

## SCHEDULES

### SCHEDULE 18

Section 172

#### ADVERTISING OF LESS HEALTHY FOOD AND DRINK

#### PART 1

##### PROGRAMME SERVICES: WATERSHED

##### *Television programme services*

1 After section 321 of the Communications Act 2003 insert—

##### **“321A Objectives for advertisements: less healthy food and drink**

- (1) OFCOM must set standards by virtue of section 321(1)(b) prohibiting television programme services provided between 5.30 am and 9.00 pm from including advertisements for an identifiable less healthy food or drink product, except as provided for by subsection (3).
- (2) OFCOM must ensure that the prohibition provided for by the first standards set by virtue of subsection (1) takes effect from the beginning of 1 January 2023.
- (3) Standards set by virtue of subsection (1) must exempt from the prohibition imposed by them—
  - (a) advertisements included in television programme services as a result of arrangements made by or on behalf of a person who is, at the time when the arrangements are made, a food or drink SME;
  - (b) advertisements prescribed in any regulations made by the Secretary of State under this paragraph.
- (4) For the purposes of this section—
  - (a) “advertisements” includes advertisements under a sponsorship agreement and anything else which, under a sponsorship agreement, is included in a television programme service, other than in a television programme;
  - (b) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;
  - (c) a food or drink product is “less healthy” if—
    - (i) it falls within a description specified in regulations made by the Secretary of State, and
    - (ii) it is “less healthy” in accordance with the relevant guidance;

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- (d) “the relevant guidance” is the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;
  - (e) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations.
- (5) Regulations under subsection (4)(e) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).
  - (6) The Secretary of State may, before the date specified in subsection (2), amend that subsection so as to substitute a later date for the date that is for the time being specified there.
  - (7) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.
  - (8) Before making regulations under subsection (3)(b) or (7), the Secretary of State must consult such persons as the Secretary of State considers appropriate.
  - (9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

*On-demand programme services*

2      After section 368F of the Communications Act 2003 insert—

**“368FA Advertising: less healthy food and drink**

- (1) From the beginning of 1 January 2023, on-demand programme services must not, between 5.30 am and 9.00 pm, include advertisements for an identifiable less healthy food or drink product.
- (2) The prohibition imposed by subsection (1) does not apply in relation to advertisements included in on-demand programme services as a result of arrangements made by or on behalf of a person who is, at the time when the arrangements are made, a food or drink SME.
- (3) The Secretary of State may by regulations provide for further exemptions from the prohibition imposed by subsection (1).
- (4) For the purposes of this section—
  - (a) “advertisements” includes advertisements and sponsorship announcements (within the meaning given by section 368G(17)) under a sponsorship agreement;
  - (b) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;
  - (c) a food or drink product is “less healthy” if—

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- (i) it falls within a description specified in regulations made by the Secretary of State, and
  - (ii) it is “less healthy” in accordance with the relevant guidance;
  - (d) “the relevant guidance” means the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;
  - (e) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations.
- (5) Regulations under subsection (4)(e) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).
- (6) The Secretary of State may, before the date specified in subsection (1), amend that subsection so as to substitute a later date for the date that is for the time being specified there.
- (7) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.
- (8) Before making regulations under subsection (3) or (7), the Secretary of State must consult such persons as the Secretary of State considers appropriate.
- (9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

## PART 2

### ONLINE SERVICES: PROHIBITION

3 In the Communications Act 2003, after Part 4B insert—

#### “PART 4C

### ONLINE ADVERTISING OF LESS HEALTHY FOOD AND DRINK

#### *Advertising of less healthy food and drink*

#### **368Z14 Prohibition of paid-for advertising of less healthy food and drink**

- (1) From the beginning of 1 January 2023, a person must not pay for advertisements for an identifiable less healthy food or drink product to be placed on the internet.
- (2) Subsection (1) does not apply where the person paying is, at the time when the payment is made, a food or drink SME.
- (3) Subsection (1) does not apply—

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- (a) in relation to advertisements which are directed solely at persons who are engaged in, or employed by, a business which involves or is associated with the manufacture or sale of food or drink,
  - (b) in relation to advertisements included in on-demand programme services (as to which, see section 368FA),
  - (c) in relation to advertisements included in services connected to regulated radio services, or
  - (d) in relation to advertisements which are not intended to be accessed principally by persons in any part of the United Kingdom.
- (4) The Secretary of State may by regulations provide for further exemptions from the prohibition imposed by subsection (1).
- (5) For the purposes of this section—
- (a) paying includes providing any consideration (monetary or non-monetary);
  - (b) “placed” includes continues to be placed;
  - (c) paying for advertisements to be placed on the internet includes paying under a sponsorship agreement as result of which advertisements are placed on the internet;
  - (d) a product is “identifiable”, in relation to advertisements, if persons in the United Kingdom (or any part of the United Kingdom) could reasonably be expected to be able to identify the advertisements as being for that product;
  - (e) a food or drink product is “less healthy” if—
    - (i) it falls within a description specified in regulations made by the Secretary of State, and
    - (ii) it is “less healthy” in accordance with the relevant guidance;
  - (f) “the relevant guidance” is the guidance entitled “Nutrient Profiling Technical Guidance” published by the Department of Health on 1 January 2011;
  - (g) “food or drink SME” means a small or medium enterprise, within the meaning given by regulations made by the Secretary of State, of a description specified in the regulations;
  - (h) “services connected to regulated radio services” has the meaning given by regulations made by the Secretary of State.
- (6) Regulations under subsection (5)(g) that make provision by reference to the number of members of staff of a person may make provision about who is to count as a member of staff (including members of staff of another person).
- (7) The Secretary of State may, before the date specified in subsection (1)—
- (a) amend that subsection so as to substitute a later date for the date that is for the time being specified there, and
  - (b) make corresponding amendments to the references to that date in subsections (11) and (12).
- (8) The Secretary of State may by regulations amend this section to change the meaning of “the relevant guidance”.
- (9) Before making regulations under subsection (4) or (8), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

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- (10) A statutory instrument containing regulations under subsection (8) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
- (11) A person is to be treated as having contravened subsection (1) if—
  - (a) at any time on or after 1 August 2021 but before 1 January 2023, the person made a payment for advertisements to be placed on the internet on or after 1 January 2023, and
  - (b) if the payment had been made on 1 January 2023, the person would have contravened subsection (1).
- (12) Subsection (11) does not apply if the person—
  - (a) has put in place arrangements to ensure that they are entitled to require that the advertisements are not placed on the internet on or after 1 January 2023, and
  - (b) uses all reasonable endeavours to ensure that the advertisements are not so placed.

### **368Z15 Enforcement**

- (1) Where the appropriate regulatory authority determine that a person is contravening or has contravened section 368Z14 they may do one or both of the following—
  - (a) give the person an enforcement notification;
  - (b) impose a financial penalty on the person in accordance with section 368Z16.
- (2) The appropriate regulatory authority must not make a determination as mentioned in subsection (1) unless—
  - (a) there are reasonable grounds for believing that a contravention of section 368Z14 is occurring or has occurred, and
  - (b) they have allowed the person an opportunity to make representations about that apparent contravention.
- (3) An enforcement notification is a notification which—
  - (a) specifies the determination made as mentioned in subsection (1),
  - (b) imposes requirements on the person to take such steps for complying with section 368Z14 and for remedying the consequences of the contravention as may be specified in the notification,
  - (c) fixes a reasonable period for the taking of those steps, and
  - (d) sets out the reasons for the appropriate regulatory authority's decision to give the enforcement notification.
- (4) The requirements specified in an enforcement notification may include requirements to do one or more of the following—
  - (a) instruct or request specified persons to remove specified advertisements from the internet;
  - (b) arrange for specified advertisements to be modified in specified ways.
- (5) A person to whom an enforcement notification is given must comply with it.

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- (6) The duty under subsection (5) is enforceable in civil proceedings by the appropriate regulatory authority—
  - (a) for an injunction,
  - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or
  - (c) for any other appropriate remedy or relief.
- (7) If a person to whom an enforcement notification has been given does not comply with it, the appropriate regulatory authority may impose a financial penalty on that person in accordance with section 368Z16.

### **368Z16 Financial penalties**

- (1) The amount of a penalty imposed on a person under section 368Z15 is to be such amount not exceeding the maximum penalty as the appropriate regulatory authority determine to be—
  - (a) appropriate, and
  - (b) proportionate to the contravention in respect of which it is imposed.
- (2) The maximum penalty is—
  - (a) in a case in which the person carries on a relevant business, an amount not exceeding the greater of—
    - (i) 5% of the turnover of the person’s relevant business for the relevant period, and
    - (ii) £250,000;
  - (b) in any other case, £250,000.
- (3) For the purposes of this section—
  - (a) a person’s “relevant business” is so much of any business carried on by the person as involves or is associated with the manufacture or sale of less healthy food or drink products;
  - (b) “relevant period”, in relation to a person’s relevant business, means—
    - (i) except in a case falling within sub-paragraph (ii) or (iii), the period of one year ending with the 31 March before the time at which the penalty is imposed;
    - (ii) in the case of a person who at the time at which the penalty is imposed has been carrying on that business for a period of less than a year, the period, ending with that time, during which the person has been carrying it on;
    - (iii) in the case of a person who at the time at which the penalty is imposed has ceased to carry on that business, the period of one year ending with the time when the person ceased to carry it on;
  - (c) the amount of the turnover of a person’s relevant business for the relevant period is to be calculated by the appropriate regulatory authority in accordance with the following sub-paragraphs—
    - (i) the amount is to be calculated in conformity with accounting practices and principles which are generally accepted in the United Kingdom;

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- (ii) the amount is limited to the amounts derived by the person from the relevant business after deduction of sales rebates, value added tax and other taxes directly related to turnover;
  - (iii) where the person’s relevant business consists of two or more undertakings that each prepare accounts, the amount is to be calculated by adding together the turnover of each, save that no account is to be taken of any turnover resulting from the supply of goods or the provision of services between them.
- (4) In determining the amount of a penalty under subsection (1) the appropriate regulatory authority must have regard to any statement published by OFCOM under section 392 (guidelines to be followed in determining amount of penalties).
- (5) A financial penalty imposed under this section, if not paid within the period fixed by the appropriate regulatory authority, is to be recoverable by the appropriate regulatory authority as a debt due to them from the person obliged to pay it.
- (6) Where a financial penalty is imposed under this section in respect of matters appearing to OFCOM to have a connection with Northern Ireland and no connection with the rest of the United Kingdom, the penalty must be paid into the Consolidated Fund of Northern Ireland.
- (7) In any other case, a financial penalty imposed under this section is to be paid into the Consolidated Fund of the United Kingdom.

### **368Z17 Power to demand information**

- (1) The appropriate regulatory authority may give a person a notice demanding information that the authority require for the purpose of carrying out their functions under this Part.
- (2) The notice may relate to any information that the person appears to have or be able to generate.
- (3) A notice under this section must—
  - (a) describe the required information,
  - (b) fix a reasonable period within which the information is to be provided, and
  - (c) set out the appropriate regulatory authority’s reasons for requiring it.
- (4) A notice under this section may specify the manner in which the information is to be provided.
- (5) The appropriate regulatory authority may not require the provision of information under this section unless they have given the person from whom it is required an opportunity of making representations to them about the matters appearing to them to provide grounds for making the request.
- (6) Section 368Z15 applies in relation to a failure to comply with a demand for information imposed under this section as if that failure were a contravention of section 368Z14.
- (7) In this section “information” includes copies of advertisements.

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### **368Z18 Guidance**

- (1) The appropriate regulatory authority must draw up and, from time to time, review and revise, guidance setting out their intentions concerning the exercise of their functions under this Part.
- (2) The appropriate regulatory authority must consult the Secretary of State before drawing up or revising the guidance.
- (3) The appropriate regulatory authority must publish the guidance and any revised guidance in such manner as they consider appropriate for bringing it to the attention of the persons who, in their opinion, are likely to be affected by it.

### **368Z19 The appropriate regulatory authority**

- (1) OFCOM may designate any body corporate to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision of this Part, subject to subsection (9).
- (2) To the extent that no body is designated for a purpose, OFCOM is the appropriate regulatory authority for that purpose.
- (3) Where a body is designated for a purpose, OFCOM may act as the appropriate regulatory authority for that purpose concurrently with or in place of that body.
- (4) OFCOM may provide a designated body with assistance (including financial assistance) in connection with any of the functions of the body under this Part.
- (5) A designation may in particular—
  - (a) provide for a body to be the appropriate regulatory authority in relation to advertisements of a specified description;
  - (b) provide that a function of the appropriate regulatory authority is exercisable by the designated body—
    - (i) to such extent as may be specified;
    - (ii) either generally or in such circumstances as may be specified;
    - (iii) either unconditionally or subject to such conditions as may be specified.
- (6) The conditions that may be specified pursuant to subsection (5)(b)(iii) include a condition to the effect that a function may, generally or in specified circumstances, be exercised by the body only with the agreement of OFCOM.
- (7) A designation has effect for such period as may be specified and may be revoked by OFCOM at any time.
- (8) OFCOM must publish any designation in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it.



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- (9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—
- (a) is a fit and proper body to be designated,
  - (b) has consented to being designated,
  - (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority (taking into account any financial assistance that OFCOM intends to provide under subsection (4)),
  - (d) is sufficiently independent of persons who carry on business that involves or is associated with the manufacture or sale of less healthy food or drink products, and
  - (e) will, in performing any function to which the designation relates, have regard in all cases—
    - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
    - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.
- (10) Subject to any enactment or rule of law restricting the disclosure or use of information by OFCOM or by a designated body—
- (a) a designated body may provide information to another designated body for use by that other body in connection with any of its functions as the appropriate regulatory authority;
  - (b) a designated body may provide information to OFCOM for use by OFCOM in connection with any of their functions under this Part;
  - (c) OFCOM may provide information to a designated body for use by that body in connection with any of its functions as the appropriate regulatory authority.
- (11) In carrying out their functions as the appropriate regulatory authority, a designated body may carry out, commission or support (financially or otherwise) research.
- (12) In this section—
- “designation” means a designation under this section and cognate expressions are to be construed accordingly;
  - “specified” means specified in a designation.

### **368Z20 Power to amend this Part to extend prohibition**

- (1) The Secretary of State may by regulations amend this Part for the purpose of prohibiting persons from doing either or both of the following (so far as not already prohibited)—
- (a) placing on the internet advertisements for an identifiable less healthy food or drink product;
  - (b) making arrangements for advertisements for an identifiable less healthy food or drink product to be placed on the internet.
- (2) For the purposes of subsection (1)—
- (a) “placing” includes leaving in place;

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- (b) “placed” includes continues to be placed.
- (3) The provision which may be made by regulations under subsection (1) by virtue of section 402(3)(c) includes provision repealing, revoking or amending provision made by or under any of the following whenever passed or made—
  - (a) an Act;
  - (b) an Act of the Scottish Parliament;
  - (c) a Measure or Act of Senedd Cymru;
  - (d) Northern Ireland legislation.
- (4) Before making regulations under subsection (1), the Secretary of State must consult such persons as the Secretary of State considers appropriate.
- (5) A statutory instrument containing regulations under subsection (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

### **368Z21 Interpretation**

In this Part—

“appropriate regulatory authority” is to be construed in accordance with section 368Z19;

“less healthy”, in relation to a food or drink product, has the meaning given by section 368Z14(5)(e).”

## **PART 3**

### CONSEQUENTIAL AMENDMENTS

- 4 The Communications Act 2003 is amended as follows.
- 5 In section 368C (on-demand programme services: duties of the appropriate regulatory authority), after subsection (5) insert—
  - “(6) The appropriate regulatory authority must draw up and, from time to time, review and revise, guidance setting out their intentions concerning the exercise of their functions under this Part in relation to the prohibition imposed by section 368FA (advertising: less healthy food and drink).
  - (7) The appropriate regulatory authority must consult the Secretary of State before drawing up or revising guidance under subsection (6).”
- 6 In section 402(2) (instruments subject to negative procedure) —
  - (a) in paragraph (a) omit “or regulations under section 368BC”;
  - (b) after paragraph (a) insert—
    - “(aza) regulations under—
      - (i) section 321A(7) (see subsection (9) of that section),
      - (ii) section 368BC (see subsection (7) of that section),
      - (iii) section 368FA(7) (see subsection (9) of that section),

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- (iv) section 368Z14(8) (see subsection (10) of that section), or
- (v) section 368Z20 (see subsection (5) of that section),”.