicationsAndStatistics/Publications/AnnualReports/CMOAnnualReportsArticle/fs/en?CONTENT\\_ID=4006432&chk=2qDtw4](http://www.dh.gov.uk/PublicationsAndStatistics/Publications/AnnualReports/CMOAnnualReportsArticle/fs/en?CONTENT_ID=4006432&chk=2qDtw4)

<sup>12</sup> *Obesity Statistics*, 12 December 2005, website of ISD Scotland.

<sup>13</sup> *Health Check on the State of Public Health: Annual report of the Chief Medical Officer*, Department of Health, 2002.

<sup>14</sup> *Tackling obesity in England* (The National Audit Office, 2001).

obese to increase the risk of morbidity – risks rapidly accelerate as people become overweight<sup>15</sup>.

- 2.5 However, concerns about the impact of diet on children's long term health are not limited to the side effects of obesity. Diets that are high in fat, salt or sugar are also associated with a number of other conditions. For example, salt has been found to be a significant risk factor in developing high blood pressure and cardiovascular disease, while a high intake of saturated fat is associated with raised levels of blood cholesterol, a major risk factor for coronary heart disease. Just as diets high in fat, salt or sugar may be harmful to health, so may diets that are deficient in fruit and vegetables. One study estimated that those who eat five servings of fruit and vegetables a day are 26% less likely to have a stroke<sup>16</sup>.
- 2.6 It is generally accepted that a wide range of factors contribute to obesity and ill-health, including more sedentary lifestyles. In Ofcom's 2004 report *Childhood Obesity - Food Advertising in Context*, lifestyle data provided by the Henley Centre recorded the dramatic growth amongst children of sedentary activities, such as watching television and using computers. It reported that, while in the 1970s, 90% of children walked to school, only 10% did so now<sup>17</sup>. Increased emphasis on core curriculum subjects in schools has eroded the time available for PE lessons: in 2002, less than half of English children reached the Government's target of two hours of PE per week in school<sup>18</sup>.
- 2.7 But as physical activity is declining, so consumption of foods that are high in fat, salt or sugar (HFSS) remains at high levels. The FSA found that the vast majority of British children consume more saturated fat, salt and sugar than the maximum recommended amounts for adults<sup>19</sup>. The FSA's School Lunchbox Survey in 2003<sup>20</sup> revealed that, at lunchtime, children are eating twice as much sugar as recommended, close to half their recommended daily salt intake, and consuming high levels of saturated fats. Only a quarter of lunchboxes met the standards set for school lunches in the UK.

### Government's response

- 2.8 Responding to the mounting concern about obesity in children, the FSA commissioned research into children's responses to food promotion. The report<sup>21</sup> in September 2003 concluded that advertising to children does have an effect on their preferences, purchase behaviour and consumption. An expert review panel accepted that the effects of promotion on consumption are apparent not just for different brands but also for different types of food, and that the research had provided

<sup>15</sup> *Obesity – Third Report of Session 2003-2004*, Volume 1, House of Commons' Health Committee, 2004 (Health Committee report).

<sup>16</sup> *Lancet* 2006, 367: pages 320-26.

<sup>17</sup> Department for Environment, Food and Rural Affairs (2001), cited in Henley Centre report prepared for Ofcom.

<sup>18</sup> *Game Plan. A Strategy for Delivering Government's sport and physical activity objectives*, page 47, December 2002.

<sup>19</sup> *The National Diet and Nutrition Survey of Young People aged 4 to 18 years*, Food Standards Agency, HMSO, London, June 2000.

<sup>20</sup> The FSA's School Lunchbox Survey 'Children's packed lunches', FSA, May 2003 ([http://www.food.gov.uk/news/newsarchive/2003/sep/lunchboxes\\_factfile](http://www.food.gov.uk/news/newsarchive/2003/sep/lunchboxes_factfile))

<sup>21</sup> *Does Food Promotion Influence Children? A Systematic Review of the Evidence*, Professor Gerard Hastings, University of Strathclyde Centre for Social Marketing ([http://www.ism.stir.ac.uk/projects\\_food.htm](http://www.ism.stir.ac.uk/projects_food.htm)).

sufficient evidence to indicate a causal link between promotional activity and children's food knowledge, preferences and behaviours.<sup>22</sup>

- 2.9 In November 2003, the FSA published a discussion paper on options for action to improve children's diet and health which found that children's food promotion was dominated by television advertising<sup>23</sup> and raised the possibility of new regulation in relation to the promotion of foods. Against this background the Secretary of State for Culture, Media and Sport, Tessa Jowell, asked Ofcom in December 2003 to consider proposals for strengthening the existing code on the television advertising of food and drink to children. The work undertaken by Ofcom in response is summarised below under 'Action taken by Ofcom'.
- 2.10 In November 2004, DH published its White Paper "*Choosing Health – Making Healthy Choices Easier*"<sup>24</sup>, which laid out a road map for improving health in England<sup>25</sup> by reducing the prevalence of diet-related disease and to reduce obesity, especially in the young. It proposed action on education, physical activity, drinking, smoking and on the need to improve the nutritional balance of the average diet. In particular, the White Paper said that the promotion of foods that are high in fat, salt or sugar should be restricted in order to help achieve a better dietary balance between "healthier" and "unhealthier" foods. It envisaged that action would be taken in relation to both broadcast and non-broadcast advertising and proposed setting up a forum to work out how this should happen in the self-regulated non-broadcast sector. The White Paper concluded that if there was not "change in the nature and balance of food promotion (broadcast and non-broadcast) by early 2007" the Government would "take action to implement a clearly defined framework for regulating the promotion of food to children".
- 2.11 In February 2005, DH published an action plan and reiterated the request to Ofcom to consult on tightening the rules on food advertising<sup>26</sup>. As part of this action plan, DH convened a forum with the advertising, food manufacturing and retail sectors to explore what voluntary restrictions might be applied to non-broadcast food promotion (which is not subject to statutory regulation), with the aim of securing agreement on measures that would complement regulation of advertising in broadcast media.

### Nutritional profiling

- 2.12 The FSA, recognising that Ofcom had no expertise in the area of nutrition, health and diet, set about devising a nutritional profiling model in 2004. The intention was that it should be used solely in relation to the regulation of broadcast food advertising to children, as a tool to allow Ofcom to identify those foods that the FSA considered high in fat, salt or sugar.

<sup>22</sup> Details of the academic review can be found on the FSA's website at <http://www.food.gov.uk/multimedia/webpage/academicreview>.

<sup>23</sup> *Review of Research on the Effects of Food Promotion to Children* (FSA, September 2003). [www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf](http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf).

<sup>24</sup> The white paper can be found on the DH web site at: [http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPAndGBrowsableDocument/fs/en?CONTENT\\_ID=4097491&chk=KPBy7H](http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPAndGBrowsableDocument/fs/en?CONTENT_ID=4097491&chk=KPBy7H)

<sup>25</sup> In addition to work co-ordinated by the UK Government's Department of Health, other initiatives have been taken by relevant government departments and agencies in Wales ([www.healthschool.org.uk](http://www.healthschool.org.uk)), Scotland (<http://www.scotland.gov.uk/Topics/Health/health/19133/19651>) and Northern Ireland ([www.investingforhealthni.gov.uk/fitfutures.asp](http://www.investingforhealthni.gov.uk/fitfutures.asp)).

<sup>26</sup> P.16 *Choosing a Better Diet: a food and health action plan*, Department of Health, 2005.

- 2.13 Following an extensive consultation process involving expert advice from nutrition scientists, dieticians, the food industry and consumer organisations, the FSA published its preferred approach in November 2004<sup>27</sup>, and refined this into a specific nutritional profiling model in July 2005<sup>28</sup>. This model awards scores for the quantity of food components ('energy', saturated fat, total sugar, sodium, protein, fibre and fruit and vegetable content) that a product contains. The aggregate score determines if the product is high in fat, salt or sugar. Following approval by the FSA Board, the final version of the model was provided to Ofcom in early December 2005. The proposal to use nutrient profiling to distinguish between 'healthy' and 'less healthy' foods has been criticised by some manufacturers. We set out the arguments surrounding nutrient profiling in Section 5 and invite the views of consultees.

### Action taken by Ofcom

- 2.14 During early 2004, Ofcom undertook an extensive survey of existing research into the effects of television advertising on children's food preferences and consumption, and also commissioned bespoke qualitative and quantitative analysis and research<sup>29</sup>. The key findings are discussed in more detail in Section 3. In brief, the study concluded that television advertising has a 'modest direct effect' on children's food preferences, consumption and behaviour. Indirect effects are likely to be larger, but there is insufficient evidence to determine the relative size of the effect of TV advertising on children's food choice, by comparison with other relevant factors such as exercise, trends in family eating habits inside and outside the home, parents' demographics, school policy, public understanding of nutrition, food labeling and other forms of food promotion<sup>30</sup>. Ofcom concluded that a total ban would be both ineffective in isolation and disproportionate in its wider impact. However, there was a case for tightening specific rules, in the context of the broader public health initiative aimed at addressing childhood dietary imbalance and obesity<sup>31</sup>.
- 2.15 Ofcom noted that once DH had published its planned White Paper on health, and the FSA had completed work on a nutritional profiling scheme, it would assess whether and if so to what extent changes were needed to the Advertising Code. Since then, Ofcom has updated its original analysis of food advertising and of the television viewing patterns of children to include data up to the end of 2005. We also commissioned Professor Sonia Livingstone to undertake a further review of academic research to update the work she undertook in 2004. We have consulted stakeholders about the various policy options, and have invited the Broadcast Committee of Advertising Practice (BCAP) to develop proposals for appropriate changes to standards rules and discussed with BCAP the possible options for amendments to the advertising code.

### Ofcom's role

- 2.16 The Communications Act 2003 gives Ofcom the responsibility for regulating communications within the UK, including the use of radio-spectrum, the provision of a wide variety of telecommunications services and the licensing and regulation of

<sup>27</sup> *Nutrient profiles: Options for definitions for use in relation to food promotion and children's diets*, FSA, 25 November 2004 (<http://www.food.gov.uk/foodlabelling/researchandreports/nutrientprofiles>)

<sup>28</sup> *Food Promotions and Children's Diets – Consultation on Nutrient Profiling*, FSA, July 2005 (<http://www.food.gov.uk/news/newsarchive/2005/jul/finalnutprofcons>)

<sup>29</sup> *Childhood Obesity – Food Advertising in Context* (Ofcom, July 2004).

<sup>30</sup> *Childhood Obesity*, pages 13-14.

<sup>31</sup> Ofcom press release, 22 July 2004 ([http://www.ofcom.org.uk/media/news/2004/07/nr\\_20040722](http://www.ofcom.org.uk/media/news/2004/07/nr_20040722)).

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 in 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 Communications Act 2003);
  - to prevent the inclusion of advertising which may be misleading, harmful or offensive (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)).
- 2.17 In setting standards, Ofcom has 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 advertisements) and the likely size and composition of the potential audience (section 319 (4)).
- 2.18 As well as setting general standards to secure these objectives, the Communications Act 2003 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)). 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 (s321 (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).
- 2.19 In discharging its functions, Ofcom's principal duty is to further the interests of citizens and consumers (section 3 (1)) and we are required to secure a number of other matters including maintaining a sufficient plurality of providers of different television services (section 3(2)(d)) and the availability throughout the UK of a wide range of television services (section 3(2)(e)).
- 2.20 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)).

2.21 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 website<sup>32</sup>, 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.

### Current regulation

2.22 In pursuance of the principle of promoting self-regulation, Ofcom contracted out its regulatory functions in relation to broadcast advertising content to the Advertising Standards Authority (ASA), thus creating a one-stop-shop for consumers and citizens for the regulation of both broadcast and non-broadcast advertising<sup>33</sup>. As a result, the Advertising Standards Codes are now owned and enforced by the ASA. However, Ofcom must approve any Code changes recommended by the ASA's code-making body, the Broadcast Committee on Advertising Practice (BCAP)<sup>34</sup>. Ofcom retains sole responsibility for any changes to rules on the scheduling of advertisements<sup>35</sup>.

2.23 The advertising standards inherited from the Independent Television Commission and passed to the ASA do not have any rules relating specifically to the advertising of food to children, although there are relevant provisions. In brief, these are as follows:

<sup>32</sup> *Ofcom's regulatory principles* (<http://www.ofcom.org.uk/about/sdrp/>).

<sup>33</sup> Under the Deregulation and Contracting Out Act 1994, Ofcom delegated its functions to make and enforce advertising standards to BCAP, and its functions of enforcing standards to the Advertising Standards Authority (ASA). 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/](http://www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/).

<sup>34</sup> The Codes are drawn up by BCAP, which comprises representatives of major advertisers, advertising agencies, and the media (including broadcasters). In the process of drawing up Code rules BCAP take account of the views of the Advertising Advisory Committee (AAC), which represents consumer stakeholders. BCAP's advertising codes can be seen at [www.asa.org.uk](http://www.asa.org.uk).

<sup>35</sup> For this reason, and because the project to review the rules on the advertising of food to children dated from before the start of the new co-regulatory arrangements, Ofcom has taken the lead in developing policy options, with increasing input from BCAP on possible changes to standards.

- advertisements must not encourage or condone excessive consumption of any food, having regard to current generally accepted nutritional advice (Rule 8.3.2 - Excessive consumption);
- advertisements must not directly advise or ask children to buy or to ask their parents or others to make enquiries or purchases (Rule 7.2.1 - Direct Exhortation);
- advertisements in which personalities or other characters who appear regularly in any children's television programme present or positively endorse products or services of special interest to children, may not be broadcast before 9pm (BCAP Rules on the Scheduling of Advertising, Rule 4.2.4(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 (Rule 8.3.1 - Accuracy in food advertising);
- advertisements must not disparage good dietary practice. Comparisons between products must not discourage the selection of food such as fresh fruit and vegetables which it is accepted should form a greater part of the average diet (Rule 8.3.3 - Comparisons and good dietary practice).

2.24 The first three of these rules are designed to avoid direct harm occurring to children as a result of television advertising, to avoid encouraging harmful behaviour and to prevent viewers from being misled. However, they are not targeted at any particular category of advertising. The last two aim to prevent food advertising from misleading viewers in relation to health issues.