

Gough Square Chambers: Food Law Column

Ian Thomas and **Stuart Jessop** are specialist food law barristers at Gough Square Chambers and editors of the Food Law Column. Together with contributions from other members of chambers, they provide expert commentary and analysis on topical developments and key issues in the field of food regulation and policy.

In the March 2026 edition of the column, **Ann-Marie O’Neil** considers the background to the recent updates to the advertising of HFSS food and reviews the challenges behind implementing the legislation



A Harder Line on Soft Drinks – The HFSS Watershed and the Battle Over Brand Advertising

By **Ann-Marie O’Neil**, Gough Square Chambers

After several rounds of consultation, delay and recalibration, the long-anticipated tightening of the UK’s regulatory regime governing the advertising of high fat, salt and sugar (“HFSS”) food and drink products came into force on 5 January 2026 pursuant to amendments made by the Health and Care Act 2022 to the Communications Act 2003. The reforms introduce a 9pm watershed for television and on-demand programme services, coupled with a prohibition on paid-for online advertising of identifiable less healthy food and drink products. The policy is explicitly framed as a central component of the UK’s strategy to address childhood obesity, an issue long described by government as one of the country’s most significant public health challenges. Reducing children’s exposure to HFSS advertising has been a core element of the Government’s obesity strategy for several years, reflecting the view that advertising contributes to shaping children’s food preferences and consumption patterns.

From a legal perspective, the reforms represent the culmination of a gradual shift from self-regulatory and co-regulatory advertising controls toward statutory intervention. Historically, the UK’s advertising system relied heavily on the CAP and BCAP Codes, enforced by the Advertising Standards Authority (“ASA”), to

regulate HFSS marketing. These codes already imposed stringent audience-based restrictions, including a ban on HFSS advertising during children’s television programmes and a prohibition on targeting media where under-16s comprised more than 25% of the audience. Compliance with these codes is mandatory, and the ASA can deploy a range of sanctions including withdrawal of advertising privileges, pre-vetting requirements and referrals to Trading Standards for enforcement under consumer protection legislation.

The new statutory regime does not replace this system; rather, it overlays a further tier of restrictions on top of it. That layering is legally significant. The CAP and BCAP Codes operate through a self-regulatory and co-regulatory framework grounded in industry compliance and reputational enforcement. By contrast, the 2022 Act embeds the new restrictions directly within the Communications Act 2003, thereby placing them within a statutory framework supported by Ofcom oversight and the potential for formal legal enforcement. The resulting hybrid regime is emblematic of a broader trend in UK regulatory policy: self-regulation remains central but is increasingly supplemented by targeted statutory

interventions in areas of perceived public health risk.

The legislative history of the new restrictions is marked by repeated delays, each of which has intensified stakeholder scrutiny. The measures were initially scheduled to come into force in January 2023, then postponed to October 2025, and finally delayed again to January 2026. The most recent postponement was triggered by the Government's decision to clarify the treatment of "brand advertising", a concept that has emerged as one of the most contentious legal issues in the implementation process. The Government has stated that it intends to introduce secondary legislation explicitly exempting "pure brand advertising" from the scope of the restrictions, in order to provide legal certainty and allow further consultation.

The controversy surrounding brand advertising illustrates the complex interaction between statutory drafting, regulatory interpretation and industry expectations. The Communications Act amendments restrict advertisements for "identifiable" less healthy products. The ASA's draft implementation guidance interpreted this concept broadly, suggesting that advertising could fall within scope even where no specific HFSS product was shown, provided the branding was closely associated with such products. Industry stakeholders responded forcefully, arguing that this interpretation conflicted with ministerial assurances given during the passage of the legislation that pure brand advertising would remain lawful. Retailers and advertisers warned that the ASA's approach could significantly affect brand investment and revenue streams.

The Government's written ministerial statements in April and May 2025 represent a notable intervention in what is formally an independent regulatory sphere. While emphasising that statutory interpretation ultimately rests with the courts, ministers reaffirmed their view that pure brand advertising is not intended to fall within scope. They also indicated that regulators should adopt a proportionate enforcement approach

and support businesses in transitioning to compliance. This intervention underscores the delicate constitutional balance between Parliament, regulators and industry in the implementation of delegated legislation.

The delays have not occurred in a political vacuum. Rather, they reflect deep divisions among stakeholders about the evidential basis and proportionality of the reforms. The House of Commons Library Research Briefing dated 4 July 2025 records that advertising regulators themselves questioned the evidence supporting a 9pm watershed, suggesting that audience-based restrictions might remain the most proportionate means of protecting children while avoiding undue interference with adult viewing. The ASA emphasised the effectiveness of existing Code rules and invited the Government to consider whether alternative adjustments might better address residual harms.

Industry organisations have been even more critical. The Internet Advertising Bureau, ISBA and the Institute of Practitioners in Advertising argued that a total online advertising ban was a disproportionate response built on an incomplete evidence base. They emphasised the existence of sophisticated targeting tools capable of limiting children's exposure and warned that a blanket prohibition ignored good practice within the sector. The Advertising Association similarly urged the Government to develop solutions tailored to digital media rather than imposing broad restrictions.

Public health organisations, by contrast, have consistently advocated for stronger and more comprehensive controls. The Royal College of Paediatrics and Child Health and the Obesity Health Alliance supported the new restrictions and argued that they should be extended to other forms of marketing such as sponsorship and packaging. Their position reflects a broader public health perspective

that advertising restrictions should form part of a wider regulatory ecosystem designed to reshape the “food environment”.

The debate over the evidence base reveals a fundamental tension in the policy rationale. Government estimates suggest that the new restrictions could remove billions of calories from children’s diets annually and reduce the number of obese children by tens of thousands over time. However, industry stakeholders have questioned the magnitude of these benefits, citing analyses suggesting that the direct calorific impact of advertising restrictions may be modest. This divergence illustrates the challenge of legislating in an area where causal relationships are complex and contested.

The reforms also raise important questions about proportionality and freedom of commercial expression. Although the UK does not have a codified constitutional protection for commercial speech equivalent to that in some jurisdictions, advertising restrictions must still be compatible with the European Convention on Human Rights, particularly Article 10. The move from targeted restrictions to a broad watershed and online ban may invite scrutiny as to whether the measures are necessary and proportionate to the legitimate aim of protecting public health. The Government’s emphasis on proportional implementation and the brand advertising exemption can be understood in part as an attempt to mitigate potential legal risk.

The position of the devolved administrations adds a further layer of complexity. Public health is a devolved matter, and Scotland and Wales have pursued parallel policies focusing on the promotion and placement of HFSS products in retail settings. The Scottish Government has consulted on restrictions including multi-buy offers, meal deals and temporary price reductions, while Wales has legislated to restrict HFSS promotions and product placement in stores and online. The Welsh regulations are due to come into

force in March 2026, followed by the Scottish legislation in October 2026. These initiatives largely complement the UK-wide advertising restrictions but also demonstrate the emergence of a multi-layered regulatory environment in which businesses must navigate differing rules across the UK.

Taken together, the HFSS reforms illustrate the increasing willingness of the UK Government to intervene directly in the advertising ecosystem to pursue public health objectives. The protracted implementation process, the contested evidence base and the ongoing disputes over brand advertising demonstrate the difficulty of translating public health policy into legally robust regulatory frameworks. For lawyers advising advertisers, broadcasters, online platforms and food businesses, the key takeaway is that the regulatory risk landscape is shifting decisively.

Looking ahead, the coming year is likely to prove as consequential as the legislative journey that preceded it. With secondary legislation on the brand advertising exemption recently finalised, regulatory guidance yet to settle and enforcement practice only beginning to emerge, the practical contours of the regime remain in flux. Much will depend on how strictly the new online prohibition is policed and whether the anticipated public health benefits materialise in measurable form. For now, the HFSS reforms represent the start of a new regulatory chapter rather than its conclusion. Businesses, regulators and advisers alike will need to watch closely as the regime beds in during 2026 and beyond, and as its real-world impact on advertising practice, brand strategy and public health outcomes becomes clearer.

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Ann-Marie has a specialist practice in undisclosed commission claims and mis-selling claims. She is regularly instructed by major banks and finance companies in disputes relating to unfair relationships, secret and half-secret commissions, and allegations of breach of fiduciary duty.

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