



Secretary of State for Health and Social Care
Department of Health and Social Care
39 Victoria Street
London
SW1H 0EU

Your Ref:

Our Ref:

CNOT

Please quote this when replying

Date:

22 June 2022

Please ask for:

Ext:

Direct Dial:

E-mail:

Direct Fax:

@dwf.law

Dear Sirs

Our client: Eat Natural Limited

Letter before claim - proposed claim for judicial review

Food (Promotion and Placement) (England) Regulations 2021 and implementation guidance dated 6 April 2022

We act for Eat Natural Limited ("ENL").

ENL seeks to challenge the Food (Promotion and Placement) (England) Regulations 2021 ("the Regulations") and the accompanying implementation guidance entitled "Restricting promotions of products high in fat, sugar or salt by location and by volume price" ("the Guidance") insofar as it interprets and applies certain aspects of the Regulations.

The judicial review challenge relates to the Regulations read with the Guidance, and the grounds on which it relies did not arise until the publication of the Guidance on 6 April 2022.

In accordance with the Pre-Action Protocol for Judicial Review, we set out below the information required in a letter before claim¹.

1. Defendant

1.1 This letter relates to a proposed claim for judicial review of the Department of Health and Social Care ("DHSC"), 39 Victoria Street, London, SW1H 0EU.

2. The claimant

¹ Annex A of the Pre-Action Protocol for Judicial Review

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2.1 The proposed claimant ("the Claimant") is ENL, the manufacturer of a range of "bar" products made primarily from fruits, nuts and seeds.

2.2 ENL's address is 4 Fourth Avenue, Bluebridge Industrial Estate, Halstead, Essex, United Kingdom, CO9 2SY.

3. **The defendant's reference details**

3.1 The Claimant has had previous dealings with Kevin Dodds, Deputy Director, Public Health at the DHSC in relation to this issue.

4. **The Claimant's legal advisers**

4.1 The Claimant's legal advisers are DWF Law LLP, 20 Fenchurch Street, London, EC3M 3AG.

4.2 Please address all correspondence to [REDACTED] and send it by email to [REDACTED]@dwf.law.

5. **The details of the matter being challenged**

5.1 Please see the detailed grounds of challenge set out at Annex A.

6. **Interested Parties**

6.1 There are no other Interested Parties.

7. **The issue**

7.1 The Claimant challenges the Regulations and the associated implementing Guidance, published 6 April 2022.

7.2 It is the Claimant's position that the Regulations and Guidance together impose restrictions of unjustifiable scope which are inconsistent with the stated aims of the policy underlying the Regulations, and which draw an unreasonable distinction between products which are included in the Regulations and therefore subject to certain restrictions, and products which are excluded from the Regulations and therefore not subject to restrictions.

7.3 Of specific concern is the inclusion of "sweet bars based on one or more of these ingredients: nuts, seeds or cereal" in Category 7 whereas "raw, coated, roasted or flavoured nuts and seeds (or mixes of these products – for example, a mix of nuts and seeds)" and "trail mix made up of dried fruit and nuts or seeds" are specifically excluded from the scope of Category 2 and dried fruit and sweet coated nuts are specifically excluded from the scope of Category 4.

7.4 The Claimant's concerns are set out in detail at Annex A, the detailed grounds of challenge.

8. **The details of the action that the defendant is expected to take**

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- 8.1 The Regulations and Guidance are intended to place restrictions on the promotions and placement of foods and drinks that are high in fat, salt or sugar ("HFSS") or 'less healthy'. However, as currently drafted, they restrict products which are demonstrably more healthy (i.e. have a lower Nutrient Profiling Model ("NPM") score) than some unrestricted products.
- 8.2 The Claimant wishes to understand how the categories of products in scope of the Regulations and Guidance were determined, and whether they can be objectively justified. It is the Claimant's position that the scope of the Regulations and Guidance should ensure that products comprising similar ingredients and with similar NPM scores are treated in the same manner. The DHSC is being asked to provide evidence of its considerations and justification in determining the products in and out of scope.
9. **ADR proposals**
- 9.1 The Claimant is not making any proposals in relation to ADR but should the DHSC wish to enter into discussions to resolve or narrow the dispute, the Claimant remains open to this.
10. **The details of any information sought**
- 10.1 In relation to the distinction drawn by the Guidance between the inclusion in Category 7 of *"sweet bars based on one or more of these ingredients: nuts, seeds or cereal"* and the exclusion of *"raw, coated, roasted or flavoured nuts and seeds (or mixes of these products – for example, a mix of nuts and seeds)"* and *"trail mix made up of dried fruit and nuts or seeds"* from Category 2 and dried fruit and sweet coated nuts from Category 4, the Claimant seeks:
- (a) Any documentary evidence setting out the DHSC's consideration of and reasoning for the distinction between the inclusion in Category 7 of *"sweet bars based on one or more of these ingredients: nuts, seeds or cereal"* and the exclusion of *"raw, coated, roasted or flavoured nuts and seeds (or mixes of these products – for example, a mix of nuts and seeds)"* and *"trail mix made up of dried fruit and nuts or seeds"* from Category 2 and dried fruit and sweet coated nuts from Category 4;
 - (b) Confirmation of whether the NPM was applied when determining the Guidance for Categories 2, 4 and 7;
 - (c) The criteria used for including *"sweet bars based on one or more of these ingredients: nuts, seeds or cereal"* in Category 7 and any supporting evidence;
 - (d) The criteria used for excluding *"raw, coated, roasted or flavoured nuts and seeds (or mixes of these products – for example, a mix of nuts and seeds)"* and *"trail mix made up of dried fruit and nuts or seeds"* from Category 2 and any supporting evidence;
 - (e) The criteria used for excluding dried fruit and sweet coated nuts from Category 4 and any supporting evidence;

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- (f) Any documentation relating to the consideration of the inclusion and/or categorisation of sweet and savoury nuts;
- (g) Any documentation explaining the justification for the difference in shape or form resulting in different treatment; and
- (h) Any consideration of portion size of the respective serving options.

11. The details of any documents that are considered relevant and necessary

- 11.1 Please provide any document, including correspondence, attendance notes, empirical data, et cetera, relevant to or considering the issues set out at section 10 above, as well as any evidence, consultation or assessment relating to the same.
- 11.2 It is the Claimant's position that the Regulations and Guidance together impose an unjustifiable scope, with there being an unreasonable distinction between products which are included in the Regulations and therefore subject to certain restrictions, and products which are excluded from the Regulations and therefore not subject to restrictions. The above requested documentation is relevant to enable the Claimant to assess the grounds for distinction.

12. Address for reply and service of court documents

- 12.1 Please address any reply to the Claimant's legal advisers.
- 12.2 As set out above, the Claimant's legal advisers are DWF Law LLP, 20 Fenchurch Street, London, EC3M 3AG. Please address all correspondence to [REDACTED] and send it by email to [REDACTED]@dwf.law.
- 12.3 This same address should be used for service of court documents.

13. Proposed reply date

- 13.1 Please provide a reply within 14 days of the date of this letter.

Please acknowledge safe receipt of this letter.

Yours faithfully

[REDACTED]

DWF Law LLP



Annex A

1. The proposed Claimant ("**the Claimant**") is Eat Natural Limited ("**ENL**"), the manufacturer of a range of "bar" products made primarily from fruits, nuts and seeds.
2. The Claimant challenges the Food (Promotion and Placement) (England) Regulations 2021 (SI 2021/1368, "**the Regulations**") and implementation guidance entitled "Restricting promotions of products high in fat, sugar or salt by location and by volume price" ("**the Guidance**") insofar as it interprets and applies certain aspects of the Regulations.
3. The Regulations are intended to restrict the promotion of so-called high fat, sugar and salt (HFSS) products by location and volume price in medium and large businesses that sell food or drink in England. When the Regulations come into force in October 2022, "specified food" within the scope of the Regulations will not be permitted to be placed at store entrances, aisle ends and checkouts and their online equivalents (that is entry pages, landing pages for other food categories, and checkout pages). Volume price restrictions on specified food were originally to come into force at the same time as location restrictions but will now not be implemented until October 2023.
4. The objective of the Regulations is "to reduce overconsumption of HFSS products that can contribute to children being overweight or living with obesity" (Explanatory Memorandum ("**EM**"), §2.2). This objective is explained in greater detail in §7.1 of the Explanatory Memorandum:

"Nearly a quarter of children in England are overweight or obese when they start primary school aged five, and this rises to one third by the time they leave aged 11. Childhood obesity rates in the UK are among the highest in Western Europe. Regular overconsumption of food and drink high in calories, sugar and fat can lead to weight gain and, over time, obesity, which in turn has a significant impact on health and wellbeing and increases the risk of obesity related diseases. Obese children are more likely to become obese adults; currently around two-thirds of adults are overweight or obese with over one in four living with obesity. Obesity in adulthood increases an individual's risk of developing type 2 diabetes, heart disease, fatty liver disease and a number of cancers."

5. As to the link between childhood obesity and location restrictions, the EM states (§§7.6-7.7):

"The shopping environment plays an important part in the way products are marketed to us, with simple factors such as the location of products within stores significantly affecting what we buy. For example, end of aisle displays can increase sales of soft drinks by over 50%. Children are uniquely vulnerable to the techniques used to promote sales. These effects can then be transmitted into the purchasing



behaviours of parents through 'pester power', with evidence showing 70% of parents purchased at least one food item requested during a shopping trip.

The retail promotional environment does not align with healthy eating guidelines and makes it harder for families to make healthier choices when shopping. A recent survey from the Obesity Health Alliance showed that 43% of all food and drink products located in prominent areas, such as store entrances, checkouts, and aisle ends, were for sugary foods and drinks. 70% of these products were for food and drinks that contribute significantly to children's sugar and calorie intakes and less than 1% of food and drink products promoted in high profile locations were fruit or vegetables."

6. The "specified foods" which are to be subject to location restrictions are defined in reg. 3 of the Regulations. Materially, in order to be a "specified food", food must be "contained in a prepacked food item" and must fall within one of the categories in Schedule 1 to the Regulations, and also be "less healthy" in that it scores 4 or more points in accordance with the Nutrient Profiling Technical Guidance.

7. Material features of the Schedule 1 categories include:

"Category 2: Any of the following:

1. Savoury snacks whether intended to be consumed alone or as part of a complete meal including—

(a) products made from potato, other vegetables, grain or pulses;

(b) extruded, sheeted and pelleted products;

(c) bagged savoury crackers, rice cakes or biscuits,

such as crisps, pitta bread based snacks, pretzels, poppadums, salted popcorn and prawn crackers (but not raw, roasted, coated or flavoured nuts).

Category 4: Confectionery including chocolates and sweets.

Category 7: Sweet biscuits and bars based on one or more of nuts, seeds or cereal."

8. The EM states (§7.13) that "[t]he decision on the products in scope was made following consultation feedback, reducing the scope to those categories that are of most concern to childhood obesity".
9. The Guidance emphasises that the food products within the scope of the Regulations "have been identified as being the biggest contributors to children's sugar and calorie intakes, are heavily promoted and are therefore the categories of most concern for childhood obesity". This is said to be "largely aligned with the categories that are included in the sugar reduction programme and calorie reduction programme" (p. 9).



10. The Guidance elucidates the interpretation and application of the categories in Schedule 1 to the Regulations. The Guidance lists “key exclusions” from category 2 as including:

- raw, coated, roasted or flavoured nuts and seeds (or mixes of these products – for example, a mix of nuts and seeds);*
- fruit-based snacks such as dried fruit, fruit crisps or chips (includes both sweetened and unsweetened fruit ingredients);*
- trail mix made up of dried fruit and nuts or seeds”*

Key exclusions are to be regarded as “out of scope of the restrictions and are not included in other categories in scope of the restrictions, unless otherwise stated”.

11. As regards category 4, “Confectionery, including chocolate and sweets”:

- chocolate-coated nuts, peanuts, seeds and fruit are within scope of this category.
- Key exclusions are “all dried fruit” and “sweet coated nuts (other than chocolate-covered nuts) – for example, honey coated, syrup coated, carob coated, sweet chilli flavours, and mixes of sweet and salty or savoury”.

12. As regards category 7, the Guidance states the following “Principle”:

“Includes all sweet biscuits (filled and unfilled) and chocolate bar biscuits, including flour-based and ‘free from’ products. Also includes sweet bars based on one or more of these ingredients: nuts, seeds or cereal.

This includes products that are akin to a ‘classic’ cereal bar product, whether they are in the shape of a bar or otherwise.

Products marketed as ‘protein bars’ may be considered under this category if their ingredients contain cereal, nuts or seeds.

All sizes, shapes and types of packets are included (including, for example, tins and trays, multipacks and re-sealable bags, but other formats of the same products are also covered by the regulations).”

13. Examples of products within scope of this category are “cereal bars”, which are explained as follows:

“(cereal bars may be similarly shaped to a chocolate bar, made of cereals and typically other ingredients such as fruits and nuts, but can also include nut and seed-based bars)”.



Eat Natural bars

14. The bars manufactured by Eat Natural are primarily made of fruit and nuts. Some contain seeds. A small minority contain some oats. They are not “cereal bars” on any sensible meaning of that term as they contain either no cereal (in most cases) or only a small proportion of cereal. According to the Regulations read with the Guidance, Eat Natural bars are likely to fall within Category 7, as “sweet bars ... based on nuts, seeds or cereal”. This is illogical and unjustifiable in circumstances where:

- The principal raw ingredients of Eat Natural bars, namely dried fruit, nuts and seeds, are excluded from the scope of the Regulations. Dried fruit, nuts and seeds are a “key exclusion” from category 2, including where they are coated or flavoured. Dried fruit and sweet coated nuts are also a key exclusion from category 4 (save unless they are coated in chocolate).
- Those exclusions are grounded in extensive scientific research which demonstrates that dried fruit and nuts have significant health benefits. Daily consumption of a handful of nuts has been shown to be associated with a 20% reduction in cardiovascular disease.² In other words, dried fruit, nuts and seeds (including where syrup-coated) are excluded from the Regulations but will be included if they are combined in a “bar” form. Nuts are a good source of macro and micronutrients, including unsaturated fats, protein, vitamin E, iron, magnesium, zinc, copper and manganese. There is evidence to show that nut consumption is associated with reductions in body weight, waist circumference and hunger.³ Nut consumption is widely regarded as beneficial to diet, including by the British Dietetic Association, British Nutrition Foundation, British Heart Foundation, Diabetes UK and NHS Change 4 life. Yet only around 1/3 of the population consumes nuts, with much lower numbers amongst teenagers. As for dried fruit, this counts towards the important “5 a day” yardstick and is a good source of micronutrients, including vitamin A, vitamin E, vitamin K, vitamin B6, vitamin C, iron, potassium, copper, manganese, calcium, fibre, and polyphenols.
- However, the effect of the Regulations read with the Guidance is to draw a distinction between Eat Natural bars and the central ingredients of those bars. Dried fruit, nuts and seeds, including where syrup-coated, are excluded from the Regulations if sold separately (or mixed together as “trail mix”); but where combined into a bar they will be subject to restriction.
- There is no nutritional justification for that distinction. The ingredients of Eat Natural bars have a similar nutritional value whether sold separately or in combination. Indeed, the distinction results in the

² European Journal of Epidemiology (2019) 34:37-55.

³ PubMed <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6013998/>; Crit Rev Food Sci Nutr. 2020;60(1):84-93 <https://pubmed.ncbi.nlm.nih.gov/30422677/>.

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perverse situation where (for example) sweet coated nuts with a much higher sugar content than an Eat Natural bar are excluded from the Regulations, yet the bar, which combines nuts with other beneficial ingredients such as dried fruit or seeds, is included. We refer to the table below which has been compiled from the nutritional information provided by the website of a leading supermarket.

Product	Link	Fat/ 100g	Sugar/ 100g	Fibre/ 100g	Protein/ 100g	Calories/ 100g
Honey salted peanuts	https://www.sainsburys.co.uk/gol-ui/product/nuts/sensations-californian-honey---salted-peanuts-145g	40.0 g	25.0g	5.0g	19.0g	561kcal
Unsalted peanuts and raisins	https://www.sainsburys.co.uk/gol-ui/product/nuts/sainsburys-unsalted-jumbo-peanuts---raisins-200g	24.9 g	38.5g	3.9g	14.1g	453kcal
Honey roasted cashews	https://www.sainsburys.co.uk/gol-ui/product/nuts/sainsburys-honey-roast-cashews-150g	41.3 g	19.6g	5.0g	16.6g	577kcal
Eat Natural Protein Bars with Peanuts & Chocolate	https://www.sainsburys.co.uk/gol-ui/product/cereal-bars---on-the-go/eat-natural-bar--protein-3x45g	30.5 g	18.8g	7.3g	22.8g	510kcal
Eat Natural Fruit & Nut Bars Almond & Apricot with yoghurt coating	https://www.sainsburys.co.uk/gol-ui/product/eat-natural-almond--apricot--yogurt-bars-x3	26.7 g	31.2g	5.0g	6.6g	476kcal

- To give another example, a typical bag of maple pecans contains 41g of sugar per 100g and has a NPM score of 7. Whereas an Eat Natural maple pecan and peanut bar has 13.2g of sugar per 100g and a NPM score of 8. The former is excluded from the Regulations read with the Guidance; the latter is included.

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- The distinction drawn by the Regulations read with the Guidance might be comprehensible if nut/seed-based bars posed a particular risk for childhood obesity (contrary to the nutritional evidence referred to above). There is no such evidence. There is research to show that consumption of fruit/seed/nut-based nut bars have no impact on body weight.⁴ Moreover, Eat Natural's experience is precisely to the contrary: the under-18s represent a tiny fraction of the persons consuming Eat Natural bars.
15. ENL has sought to engage with Government in order to understand the reasoning for the distinction drawn between nut/seed-based bars and the ingredients of such bars. It has yet to receive any explanation for that distinction.
16. In a recent written Parliamentary question (UIN 9010, tabled on 25 May 2022), Nigel Mills MP asked the Secretary of State for Health and Social Care *"with reference to the high fat, sugar and salt regulations, whether his Department plans to publish evidence that demonstrates why sweet nut bars are set to be included in the restrictions, and why sweet nuts in bags are not"*. The answer, on 9 June 2022, stated as follows:

"The Government decided the restrictions of foods high in fat, salt or sugar in stores and online should apply to a specified list of categories which are significant contributors to children's sugar, salt, and calorie intakes and are heavily promoted. Products within these categories are considered less healthy if they receive a score of four or more for food or a drink product scores one or above, using the 2011 technical guidance to the 2004/2005 Nutrient Profiling Model (NPM). The 2004/2005 NPM is being applied as it is based on scientific evidence and provides an overall assessment of the nutritional content of products considered by balancing the beneficial nutrients of a product including fruit, vegetables and nuts, fibre and protein content against components of food that children should eat less of, such as saturated fat, sugar, salt, and calories. The categories in the sugar and calorie reduction and reformulation programmes have been used as a basis as they were formulated following research and analysis undertaken by Public Health England (PHE). The categories identified everyday foods that contribute significantly to the sugar and calorie intakes of children up to the age of 18 years old. For the sugar reduction programme, PHE held stakeholder engagement between 2016 and 2017 to inform decisions on the categories included in the programme and ensure the application of a consistent approach to businesses and products. A similar approach was used for the calorie reduction programme. The impact assessments for the promotions and placement restrictions, published in December 2020, show the overall health benefit is significant and takes into account the proportionality

⁴ Davidi et al, "The effect of the addition of daily fruit and nut bars to diet on weight, and cardiac risk profile, in overweight adults" (*Journal of Human Nutrition and Dietetics*, vol. 24, p. 543) and the *British Journal of Nutrition* (2017), 116, 2169-2174.

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and feasibility of restricting specific product categories. Definitions of product categories in scope of the advertising restrictions are to be included in a consultation which will be launched shortly.”

17. In this answer, the Minister does not provide an answer to the specific question why nut bars are treated differently to sweet nuts in bags. She refers to Public Health England research which “*identified everyday foods that contribute significantly to the sugar and calorie intakes of children up to the age of 18 years old*” but that research (which is also referenced in the Guidance) does not refer to fruit/nut/seed-based bars, or to any relevant distinction between bars and their constituent ingredients. There is reference to “cereal bars” in the National Diet and Nutrition Survey food categories which were utilised in the calorie reduction programme. However: (i) fruit/nut/seed-based bars have a quite different nutritional profile to cereal bars, and (ii) cereal bars do not raise the same issue regarding the unjustifiable distinction between bars and their raw ingredients. To the contrary, breakfast cereals are included in the Regulations (see category 3) such it would be illogical and unjustifiable to exclude cereal bars.
18. Against that background, the Claimant seeks a full explanation for the decisions to include nut/seed-based bars within the Regulations read with the Guidance whilst excluding dried fruit, nuts and seeds even where sweet-coated. That explanation should include reference to the specific evidence relied upon for these decisions.
19. Pending the provision of that full explanation, the Claimant believes that the distinction between seed/nut-based bars and the ingredients of such bars is based on irrelevant considerations and is irrational in that there have been demonstrable flaws in the reasoning which has led to it (cf *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, §98).

Timing

20. The judicial review challenge intimated above is to the Regulations read with the Guidance, and the grounds on which it relies did not arise until the publication of the Guidance on 6 April 2022.
21. However, insofar as necessary, the Claimant will contend that it is within time to challenge the Regulations themselves, as these are not yet in force (see *R. v Customs and Excise Commissioners Ex p. Eurotunnel Plc* [1995] CLC 392; *R (Cukurova Finance International Ltd) v HM Treasury* [2009] EuLR 317).