

Redacted under section 40(2)



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 [REDACTED]

Please quote this when replying

Date:

22 June 2022

Please ask for:

Ext:

Direct Dial:

E-mail:

Direct Fax:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]@dwf.law

Dear Sirs

Our client: Ferrero UK 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 Ferrero UK Limited ("**Ferrero**").

Ferrero 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 Ferrero, the manufacturer of individually wrapped chocolate confectionery.

2.2 Ferrero's address is 889 Greenford Road, Greenford, UB6 0HE.

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] [REDACTED] and send it by email to [REDACTED] [@dwf.law](mailto:[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 potential exclusion from scope of "*specified food that is not prepacked (such as **pick and mix confectionery** or loose bakery items)*" [emphasis added] which results in products with high nutrient profiling model ("**NPM**") score being excluded whereas products with a lower score are included.

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**

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

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drafted, they restrict products which are demonstrably more healthy (i.e. have a lower NPM score) than some unrestricted products.

8.2 The Claimant wishes to understand how the 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.

8.3 It is not clear whether the Guidance (in permitting pick and mix confectionery in restricted locations) is referring to pick and mix displays in their entirety, including individually wrapped chocolates and/or sweets. The claimant seeks confirmation as to the DHSC's intentions in this part of the Guidance.

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 exclusion from the scope of the Regulation and Guidance of "*specified food that is not prepacked (such as **pick and mix confectionery** or loose bakery items)*" [emphasis added] which results in products with a high NPM score being potentially excluded from scope, the Claimant seeks:

- (a) The justification for the measures only applying to pre-packed foods rather than all foods meeting a nutritional criterion;
- (b) Any evidence of the decision to restrict certain products within the same category based on packaging rather than nutrition, specifically with regards to pick and mix confectionery where unwrapped sweets are excluded from scope whereas wrapped sweets and chocolates are restricted, despite the nutritional content being similar;
- (c) Confirmation of whether the NPM was applied when preparing the Guidance, specifically when deciding whether unwrapped pick and mix confectionery should be covered by the Regulations;
- (d) Any documentary evidence to support, or otherwise, that unwrapped pick and mix confectionery products were nutritionally better/worse than products within scope of the restrictions; and
- (e) If the NPM was not used, details of the criteria that was used and evidence gathered to support the decision to exempt loose pick and mix confectionery.

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.

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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] [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 Ferrero UK Limited ("**Ferrero**"), the manufacturer of individually wrapped chocolates.
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. A "prepacked" food item is defined according to the definition in art. 2(2)(e) of Regulation (EU) 1169/2011: *"any single item for presentation as such to the final consumer and to mass caterers, consisting of a food and the packaging into which it was put before being offered for sale, whether such packaging encloses the food completely or only partially, but in any event in such a way that the contents cannot be altered without opening or changing the packaging".*
8. Schedule 1 categories include:

"Category 4: Confectionery including chocolates and sweets."

9. 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"*.
10. 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).
11. The Guidance elucidates the interpretation and application of the categories in Schedule 1 to the Regulations.

Ferrero

12. Ferrero manufactures chocolate confectionery which is typically composed of individually wrapped items. They are "pre-packed" food within the Regulations' definition and fall into Category 4, as confectionery.

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13. Under the heading “best practice” on p. 18 of the Guidance, it is stated:

“A display of specified food that is not prepacked (such as pick and mix confectionery or loose bakery items) in a restricted location would be permitted, but would not be considered best practice.”

14. Displays of pick and mix confectionery commonly contain a combination of unwrapped sweets and chocolates, which are not “pre-packed” and individual, wrapped chocolates and/or sweets. It is unclear to Ferrero whether this feature of the Guidance, which asserts that pick and mix displays are not formally restricted, intends to refer to the entirety of a pick and mix display, even if it contains individually wrapped chocolates and/or sweets, or whether it intends to refer to pick and mix displays only insofar as they contain unwrapped items.
15. For the avoidance of doubt, if it is the defendant’s position that the Guidance here refers to pick and mix displays in their entirety, even including individually wrapped chocolates and/or sweets, the Claimant will contend that that is an unlawful construction of the Regulations. Individually wrapped chocolates and/or sweets are pre-packed items which fall within Category 4 and should fall to be restricted whether or not they are sold alongside other food items which are not pre-packed.

Timing

16. 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.
17. 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).