

Scottish Government consultation proposed regulations to restrict promotions of food and drink high in fat, sugar or salt

Response from Obesity Action Scotland
Closing date: 21 May 2024

Section 1: Foods subject to restriction

Question 1 – Do you agree with the proposal to be consistent with the category descriptions set out in Schedule 1 of the UK Government regulations for England?

Yes

We recognise the desire for the categories outlined to be consistent with England.

Our preference is for a whole category approach, rather than applying the nutrient profile model (NPM) to specific products within categories. A policy approach which targets unhealthy (discretionary) foods, and all elements of price and location promotions will deliver the most effective change in the population's diet. We believe a policy that is focused on reducing the amount of unhealthy (discretionary) foods in our diet will be more effective and cost-effective than a policy focused just on reformulation. Further, we prefer referring to them as unhealthy food and drink or food high in fat, sugar and salt (HFSS), as the term 'discretionary' is misleading and prejudicial with regard to consumers.

A category-based approach is also easier to understand by retailers and consumers, and easier to enforce and regulate. This was evidenced by the World Health Organisation (WHO) European Office, that clearly state that category-based models are easier to adapt and modify¹. Such an approach also limits possibilities for brand stretching and surrogate promotions by way of products left out of the purview of the regulations.

If at all a targeted approach is considered, in our view, it would strictly need to be based on the updated NPM model, rather than the 2004/05 version of the NPM as currently proposed in the consultation, as the former applies more stringent criteria.

Question 2 – Do the food category descriptors set out in Schedule 1 [and included in Annex D] sufficiently describe the food categories within the scope of regulations?

Yes

Whilst the categories are generally clear, with regards to what would be in scope, there is some uncertainty over which products would and wouldn't be included, due to a lack of definitions being provided. We recommend the categories being defined to be inclusive of all unhealthy foods there within.

¹ World Health Organization (WHO) Regional Office for Europe (2015) Nutrient Profile Model
http://www.euro.who.int/__data/assets/pdf_file/0005/270716/Nutrient-children_web-new.pdf

It is welcome that category 5 – ice cream, ice lollies, frozen yogurt, water ices, and similar frozen products – as detailed in Appendix D of the food categories is included within scope. We called for these products to be in scope in our response to the previous consultation held in 2022 and are pleased to see them featured. However, there remains uncertainty with regards to some of the products listed in the category. ‘Similar frozen products’ is listed within category 5, but this is not defined and it’s not clear what types of products this would cover. Linked to this, it is also welcome to see dairy desserts included within category 9 – our response to the previous consultation had called for this also. However, as with ‘similar frozen products’, ‘dairy desserts’ are not defined in the consultation document. It is thus currently unclear which products this specifically refers to. This lack of definition for both types of products could create loopholes and makes both implementation and enforcement more challenging.

Apart from these, there appear to be some significant omissions in the proposed food category descriptors, which are important to be addressed. On page 8 of the consultation document, fruit juices are included in the products listed in the soft drinks with added sugar category, which suggests that they are considered as being within scope. However, section 3(2) of Annex D on page 47 states that a “a soft drink does not contain added sugar ingredients only by reason of containing fruit juice, vegetable juice or milk (or any combination of them)”, which contrary to the information provided on page 8, appears to suggest that fruit juice would not be within scope. Fruit juices are not currently covered by the Soft Drinks Industry Levy (SDIL). It is therefore very unclear whether fruit juices are within or out with scope of the proposed regulations. This needs to be clarified to avoid loopholes and ensure effective implementation, adherence, and enforcement.

We believe the regulations should include a whole category of soft drinks with added sugar. It’s important that the categories within scope are not limited to just those products covered by the Soft Drinks Industry Levy (SDIL), as this could result in products still high in sugar being out with scope of the regulations. The WHO recommends that such products should be included within restrictions². Currently, SDIL does not cover products such as fruit and vegetable juices, milk-based drinks, and squash-type drinks, many of which may still be very high in sugar. Simply using the SDIL could result in products with added sugar up to 5g/100ml sugar being out with the scope of the restrictions.

We note that diet soft drinks are not discussed at all within the consultation and are not currently included within the proposals outlined. Diet soft drinks account for a growing proportion of soft drink consumption in Scotland. Recently published data from Food Standards Scotland shows there has been a 10% increase in the amount of diet soft drinks sold online between 2021 and 2022³, and that more than a third of diet soft drinks (34.8%) were purchased on a price promotion in 2022, which was higher than the proportion of regular soft drinks (31.6%) sold on price promotion⁴. Diet soft drinks are unhealthy and not required for a healthy diet. They can reinforce a preference for sweet flavours⁵ and where they are carbonated, the acidity can contribute to tooth decay⁶, and distracts attention from tap water, which should be the default healthy hydration option. This aligns with the WHO model/recommendation which proposes that restrictions should apply to any beverages to which non-calorie sweeteners (i.e. diet soft drinks) are added. We would like to see diet soft drinks within scope of the regulations.

Page 9 of the consultation document states that sweet biscuits and bars will be within scope where they are “based on one or more of nuts, seeds or cereals”. The category information outlined in

² <https://www.who.int/news/item/13-12-2022-who-calls-on-countries-to-tax-sugar-sweetened-beverages-to-save-lives>

³ Food Standards Scotland (2022) Take Home Retail Purchase and Price Promotions in Scotland https://www.foodstandards.gov.scot/downloads/FSS_-_NSP_-_Kantar_Retail_Purchase_and_Promotion_2021_Data_-_Slide_Deck_-_FINAL_FOR_PUBLICATION_-_29_November_2022_%281%29.pdf

⁴ Food Standards Scotland (2024) Monitoring Retail Purchase and Price Promotions in Scotland 2019- 2022 https://www.foodstandards.gov.scot/downloads/Monitoring_retail_purchase_and_price_promotions_in_Scotland_2019-2022.pdf

⁵ Green E, Murphy C (2012) Altered processing of sweet taste in the brain of diet soda drinkers. *Physiological Behaviour* 107(4):560-7. doi: 10.1016/j.physbeh.2012.05.006

⁶ <https://www.bda.org/what-we-do/campaigns-and-advocacy/priorities/improving-oral-health/sugar/>

Annex D does not provide any further information. It is unclear what this means in relation to sweet biscuits that don't contain one or more of nuts, seeds or cereals but are still sweet, and whether such products would be in scope is also unclear. For a consistent approach, all sweet biscuits, irrespective of additional ingredients, be brought under the ambit of the regulation and that the definition of the category clarify this inclusion.

Question 3 – Please provide any additional comments on the proposed approach to foods in scope of the policy.

As outlined in our response to question 2, our preference is for a whole category approach with a narrower range of categories focused on HFSS food products that are evidenced to be the most harmful to health, which can then be expanded to other categories once the policy is implemented and working effectively across unhealthy, discretionary product categories. The example of porridge oats and the misrepresentation of it in the media highlights the complexity of taking a targeted NPM approach and the misunderstandings it can create.

The proposal that non-pre-packed foods will be out with scope of the regulations, as detailed in paragraphs 37 and 38 on page 10 of the consultation document, has grave consequences. Including only prepacked products will be particularly problematic for targeting price and location promotions in out of home (OOH) settings, where food is often made and/or served to order, and so is not prepacked.

Paragraph 37 on page 10 of the consultation document suggests that businesses may not be able to determine where loose or non-pre-packed products can or cannot be promoted due to non-availability of relevant nutritional information. This is not a valid argument for several reasons. First, it is a legal requirement⁷ that all businesses have full knowledge of the nutritional composition and full list of ingredients in the products they are selling, such as with regard to allergies and intolerances. Therefore, it is reasonable to expect a business to be able to provide a list of the full ingredients and nutritional composition and calculate the resulting NPM score. Second, a previous Scottish Government consultation on the introduction of legislation on mandatory calorie labelling in the Out of Home (OOH) sector⁸, proposed that out of home businesses calculate the number of calories in the products/items they sell, using the ingredients and nutritional composition of the product(s). The OOH businesses are therefore considered to have the relevant nutritional information of products, which can be used to determine if the products fall within the categories proposed for inclusion in restrictions on price and location promotions. The argument that nutritional information is not available is therefore cannot be an acceptable reason for excluding non-pre-packed products from the scope of this regulation. Lastly, a whole category approach discussed earlier in our response would remove the need for exclusion of the non-pre-packed food and simplify implementation.

Furthermore, including only pre-packed products could also shift promotions and sales towards non-pre-packed items, such as pick and mix and loose bakery items, which are not subject to the restrictions. This would simply result in a shift in promotions to other HFSS items, rather than resulting in an overall decrease in the number of promotions on unhealthy HFSS items, which should be the aim for implementing the regulations. For many of these products, like in-store bakery items, it should be assumed they are less healthy unless the company can provide evidence to indicate otherwise.

⁷ EU Food Information to Consumers Regulation (EU) No. 1169/2011, commonly known as EU FIC Regulation. This EU legislation has been implemented into UK law, via the Food Information Regulations 2014 and still applies following the UK's exit from the European Union

⁸ Scottish Government (2022) Consultation on Mandatory Calorie Labelling in the Out of Home Sector in Scotland <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2022/04/consultationmandatory-calorie-labelling-out-home-sector-scotland/documents/consultation-mandatory-calorie-labelling-out-homesector-scotland/consultation-mandatory-calorie-labelling-out-home-sector-scotland/govscot%3Adocument/consultationmandatory-calorie-labelling-out-home-sector-scotland.pdf>

Unlimited refills

With regards to unlimited refills of soft drinks, it is welcome that they are included within the proposals as being within scope of the regulations. This points to recognition of the significant contribution these drinks make to diets and excess calorie consumption, with evidence showing that consumers seek to get their “money’s worth”⁹. However, this approach is inconsistent with other proposals in the consultation which outline that non-pre-packed products will be out with scope, which we strongly disagree with. This creates inconsistency between food and drink non-pre-packed items and could create uncertainty. We would like to see all non-pre-packed food and drink products included within scope of the regulations.

Section 2: Price Promotions

Question 4 – Is the proposed definition of the following sufficiently clear for the purpose of implementation and enforcement?

- a. Multibuy – Yes**
- b. Extra free – No**

The definition of multibuy is clear. The definition for extra-free is less clear as this is included with the definition of multi-buys and not provided separately. Extra free is currently only referenced in part (ii) of paragraph 46 on page 13 within the definition section for multi-buys. It is therefore unclear what we’re being asked to comment on in this question. For clarity, it would be beneficial to separate out multibuys and extra free and provide individual definitions for each.

Question 5 – Is the proposed timescale of 12 months at paragraph 56 sufficient to allow price promotions on packaging to be phased out?

Yes

12 months is a sufficient timescale and shouldn’t be any longer. These regulations have been discussed and proposed in Scotland since 2018 and as a result the food and drink industry have known they are coming and have had ample time to prepare.

Question 6 – What, if any, implications do you expect there would be for businesses if meal deals are included within the scope of this policy (please include evidence where available)?

Meal deals should be included within the regulations. Including them presents positive opportunities for businesses.

Including meal deals within the regulations offers businesses the opportunity to offer and position healthier options closer to consumers and improve their demand. Recently conducted consumer surveys report that around a third (32%) of consumers state they would continue to purchase meal deals if they contained a healthier item in place of a restricted unhealthy one, and a further 9% reported they would buy the healthier main component without the additional item, which is usually unhealthy¹⁰ – this indicates that over 40% of consumers support and would like to see meal deals change to become healthier, and this presents an important opportunity for businesses to amend their offering to cater for this preference.

⁹ EconPapers: The Flat-Rate Pricing Paradox: Conflicting Effects of “All-You-Can-Eat” Buffet Pricing (repec.org)

¹⁰ Scottish Government (2024) Consumer Survey on Shopping Behaviours and Meal Deals: Evidence Brief <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2024/02/consumer-survey-shopping-behaviours-meal-deals-evidence-brief/documents/consumer-survey-shopping-behaviours-meal-deals-evidence-brief/consumer-survey-shopping-behaviours-meal-deals-evidence-brief/govscot%3Adocument/consumer-survey-shopping-behaviours-meal-deals-evidence-brief.pdf>

Restricting unhealthy HFSS products within meal deals also creates a level playing field for all businesses and would facilitate access to healthier meal deal options. It would also be logistically simpler for businesses. It's important to stress that the proposals in the consultation would not ban meal deals. Rather the proposals mean that businesses will be empowered to provide healthier products within meal deals, continue to benefit from the sale of meal deals, and could see an increase in sales of healthier products.

Question 7 – If meal deals are included within the scope of the policy, which would be your preferred option for targeting them?

Option 1 – Meal deals cannot contain HFSS targeted foods

Option 2 – Meal deals can contain up to one HFSS targeted food

Option 3 – Meal deals cannot contain targeted HFSS discretionary foods

Option 1 is our preferred option, as this aligns more closely to our preference for a whole category approach. Meal deals are a significant source of calories and are recognised in evidence as being a public health issue. Evidence shows that meal deals in the UK often fall short of UK nutrition guidelines, with lunch time meal deals typically exceeding the recommended meal calorie consumption. Similar findings were also found for sugar and salt, demonstrating that meal deals can make a significant contribution to excess calorie, sugar, and salt consumption. Meal deals have also been shown to drive less healthy purchases¹¹.

Given this evidence, it is vital that meal deals are within the scope of the regulations. Failure to include meal deals, especially the unhealthy HFSS products featured within them, risks undermining the overall effectiveness of the regulations, and would result in unhealthy products continuing to be heavily promoted to consumers.

Option 2 should not be chosen. This would significantly undermine the primary aim of the policy and would also be very challenging for businesses to administer. It would require complex changes to checkout/payment systems, for example, to make it work in practice.

In any option selected, it's important to ensure that less healthy components of a meal deal are not separately on promotion outside of the meal deal, to avoid their access at a discounted price.

It's vital that meal deals are within scope of the regulations as they make a significant contribution to promotions and the purchase of excess calories.

Data from Food Standards Scotland (FSS) highlights that meal deals account for the largest proportion of supermarket front-of-store offerings, and account for the highest proportion of trips on promotion. Food on the go (which is largely constituted by meal deals) accounted for a fifth of all items purchased on promotion in supermarket convenience stores, with crisps, savoury snacks and popcorn, and sandwiches the top product categories sold on promotion (55% and 42% respectively)¹². This is further supported by evidence from our recently published study, which found meal deals accounted for 38% of price promotions, in the five supermarkets visited in Glasgow, and meal deals were the most commonly used type of price promotion to promote discretionary food and drink items¹³. Meal deals account for a large proportion of price promotions and are skewed towards unhealthy discretionary products.

¹¹ Public Health Scotland (2024) Restricting promotions of food and drink high in fat, sugar or salt Evidence briefing 2: Meal deals https://publichealthscotland.scot/media/24917/v3_hfss-meal-deals-evidence-briefing-2_1380.pdf

¹² Food Standards Scotland (2019) The Out of Home Environment in Scotland https://www.foodstandards.gov.scot/downloads/The_Out_of_Home_Environment_in_Scotland_2019_PDF.pdf

¹³ Obesity Action Scotland (2024) In store promotions of food and drink products. An observational study <https://www.obesityactionsotland.org/media/kprjwvxv/in-store-promotions-report-2024.pdf>

Further, there is a need for the regulation to ensure that any restrictions placed on unhealthy products within meals do not result in the overall price of meal deals increasing when healthier options are provided. The affordability of these for consumers is important to serve the objectives of the regulation, and they offer the opportunity to increase access to affordable, healthy meal options. As outlined in our response to question 6, evidence shows that where healthy options are provided within meal deals, consumers will continue to purchase them.

Question 8 – If temporary price reductions (TPRs) are included within the scope of the policy, is the proposed broad definition at paragraph 85 sufficient for implementation and enforcement?

Yes

The definition is sufficient for implementation and enforcement. We would like to emphasise the importance of not outlining/defining a specific time-period within the regulations i.e. the time period that would be classified as ‘temporary’ for the purposes of the promotion, as doing so would create loopholes or opportunities for businesses to subvert the restrictions by setting the timescale for these promotions out with the time-period defined in the regulations.

One of the arguments presented against the inclusion of TPRs in price promotion restrictions is the issue of defining temporary with regards to a price reduction. This problem of defining ‘temporary’ should be easily resolved using existing consumer protection guidance for pricing¹⁴.

Question 9 – What, if any, implications do you expect there would be for businesses if TPRs are included within the scope of this policy? (please include evidence where available)

TPRs must be included in price promotion restrictions as they are the most commonly used type of price promotion in Scotland and therefore most frequently influencing consumer behaviour.

TPRs consistently account the largest proportion of price promotions in Scotland. Recently published data from Food Standards Scotland reports that TPRs account for 14.4% of all food and drink purchased on price promotion, out of a total of 20%, compared to only 0.1% for multi-buy promotions¹⁵. Further, findings from our recently published research found TRPs were the most commonly used type of price promotion and were also most commonly used on discretionary HFSS products¹⁶. Our research found that TPRs were the only type of price promotion used in each of the stores visited, demonstrating the extensive use of them and their reach.

Table 21 on page 31 of the Partial Business and Regulatory Impact Assessment (BRIA) breaks down the proportion of sales by food and drink categories by promotion type and by product category. It shows that across all products categories proposed as being within scope of the regulations, multi-buys and X for Y promotions account for a very small proportion of total sales on promotions, indicating that TPRs are the most commonly used type of price promotion across each of the categories. Similarly, the data also shows that the proportion spent on promotion for each of the product categories vastly outweighs the proportion of total grocery spend that the sales of products in these categories account for. This therefore highlights that TPRs need to be within scope of the regulations, as they have the biggest impact both in terms of spending and on diets. The partial BRIA details that businesses are strongly opposed to TPRs being within scope of the regulations. The strength of the data outlined in the partial BRIA shows that the businesses are aware of the real and profound impact and are high profitability of TPR promotions. Given these impacts on consumers, there is a clear need for TPRs to be within the scope of the regulations. TPRs currently aid brand

¹⁴ [https://www.legislation.gov.uk/uksi/2005/2705/schedules/made#:~:text=Introduction-,The%20Consumer%20Protection%20Act,of%20new%20homes\)%%20or%20facilities.](https://www.legislation.gov.uk/uksi/2005/2705/schedules/made#:~:text=Introduction-,The%20Consumer%20Protection%20Act,of%20new%20homes)%%20or%20facilities.)

¹⁵ Food Standards Scotland (2024) Monitoring Retail Purchase and Price Promotions in Scotland 2019- 2022 https://www.foodstandards.gov.scot/downloads/Monitoring_retail_purchase_and_price_promotions_in_Scotland_2019-2022.pdf

¹⁶ Obesity Action Scotland (2024) In store promotions of food and drink products. An observational study <https://www.obesityactionsotland.org/media/kprjwvxv/in-store-promotions-report-2024.pdf>

shifting and brand share, rather than supporting consumers to access healthier products. Including them within the scope of the regulations presents an opportunity to change this trend and improve access to and affordability of healthier products.

The full impact of the regulations in terms of achieving positive diet and health impacts can only be achieved if TPRs are included in the regulations. Evidence from a Scottish Government commissioned modelling study found that restricting promotions and marketing of HFSS products can be powerful, reducing energy intake by more than 600 calories per person per week. Crucially, however, this calorie reduction could only be achieved when all types of promotions are restricted. If only multi-buy promotions were restricted, a much smaller reduction of only 115 calories per person per week would be achieved¹⁷. This highlights the major impact that TPRs have on overall calorie consumption. TPRs therefore must be regulated. Furthermore, evidence from this study shows a significant weekly reduction in calories consumed of over 500kcal per person in those in the most deprived quintile.

Promotions overall and specifically TPRs encourage people to impulse purchase and spend more, on average around 20% more than they intended to, with 43% of people reporting that TPRs caused them to impulse buy¹⁸. This is further supported by evidence presented in the partial BRIA. Table 20 on page 30 outlines the modelled reduction in take home spend by consumers on discretionary products for just multi-buy promotions and then for all types of promotions. The findings show much larger savings when all types of promotions are included.

Further, TPRs are also the most commonly used type of price promotion during the Christmas season and other seasonal periods, accounting for around a quarter of all price promotions. Substantially more calories are purchased and consumed during these periods. Failing to include TPRs in regulations on price promotions will therefore do little to address this calorie overconsumption.

TPRs account for a large number of promotions in Scotland. Failing to include TPRs in price promotions restrictions would thus powerfully undermine the proposed policy. It could also encourage displacement of promotions away from other types of promotions included in the restrictions, like multi-buys, resulting in even more TPR promotions. Including all types of promotions in the regulations creates a level playing field for retailers and incentivises a shift towards healthier options being more accessible and for affordable for everyone. Any perceived negative impact on business shouldn't be prioritised over public health.

As with all promotions regulations, we feel it is important to stress that the proposed regulations will not ban promotions; rather, they will restrict promotions on unhealthy HFSS products. These HFSS products are still able to do sold, just not promoted, and retailers are still able to offer promotions on healthier products.

If we want to truly shift the diet of the Scottish population to make meaningful progress towards healthy weight goals, we need whole category exclusion of unhealthy products. We also need the aim of this legislation to be dietary improvement, not just reformulation. Without a whole category approach, businesses will focus on reformulating their products slightly to meet the NPM, which will not deliver the wholesale changes we need to see to improve the food environment. If the aim is reformulation we are only tinkering at the edges, and not delivering the meaningful change required to meet the targets set under the Healthy Weight delivery plan, including the commitment to half

¹⁷ Scottish Government (2022) Economic modelling: reducing health harms of foods high in fat, salt or sugar: Final report <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2022/05/economicmodelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report/documents/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-finalreport/govscot%3Adocument/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report.pdf>

¹⁸ Obesity Action Scotland (2022) Obesity and Promotions of HFSS products briefing https://www.obesityactionscotland.org/media/ozegu5kc/promotions_briefing_update.pdf

childhood obesity by 20230, in under 7 years' time. Reformulation of products needs to be addressed separately and should not be the focus of these regulations.

Section 3: Location Restrictions

Question 10 – Are the proposed definitions of the following prominent in-store locations, as described in paragraph 98, sufficiently clear for implementation and enforcement?

- a. Checkout – No**
- b. End of aisle – Yes**
- c. Store entrances – Yes**
- d. Covered external area – Don't know**
- e. Free standing display area – Yes**

Please explain your answers

a. Checkout

We feel the definition is not clear.

Paragraph 98 (i) of the consultation document states that a checkout area where targeted food cannot be placed is defined as “any area within 2 metres of the checkout facility...including a self-checkout” and (ii) “any area within 2 metres of a designated queuing area or queue management system”. However, both paragraph 98 (i) and (ii) go on to state that “Targeted HFSS foods would be able to be placed in an aisle (but not the end of an aisle) even if it is within 2 metres of a checkout”. This is unclear and needs clarification. The 2-metre restriction should be in place, regardless of whether this covers an aisle or not. This leaves opportunities for loopholes with regards to where products are placed within stores, and will also make implementation, monitoring, and enforcement much more challenging.

Checkouts are known to be key target locations within stores, so it's vital they are within scope of the regulations and for there to be a clear and easy to understand definition and rules. Evidence shows that food placed at checkouts is more likely to be unhealthy, and many people report that displays at checkouts encourage them to buy the products on display.

Data from an FSS Consumer Tracking Survey has reported that more than two thirds (67%) of people agree that placing HFSS products next to the checkout encourages people to buy more¹⁹, and checkouts are among the most common prominent locations used to promote discretionary products.²⁰ Research from The Obesity Health Alliance in 2019 found that 43% of all food and drink products placed in prominent in-store locations such as checkouts were for sugary food and drinks. Placing these products at checkouts is known to increase impulse purchasing and to also increase children pestering parents and drives increased sales²¹.

Removing HFSS products from checkout areas should significantly decrease the purchase and consumption of these harmful products. Findings from a study has shown that removing unhealthy food and drink from checkouts and nearby aisle-ends led to approximately 1,500 fewer portions of confectionery being sold in a supermarket each week²². Research has found that removing

¹⁹ Food Standards Scotland (2019) Food in Scotland Consumer Tracking Survey Wave 8 – Diet & Nutrition https://www.foodstandards.gov.scot/downloads/FSS_Consumer_Tracker_-_Wave_8_-_Report.pdf

²⁰ Obesity Action Scotland (2024) In store promotions of food and drink products. An observational study <https://www.obesityactionsotland.org/media/kprjwvxv/in-store-promotions-report-2024.pdf>

²¹ Obesity Health Alliance and Food Active (2023) Location, location, location. Exploring the impact and implementation of the promotion of high in fat, sugar and salt products by locations legislation in England https://foodactive.org.uk/wp-content/uploads/2023/11/Location_Location_Location_Winter2023_FINAL.pdf

²² World Health Organization (WHO) Regional Office for Europe (2022) WHO European Regional Obesity Report 2022 <https://apps.who.int/iris/bitstream/handle/10665/353747/9789289057738-eng.pdf>

discretionary foods, like sweets and crisps, from supermarket checkouts can lead to a dramatic fall in the amount of unhealthy snacks purchased. The study found that there was a 76% reduction in purchases of sugary confectionery, chocolate, and crisps from supermarkets that had checkout location restrictions for HFSS products compared to those that did not, over the course of a year, and also found an immediate 17% reduction in purchases of sugary confectionery in supermarkets with checkout policies²³.

There is an opportunity to replace HFSS products at checkouts with healthier options, to promote and encourage purchase and consumption of healthier options. Furthermore, survey evidence shows that almost two-thirds of people support measures to restrict where unhealthy food can be displayed in stores (findings from polling of more than one thousand people living in Scotland, commissioned by Obesity Action Scotland in August 2022 in Scotland²⁴). This is supported by data from the FSS Consumer Tracking Survey, and a systematic review in 2020, which confirmed that increased availability and more promotions of healthy food, accompanied by fewer promotions of unhealthy food, leads to “better dietary-related behaviours”²⁵. There is thus a high level of public support for these proven measures to restrict the display of HFSS products at checkouts and other prominent locations.

b. End of Aisle

The definition provided is largely sufficient. However, we feel it is not clear as to whether this applies to only displays fixed to the end of an aisle or also to ones which sit just inside an aisle such as at the inside edge of the aisles, which are increasingly used to display products that would be within scope of the regulations. This could be a potential loophole in the regulations. Lessons from the location promotion restrictions in England point to retailers simply shifting HFSS/restricted products to locations within aisles, and drawing significant attention to these products through the use of floor stickers, ceiling mounted signs etc.

Research has shown end of aisle promotions to be associated with an increase in sales of the products promoted there across a range of product categories²⁶, and just under a third of people have reported that end of aisle displays led them to buy unhealthy food or drink on impulse²⁷. Aisle end promotions also account for a sizeable proportion of in-store location promotions – findings from our study found 12% of location promotions were end of aisle promotions²⁸.

c. Store entrances

The definition provided is largely sufficient. It is based on a floor space calculation which we understand is consistent with that used in the English regulations.

It’s important that store entrances are within scope of the regulations, as evidence shows that predominantly unhealthy products are displayed here. Evidence from a survey by the Obesity Health Alliance found that 86% of food and drink products located at store entrances were products high in sugar and calories, including crisps, cakes, and confectionery²⁹.

²³ Ejlerskov K, Sharp S, Stead M et al (2018) Supermarket policies on less healthy food at checkouts: Natural experimental evaluation using interrupted time series analyses of purchases, *PLoS Med*, 15(12):e1002712

²⁴ <https://www.obesityactionsotland.org/media/qlufvkum/policy-polling-august-2022.pdf>

²⁵ Shaw SC, Ntani G, Baird J, Vogel CA (2020) A systematic review of the influences of food store product placement on dietary-related outcomes, *Nutr Rev*, 78(12):1030-1045.doi:10.1093/nutrit/nuaa024

²⁶ Whitehead R et al. (2021) The impact of non-price in-premise marketing on food and beverage purchasing and consumer behaviour: A systematic review. PHS, University of Stirling and University of Glasgow

²⁷ Food Standards Scotland (2019) Food in Scotland Consumer Tracking Survey – Wave 8

<https://www.foodstandards.gov.scot/publications-and-research/publications/food-in-scotland-consumer-tracking-survey-wave-8>

²⁸ Obesity Action Scotland (2024) In store promotions of food and drink products. An observational study

<https://www.obesityactionsotland.org/media/kprjwwxv/in-store-promotions-report-2024.pdf>

²⁹ Obesity Health Alliance (2018) Out of place: The extent of unhealthy foods in prime locations in supermarkets

<https://obesityhealthalliance.org.uk/wp-content/uploads/2018/11/Out-of-Place-Obesity-Health-Alliance-2.pdf>

Location promotions on healthy products like fruit and vegetables can substantially increase and consumption. Prompts focusing on fresh produce (in the form of an easel board just inside store entrances), resulted in 60% more fruit and vegetables being purchased, a 62% increase in spend, a 49% increase in the quantity of healthier products purchased and an associated 52% increased spend on these healthier products³⁰.

We would like to see the entrance area definition expanded to include all areas (such as aisles) where customers have to walk through (where there are no other routes) to gain access to the main part of outlet, and areas with significant customer dwell time.

d. Covered external areas

We note the definition in the consultation outlines outside areas that are connected to the store's main shopping area through which the public passed to end the main store. However, there is no mention about external areas that are not directly attached or connected to the store's main shopping area/entrance that could sell products within scope i.e. a covered external area that consumers do not pass through to get into the store. Additionally, this only appears to include covered areas with no mention of external selling areas that are not covered. It is currently not clear if such locations would be considered as in scope of the restrictions.

As with store entrances, we would like to see this expanded to all areas customers have to walk through or past to gain access to the store and areas of significant customer dwell time.

e. Free standing display areas

The definition is largely sufficient. It is welcome that the proposed definition specifically mentions display locations including the middle of an aisle. It is important this is reflected as key learnings from the implementation of the location promotions restrictions in England highlighted that retailers simply shifted promotions from end of aisles and other prominent locations to the middle of aisles using ceiling mounted and floor signage to clearly demarcate the items are being on promotion, as these locations were not in scope of the regulations in England. No clear definition of free-standing display units was provided in England which was problematic for effective implementation and enforcement of the regulations. A clear definition is essential for implementation, monitoring, and enforcement, to avoid loopholes.

However, we feel there are some points within the definition that need to be clarified. For example, within the definition outlined in the consultation document, aisle units are included in the list of display units that are within scope. Despite the location being titled free standing display areas, aisle units usually denote the built-in actual shelving units within aisles which are part of the aisles themselves and not free standing display units, which are likely to be much less common within aisles. It is therefore not clear from the definition if this means all aisle units as we've described or just ones that are fully free standing. The definition is not clear and could have a real impact on how promotions are displayed.

We encourage the Scottish Government to follow the proposed position in Wales whereby free-standing display units (in addition to those associated with the end of an aisle) are within scope. It is important to include as many locations as possible, to prevent loopholes, avoid promotions being shifted to locations not covered by the regulations, and to ensure maximum effectiveness of the regulations.

³⁰ Obesity Action Scotland (2019) Evidence overview: Impact of in-store advertising on consumer purchasing <https://www.obesityactionsotland.org/media/i0pjseuy/hfss-promotion-restrictions-oas-evidence-overview-website-ready.pdf>

Question 11 – Do you agree with the proposed approach to applying store entrance criteria to dedicated food areas within the stores, as described at paragraphs 100-102?

Yes

Yes, we largely agree with the proposed approach. It's essential the regulations cover any areas in stores where customers walk past items when entering and exiting (i.e. high flow areas), areas of significant dwell, and anything that indicates there are unhealthy foods on offer.

Question 12 – Do you agree with the proposed description for relevant floor space?

Yes

Yes, we largely agree.

We note paragraph 104 in the consultation document notes that “an area occupied by a separate business other than the store it is in (a concession), but only where the concession operates its own payment facilities” would be excluded from the relevant floor area of a store. This statement implies that a concession would be excluded, if it has its own payment facilities, however, this needs to be clarified and what the implications of this would be if the concession area on its own met the criteria for a qualifying business i.e. would the concession area be within or out with scope?

We consider it particularly important that there is a robust and comprehensive way for enforcement agencies to independently verify the area that is in scope of the restrictions.

Question 13 – Please provide any additional comments on the proposals for in-store locations within the scope of the policy

It's important that in-store location restrictions are as comprehensive as possible to ensure their effectiveness if not undermined by stores simply shifting to locations not covered by the regulations, as has been seen in some instances in England.

There are some important types of promotions not included in the proposals that we feel should be included. These include – shelf edge labels, upselling, loyalty pricing, promotional/seasonal aisles, designated queuing areas, in-store advertising, and on-pack promotions/advertising. We discuss some of these below.

Upselling

Upselling continues to be a problem for consumers when purchasing. Data from a Food Standards Scotland Consumer Tracking survey highlights that just under two-thirds of people (64%) feel that out of home premises shouldn't encourage customers to upsize. More than a quarter (27%) report being asked if they wish to upsize too often, and a fifth report finding it difficult to say no, if they are asked to 'go large', make it a meal deal or add sides and extras³¹.

Loyalty pricing

This is a type a price promotion but we're commenting here as there wasn't a suitable question specifically in relation to price promotions in which to discuss this type of promotion.

This is an increasingly important promotion technique used by retailers and should be included within the regulations. Loyalty pricing is preferential pricing offered to regular or loyal customers, such as Tesco Clubcard Prices. Evidence shows that around 95% of promotional sales in Tesco are

³¹ Food Standards Scotland (2019) Food in Scotland Consumer Tracking Survey Wave 8 – Diet & Nutrition
https://www.foodstandards.gov.scot/downloads/FSS_Consumer_Tracker_-_Wave_8_-_Report.pdf

now only available via the Clubcard Prices mechanism³², demonstrating not only the widespread reach of these promotions but also that there has been a shift in the behaviours of supermarkets in the promotions they offer. If other promotions for HFSS products were restricted, but loyalty pricing permitted, it is likely that even more promotions would be offered via loyalty pricing mechanisms.

Evidence shows that loyalty pricing encourages consumers to make a purchase they wouldn't otherwise have made, with a third of people (33%) reporting that loyalty pricing resulted in them impulse buying³³.

Multi-packs

These should be included, as failing to include them could create a loophole that the industry could exploit, by shifting promotions and production towards multi-packs. It is disappointing they aren't discussed in the current consultation.

Data from Food Standards Scotland shows that multi-packs of crisps and snacks are more frequently purchased on promotion than smaller sized single packs, encouraging overconsumption. Multi-packs were also the most common type of purchase for crisps and snacks, accounting for over 50% of all purchases of crisps and snacks³⁴. The data highlights the importance of multi-packs to the purchase and consumption of discretionary snack foods.

Seasonal and promotional aisles

There is currently no provision within the proposed regulations which specifically references promotions in temporary and seasonal promotional aisles. These prominent locations are used extensively and innovatively by retailers to promote their products. Findings from our recently published study of price and location promotions in five supermarkets in Glasgow found that promotional aisles were the most commonly used type of location promotion, accounting for just under a third (32%) of all location promotions recorded³⁵. Given the important contribution this location makes to the overall promotional landscape, it's crucial that provision is made for them within the regulations.

Question 14 – Are the proposed descriptions of the following online equivalent in-store locations sufficiently clear for implementation and enforcement?

- a. Home page – Yes**
- b. Favourites page – No**
- c. Pages not opened intentionally by the consumer – Yes**
- d. Checkout pages – Yes**

Please explain your answers

a. Home page

Yes, the definition is clear. It's welcome the proposal acknowledges this would apply regardless of whether a consumer enters the website via the homepage or not.

b. Favourites page

We do not feel the definition is clear.

³² <https://www.thegrocer.co.uk/supermarkets/why-loyalty-and-personalisation-schemes-will-set-supermarkets-apart-as-inflation-spirals/664363.article>

³³ Obesity Action Scotland (2021) Obesity and Promotion of HFSS Products
https://www.obesityactionsotland.org/media/1630/promotions_b.pdf

³⁴ Food Standards Scotland (2020) Monitor retail purchase and price promotions in Scotland (2014 – 2018)
https://www.foodstandards.gov.scot/downloads/MONITORING_RETAIL_PURCHASE_AND_PRICE_PROMOTIONS_2014_-_2018.pdf

³⁵ Obesity Action Scotland (2024) In store promotions of food and drink products. An observational study
<https://www.obesityactionsotland.org/media/kprjwxxv/in-store-promotions-report-2024.pdf>

Page 26 of the consultation document states promotions would be restricted on a favourite products page **unless** the consumer has previously purchased the targeted food (whether in store or online) or intentionally identified as a favourite product. It then goes on to define a favourite products page as meaning “a page intentionally opened by a consumer for the purpose of browsing products they have previously purchased or intentionally identified as favourite products”. This is unclear as it suggests that items previously purchased or intentionally identified as a favourite product would be out with scope of the regulations, and yet this is exactly what a favourites page is. This is very unclear and needs to be clarified.

c. Pages not opened intentionally by the consumer

Yes, this definition is clear.

d. Checkout pages

Yes, the definition is clear.

It would be welcome if the ‘shopping basket’ page/section was explicitly listed within the definition. It is implied in the definition that this part of the checkout process is included but it would assist with clarity for implementation and enforcement if this was explicitly listed.

Question 15 – Are there any other equivalent online locations that should be within scope of the policy?

Yes

Other types of online equivalent promotions we would like to see included are recommended products, best sellers, customers who bought this also bought functions, and promotional offers in order email confirmations for example.

Non-monetary promotions are more important online than in a retail environment. This is because online shoppers can’t physically see the stock, with the majority of promotions found at the stage of selecting items (on product landing pages and search results), or in the offers tab. Therefore, placing products where retailers know customers will visit or are required to visit as part of their journey on the website, including most or all of those identified above, is a logical strategy, and demonstrates the need for these online locations to be subject to regulation on the location of promotions of HFSS products.

We strongly welcome the consultation proposal to include other online locations like apps, and aggregator platforms like Deliveroo and Just Eat. Paragraph 119 in the consultation document states: *“Where a qualifying business sells targeted foods to the public through a website or other online platform, such as an aggregator or delivery app, they will be required to comply with price and location restrictions in respect of those online sales of targeted foods. Parts of online aggregator sites or apps may be captured by promotions restrictions, such as checkout pages or pop-ups on the qualifying business’ sections of the app or site”*. This is particularly relevant for the out of home sector. There has been a sharp increase in the usage of these platforms since the COVID-19 pandemic, and they now account for 70% of takeaway delivery orders. Between 2019 and 2021, the use of third-party aggregator delivery apps (e.g. Just Eat) in Scotland increased considerably by 286%, while restaurant app usage grew by over 440%. Additionally, these platforms also predominantly sell and promote unhealthy HFSS products to users³⁶.

³⁶ Obesity Action Scotland (2023) Ordering Food Online (Out of Home)
https://www.obesityactionscotland.org/media/hisjmj0s/ordering_food_online_-ooh-_final.pdf

Given this growth in usage and the dominance of HFSS products, these platforms need to be included in the regulations to restrict price and location promotions, to ensure consumers are offered and have access to healthy options. This could be achieved, for example, by a regulation that permits only healthy products to be shown on app home and landing pages. A study by Nesta, which examined the effect of food placement using 4 hypothetical app layouts, found there was a significantly higher number of calories ordered on the control app (where food and restaurants were positioned at random) than the 3 other versions of the app (where healthier and lower-calorie options were given more prominence). In the app where food was repositioned to promote healthier options, study participants ordered 6% fewer calories, and in the app where restaurants were repositioned, study participants ordered 12% fewer calories³⁷. This study highlights the importance of and need for restrictions on location promotions in online and digital environments, and the opportunities this presents for encouraging and promoting healthier options and behaviours.

It is welcome that apps and aggregators are proposed to be within scope of the restrictions and are discussed in the consultation. There is scope to improve clarity around what will and won't be covered by the regulations with regards to these, based on the definition outlined in paragraph 119 on page 29. We will discuss this further in our response to question 18.

Question 16 – Please provide any additional comments on the proposals for online locations within the scope of the policy

Online location restrictions should match with physical in-store locations (as far as possible) and should be applied to all locations discussed in our response. Applying the same restrictions to online shopping environments would provide a consistent and fair approach for retailers and avoid any 'displacement' effects of not applying the restrictions across all channels. For example, if HFSS promotions were allowed in online stores, this may move customers online, reducing the potential impact of the restrictions. Applying the regulations equally to both online and in-store locations ensure a level-playing field for businesses and can maximise health benefits. Furthermore, online location promotion restrictions could be implemented easily and quickly due to them being digital and the benefits of such restrictions would be seen quickly due to high and growing usage.

A substantial proportion of groceries are bought online in Scotland. Data from Food Standards Scotland shows there has been a 66.4% increase between 2019 and 2022 in the volume of food and drink purchased, with online sales accounting for 8% of total food and drink sales in 2022. Additionally, more than a quarter (25.8%) of all food and drink purchased online was purchased on promotion, and of these more than 18% (18.3%) were TPRs³⁸, illustrating the importance of promotions in the online food retail environment.

Further, convenience is a major driver of online sales, and promotions continue to be a major influencing factor in online shopping behaviours. Online shoppers are also more susceptible to promotions, with a study finding that around 60% of additions to online shopping baskets were 'disrupted', that is resulting from site searches or engagements with retailers' promotions³⁹.

³⁷ Nesta (2022) Reordering food options on apps could help to reduce obesity

https://media.nesta.org.uk/documents/Nesta_BIT_AHL_Food_delivery_apps_July_2022_Final_pdf_aWtrcHp.pdf

³⁸ Food Standards Scotland (2024) Monitoring Retail Purchase and Price Promotions in Scotland 2019- 2022

https://www.foodstandards.gov.scot/downloads/Monitoring_retail_purchase_and_price_promotions_in_Scotland_2019-2022.pdf

³⁹ Munson J., Tiropanis, T. and Lowe, M. (2017) Online grocery shopping: Identifying change in consumption practices. In: Lecture Notes in Computer Science (including subseries Lecture Notes in Artificial Intelligence and Lecture Notes in Bioinformatics), Springer Verlag, pp. 192–211

Section 4: Businesses in scope

Question 17 – Are the types of business within the scope of the policy sufficiently described for the purpose of implementation and enforcement?

Yes

The types of business within the scope of are sufficiently clear, however, we do not agree with the proposal that only businesses with 50 or more employees will be within scope.

If only businesses with 50 or more employees are within scope, this will exempt a lot of food and drink businesses in Scotland, particularly in the out of home sector, where small and micro businesses make up the substantial majority of food and drink businesses. Data in the partial BRIA published alongside the consultation highlights that 97.02% (12,730 out of a total of 13,120) of registered out of home private sector businesses have fewer than 50 employees, with micro businesses (0-10 employees) making up the majority of these. Therefore, exempting businesses with fewer than 50 employees will have a significant impact on the effectiveness of the regulations. We acknowledge that micro and smaller businesses would likely need to support to enable them to comply with the regulations. This support should be provided to enable to regulations to be extended to these businesses to ensure maximum effectiveness and impact of the regulations in the out of home sector. Such a move should also place greater liability on stakeholders higher up the supply chain to provide more healthy products.

We appreciate it may be more challenging for smaller retailers to apply the location restrictions. However, excluding these micro and small businesses could also have an impact on health inequalities. Evidence shows that smaller stores are more common in more deprived areas, and individuals within these communities are therefore more reliant on them⁴⁰. There is a strong association between deprivation and childhood obesity, with children both living in more deprived areas and living in lower income households at greater risk of obesity throughout childhood⁴¹. Therefore, exempting these businesses could contribute to widening health inequalities and would do nothing to close the childhood obesity inequality gap, as well as preventing these from more deprived experiencing the benefits of the regulations. Indeed, page 13 of the partial BRIA acknowledges that excluding smaller stores could drive up health inequalities, demonstrating it is a real and acknowledged concern.

We encourage the Scottish Government to consider ways that smaller retailers can be discouraged from using location-based strategies to promote HFSS products in the longer-term and to monitor the presence of promotions in exempt retailers as part of the evaluation of this policy. There is also a need for incentives for small retailers to promote healthy food, such as connectivity and supply support.

Out of Home sector

We welcome that the proposed regulations include the out of home sector. The out of home sector accounts for a quarter of all calories consumed in Scotland. In 2021, 96% of people in Scotland reported visiting an OOH outlet with an average of just under three trips a week per person. Total spend for the sector reached £3.6bn in 2021⁴². Promotions in the OOH sector make a major contribution to purchase and consumption of HFSS products and overall calorie intake.

⁴⁰ <https://www.smf.co.uk/wp-content/uploads/2018/10/What-are-the-barriers-to-eating-healthy-in-the-UK.pdf>

⁴¹ Miall, N & Pearce, A (2024) Growing up in Scotland: obesity from early childhood to adolescence. Obesity Action Scotland. doi: 10.36399/gja.pubs.319087 <https://www.obesityactionsotland.org/media/c2elenpt/gus-report-full-final.pdf>

⁴² Obesity Action Scotland (2023) Briefing: The Out of Home Food and Drink Sector <https://www.obesityactionsotland.org/media/yqhflx3m/out-of-home-briefing-2023-final.pdf>

Including the out of home sector within the regulations could also contribute to reducing inequalities. People from lower social class backgrounds (categorised by type of occupation) visited the OOH sector more often, on average, than those from higher social classes (182 vs 132 average visits per person). This trend was the same in 2019 and 2020. Despite visiting the OOH sector more often, those from lower social classes were shown to spend less per visit in 2021 compared to customers from higher social classes (£4.78 vs £6.32). This is likely to be a reflection of the different types of OOH outlets visited by each group⁴³.

However, the proposal to only apply restrictions to pre-packed foods will significantly undermine this, as the vast majority of food purchased OOH is non-pre-packed. This loophole must be filled. There needs to be consistent application of the regulations between the sectors listed. This is important to prevent loopholes both emerging and being exploited, and to avoid undermining public confidence in measures designed to protect public health.

Introducing mandatory regulations in the out of home sector can further assist with levelling the playing field by supporting and strengthening actions in other areas, such as those in the Out of Home Action Plan⁴⁴ which are voluntary measures.

Question 18 – Is the proposed extension of restrictions to online sales, including through online aggregator sites and apps (see paragraph 119) sufficiently described for the purpose of implementation and enforcement?

Yes

The proposals are largely sufficiently described. It is welcome that aggregator sites and apps are proposed to be within scope of the regulations.

As outlined in our response to question 15, these platforms have significant reach with strong growth and are a key purchasing mechanism for the out of home sector. However, there remains some uncertainty in the proposal in paragraph 119 over exactly how and where the restrictions would apply to these platforms. For example, paragraph 119 states qualifying businesses selling targeted food to the public would be within scope, however, we know from other proposals in the consultation that a qualifying business is one with 50 or more employees, and as we have highlighted, the vast majority of private out of home businesses in Scotland are micro and small businesses with fewer than 50 employees. Therefore, it is likely a large number of businesses featured on these platforms would be out with scope of the regulations. This would be problematic for implementation. It also creates an unequal playing field for businesses, as some will be exempt and some would be subject to the regulations, with smaller businesses more likely to lose out as a result.

Question 19 – Are the arrangements for franchises and symbol groups sufficiently described for the purpose of implementation and enforcement?

Yes

We welcome the proposals for franchises and symbol groups. This means these outlets will now be within scope of the regulations, as the employee count is based on the total number of employees across the whole group rather than individual stores. It is clear from the description in the consultation document that this is case.

Including franchise and symbol groups as within scope of the regulations could also positively contribute to reducing inequalities. Evidence from Food Standards Scotland shows that symbol

⁴³ Ibid

⁴⁴ Scottish Government (2021) Diet and Healthy Weight: Out of Home Action Plan <https://www.gov.scot/publications/diet-and-healthy-weight-out-of-home-action-plan/>

groups accounted for a higher nutritional volume purchased in C2DE households (more deprived) than in ABC1 households, and C2DE households also had a higher spend in symbol groups⁴⁵. Including these premises within the regulations helps to create a level playing field for consumers, where all consumers are protected from exposure to price and location promotions on unhealthy HFSS, and have equal opportunity to access promotions on healthier and staple foods. Failure to include them could result in more deprived groups continuing to be exposed to more promotions of unhealthy food, further limiting access to more healthy food options and widening inequality.

Question 20 – Do you foresee any impacts on the ability of businesses to trade either within the UK market or internationally from any of the proposed measures?

No

Introducing comprehensive price and location promotions regulations in Scotland covering as many types of promotions as possible and all types of food and drink businesses creates a level playing field for all food and drink businesses which promotes and encourages competition, rather than stifling it. It would ensure that some businesses are not negatively impacted over others.

Question 21 – Please provide any additional comments on the businesses proposed to be within scope of the policy

As outlined in response to question 17, we would like to see the regulations extended to include micro and small businesses with fewer than 50 employees, with support given to them to meet the requirements of the regulations. As these small businesses make up the vast majority of food and drink businesses in Scotland, exempting them from regulations will significantly undermine the overall effectiveness of the regulations and their impact in achieving improved health outcomes.

Section 5: Exemptions from location restrictions

Question 22 – Are the proposed exemptions from location restrictions based on business type clear and sufficiently defined to enable implementation and enforcement?

Yes

The exemptions are clear.

The proposals state that specialist shops, such as confectioners, should be exempt from location restrictions – we support and welcome this proposal. Specialist businesses are defined as those which sell only one or mainly one type of food product category, as a chocolatier or sweet shop. We recognise that specialist shops, such as confectioners, would be unable to stop displaying food subject to the restrictions at the front of store, at end of aisles or in promotional bins, as these products are the only category of product they sell. However, they should still be required to comply with price promotion restrictions, and restrictions on checkout locations should apply in all stores. Checkout displays prompt impulse buys that are additional and on top of what consumers select from the shop floor before they head to the checkout area, so there is no need for customers to be nudged to purchase even more when they are waiting to pay.

For clarity, the regulations should be updated to explicitly state that specialist shops are not exempt from price promotion restrictions, rather than just stating they are exempt from location promotion restrictions. Explicitly stating outlining in the regulations that specialist shops are required to comply with price promotions regulations ensures clarity for all stakeholders involved.

⁴⁵ Food Standards Scotland (2022) Take Home Retail Purchase and Price Promotions in Scotland
https://www.foodstandards.gov.scot/downloads/FSS_-_NSP_-_Kantar_Retail_Purchase_and_Promotion_2021_Data_-_Slide_Deck_-_FINAL_FOR_PUBLICATION_-_29_November_2022_%281%29.pdf

Question 23 – Are the exemptions from location restrictions based on individual store relevant floor area clear and sufficiently defined to enable implementation and enforcement?

Yes

It is largely clear. The proposals on store size/floor area detailed on page 34 in the consultation appear to match the regulations in England.

We do not support exemptions on the basis of floor space and call on the Scottish Government not to introduce such exemptions. Any exemptions would create loopholes, enabling unscrupulous companies to undermine the regulations.

We are concerned that there could be some confusion over which rules apply to which businesses and which one takes precedent when two contrary rules apply to a business. For example, a symbol or franchise store would be within scope (i.e. not exempt) of the regulations based on employee numbers but could be out with scope (i.e. exempt) if the floor space of their premise is less than the prescribed dimensions outlined. It needs to be clarified which rule would apply/take precedence in this instance. This creates a possible loophole and risks undermining the overall effectiveness of the policy, as it could be argued to be effectively exempting a (large) number of symbol and franchise stores, with floor space less than that prescribed in the consultation.

Question 24 – Please provide any additional comments on proposed exemptions from locations restrictions

For the restrictions to be effective, there needs to be as few exemptions as possible. Exemptions on the basis of floor space and employee numbers should be removed.

Avoiding exemptions is important to ensure consistency in the application of the regulations between different settings, to prevent loopholes being exploited, and to avoid undermining public understanding and confidence in the measures.

Section 6: Enforcement and Implementation

Question 25 – Do you agree with the proposed use of administrative sanctions for enforcement of the policy?

Yes

Administrative sanctions are appropriate but the fixed penalty notices need to be set at a level which acts as an effective deterrent to non-compliance.

We suggest using a stepped approach for fixed penalty notices, whereby the level of fine increases with each fine issued, up to a maximum. This could be a more effective deterrent for non-compliance. We also suggest varied fines for different entities in the supply chain depending both on size and role in relation to providing promotions information, for example.

Question 26 – Do you agree with the maximum penalties proposed for the offences in relation to enforcement of the policy?

Yes

The proposed maximum penalty is £2,500. The proposed level of fine and administrative sanctions (compliance notices and fixed penalty notices) seems appropriate. As outlined in our response to question 25, we would like to see a stepped approach to fixed penalty notices, whereby the level of

the fine increases with each fine issued, up to a maximum, to act as a more effective deterrent for non-compliance, and also to see varied fines, depending on the business's role in bringing forward promotions.

We note the consultation details the expectation is that local authorities, specifically their environmental health officers, will enforce the regulations. This is welcome. Local authorities are best placed to enforce the policy as they already have enforcement responsibility for food hygiene.

However, despite this, there remain a number of areas of concern in this regard. There are concerns over the capacity of local authorities to be able to undertake the enforcement. Local authorities report being understaffed, with limited capacity and resources to be able to undertake enforcement effectively. Pages 43 to 51 of the partial BRIA outlines the cost per environmental health officer for carrying out the enforcement – these costs are significant and could reach as much as £4,426,545 over a 25-year period. If local authorities are expected to undertake enforcement, it's vital they are sufficiently resourced by the Scottish Government to be able to do so. Findings from an evaluation of the location promotions regulations in England reported that despite generally high levels of awareness of the legislation, training opportunities and the number of inspections carried out was low, with limited staff time and resources cited as the main reasons. This resulted in no improvement notices being issued in the areas covered by the study, even though breaches of the regulations were identified⁴⁶. This encapsulates the need for sufficient resources and training for enforcement officers to be able to effectively and efficiently implement the policy to deliver desired outcomes.

Any potential revenue raised from fines should be channelled into enforcement activity and make use of other retail-level enforcement agencies for additional capacity and support regarding this.

There is also an issue with officers being able to calculate the NPM score during an inspection, both in terms of the information and time available. It would thus be crucial for the regulations to use a whole category approach, as outlined in the WHO evidence-based model, to overcome this problem. There would otherwise be concerns with how local authority officers would be able to calculate NPM scores during an inspection e.g. free sugar content of a product is required to calculate the NPM score, but this is not always detailed on product labels. The NPM is also acknowledged as not being the most straightforward tool to use and understand. Whilst it is expected/a legal requirement for premises to know and be aware of all the ingredients in the products they sell, this information may be held by the manufacturer or wholesaler, and not available from quick glance at the label. Furthermore, a scoring system such as the UK NPM also makes it very difficult to have true transparency, as it is very challenging for independent or third sector organisations to calculate the score for products. Such a scoring system would instead leave power in the hands of the food industry.

Question 27 – Is the proposed 12 month period following the introduction of regulations sufficient to prepare for:

- a. Implementation – Yes**
- b. Enforcement – Yes**

12 months is sufficient for both implementation and enforcement. Industry have known this policy has been coming for years and so should be prepared for it. It is therefore reasonable to expect them to be able to comply with 12 months. Any longer than this could undermine the objectives and overall effectiveness of the policy.

⁴⁶ Obesity Health Alliance and Food Active (2023) Location, location, location. Exploring the impact and implementation of the promotion of high in fat, sugar and salt products by locations legislation in England https://foodactive.org.uk/wp-content/uploads/2023/11/Location_Location_Location_Winter2023_FINAL.pdf

If the proposals were to be extended to include micro and small businesses of fewer than 50 employees, which we would like to see, we recognise some of these businesses may need more time and support to comply with the regulation. Therefore, for these micro and small businesses, an implementation period of longer than 12 months may be required. We would suggest a period of up to 24 months for smaller businesses.

Section 7 - Other comments

Question 28 – Please outline any other comments you wish to make on this consultation

Types of promotions and impact on business

The most effective and fairest approach is for regulations to create a level playing field for all food and drink businesses. The introduction of comprehensive and mandatory measures will create this level playing field across all food and drink businesses in all sectors within scope of the regulations - retail, out of home, online and wholesale.

The regulations should include as many types of price and location promotions as possible to ensure maximum effectiveness. Modelling evidence outlined in the partial BRIA outlines the economic monetary value benefits from reduced calorie consumption associated with the regulations for just multi-buy promotions and then for all promotion types. This includes costs such as costs to the NHS, quality adjusted life years (QALYs), economic output, and social care costs. The analysis shows the economic benefits are much greater for all promotions, than just multi-buys, acutely demonstrating why all types of promotions need to be covered by the regulations to achieve the maximum beneficial outcomes for individuals, economy, health systems, and society.

Focus of the regulations – dietary improvement

Context is crucial. What's around us shapes us. Improving our food environment is the single most important thing we can do to help achieve healthy weight across the population. We need action to improve the food environment now. Rates of overweight and obesity in both adults and children are continuing to rise. The latest statistics from the Scottish Health Survey highlight that over two-thirds of adults in Scotland (67%) are living with overweight and obesity, and a third of children aged 2-15 are at risk of overweight and obesity – the highest level recorded since 2011⁴⁷. This trajectory is gravely underpinned by persistent inequalities in weight outcomes for both adults and children, with those living in our most deprived communities at a much greater risk of experiencing overweight and obesity than their least deprived counterparts.

The regulations need to deliver dietary improvements across the population. The aim of the regulations therefore should be focused on dietary improvement, not just reformulation. If the aim is reformulation we are only tinkering at the edges, and not delivering the meaningful change required. We need regulations focused on removing the unnecessary, discretionary HFSS products from our diets, which provide little or no nutritional benefit, and on addressing the most powerful drivers of consumption of these products – price, availability, and marketing. Reformulation of products needs to be addressed separately and should not be the focus of these regulations.

Cost of living, health impacts and inequalities

We recognise the rising cost of living is a significant concern for many people at this time. Food prices consistently remain one of the top areas of concern for consumers, with 87% of people reporting this as a concern, and 53% reporting that healthy eating is too expensive⁴⁸. Yet, the evidence is clear, as outlined throughout our response, that price and location promotions do not save consumers money, and instead encourage consumers to purchase and consume more than intended. Recently published data from Food Standards Scotland shows that total spend on food

⁴⁷ Scottish Health Survey 2022 <https://www.gov.scot/publications/scottish-health-survey-2022-volume-1-main-report/>

⁴⁸ Food Standards Scotland (2024) Food in Scotland Consumer Tracking Survey Wave 16
https://www.foodstandards.gov.scot/downloads/Food_in_Scotland_Consumer_Tracker_Survey_Wave_16_report.pdf

and drink is higher on price promotion than not on price promotion. Per kilogram, the average spend on price promotion (£2.16 per kg) was higher than average spend not on promotion or off promotion (£1.67 per kg)⁴⁹. This highlights that, on average, it's more expensive to purchase food and drink on price promotion than not on promotion.

Furthermore, inequalities are likely to be reduced, because the most disadvantaged groups are likely to gain the biggest benefits⁵⁰. Any groups or individuals in Scotland could potentially benefit from the proposed regulations through (1) spending less on, (2) buying less of and consequently (3) consuming less of the products within scope of the regulations.

The proposed regulations could particularly benefit people living with socio-economic disadvantage. Evidence from a recently published economic modelling report by the Scottish Government shows a significant weekly reduction in calories consumed of over 500kcal per person in those in the most deprived quintile⁵¹. Furthermore, more deprived households are actually more price-sensitive, and will therefore experience disproportionately greater health benefits, thus potentially narrowing the inequalities gap.

Action on price promotions of HFSS products could also help with clarity and understanding. Data from FSS shows that those in socioeconomic group DE had lower levels of knowledge about and greater perceived barriers to healthy eating. The proposed policies to restrict promotions would have a positive impact on the socioeconomically disadvantaged, reducing the gap between rich and poor.

The health consequences associated with obesity are well evidenced and include NCDs, COVID-19 severity and in a report, from University of Glasgow and Glasgow Centre for Population Health (GCPH), obesity has been identified as a potential contributing factor to the recently seen stalling in life expectancy⁵². If we wish to see a thriving, productive healthy population in Scotland we must improve our diet and achieve dietary goals. Addressing the promotion and marketing of unhealthy foods through legislation can deliver the necessary shift in promotions in the retail and out of home environment. Despite arguments to the contrary, which argue that restricting promotions of HFSS products would have a disproportionate impact on the socioeconomically disadvantaged, evidence clearly shows promotions actively encourage people to spend more than they otherwise would, by encouraging them to purchase discretionary products. Promotions increase the volume of HFSS food and drink purchased during a shopping trip with no reduction in the volume purchased at subsequent trips. There is little evidence of compensatory behaviours in purchasing. This means there is an overall increase in the total amount of food and drink purchased and taken into the home for consumption⁵³.

Regulating promotions in this way is essential in a cost of living crisis to deliver a healthy population and healthy workforce, and ensure healthier options are the easiest and most affordable options for everyone.

⁴⁹ Food Standards Scotland (2024) Monitoring Retail Purchase and Price Promotions in Scotland 2019- 2022

https://www.foodstandards.gov.scot/downloads/Monitoring_Retail_Purchase_and_Price_Promotions_in_Scotland_2019-2022.pdf

⁵⁰ Capewell, C and Capewell, A (2018) An effectiveness hierarchy of preventive interventions: neglected paradigm or selfevident truth? J Public Health (Oxf), 1;40(2):350-358. doi: 10.1093/pubmed/idx055. PMID: 28525612

⁵¹ Scottish Government (2022) Economic modelling: reducing health harms of foods high in fat, salt or sugar: Final report <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2022/05/economicmodelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report/documents/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-finalreport/govscot%3Adocument/economic-modelling-reducing-health-harms-foods-high-fat-sugar-salt-final-report.pdf>

⁵² McCartney, G, Welsh, D, Fenton, L and Devine, R (2022) Resetting the course for population health Evidence and recommendations to address stalled mortality improvements in Scotland and the rest of the UK. A report from University of Glasgow and Glasgow Centre for Population Health https://www.gcph.co.uk/assets/0000/8723/Stalled_Mortality_report_FINAL_WEB.pdf

⁵³ Public Health England (2015) Sugar Reduction: the evidence for action https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470175/Annexe_4_-_Analysis_of_price_promotions.pdf

Public support for regulations

Contrary to arguments put forward by some sections of the food and drink industry, there are high levels of public support for government action to improve the food environment, and an increased recognition by the public of the impact of industry actions on their food and drink choices.

Survey evidence shows that 70% of people in Scotland agree that the government should take action to prevent obesity in Scotland, and more than two-thirds (67%) agreed that unhealthy foods seem to be on promotion more than healthy food⁵⁴. Additional polling evidence also shows that the vast majority of respondents (87%) supported interventions to ensure special offers and promotions are applied to healthy foods and everyday essentials when shopping in-store and online, while only 5% of respondents opposed such measures. Specifically, when looking at regulating promotions, more people were in favour of restricting price promotions of unhealthy foods in shops and online: 57% supported, 26% opposed⁵⁵. A 2023 report commissioned by The Health Foundation found 86% of people in Scotland wanting greater action to tackle health inequalities, and more than half supporting specific interventions on promotions of HFSS products⁵⁶. These polling findings demonstrate there are high levels of public support for government intervention and a recognition that action needs to be taken to change our food environment to improve public health.

A report of deliberative research by NCD Alliance Scotland and Diffley Partnership published in May 2024⁵⁷ also showed how public opinion grew for the measure once given the opportunity to discuss its impacts. The project engaged a representative sample of the Scottish Public across 5 sessions on the commercial determinants of health. Through this process, their views on a number of policy measures were surveyed. During the process, the number of participants supporting the policy rose from around 50% to 75%.

General

We note that a Partial Business and Regulatory Impact Assessment has been published alongside the consultation document, but that Health and Equalities Impact Assessments, for example, haven't been published. We question why this is the case, in particular given the stated primary aim of the policy is "to reduce the public health harms associated with the excess consumption of calories, fat, sugar and salt, including the risks of developing type 2 diabetes, various types of cancer and other conditions such as cardiovascular disease"⁵⁸. Given this aim of the policy, we would expect a health impact assessment to also be published alongside the consultation. Further, the publication of a business impact assessment and not one on health also conveys that the interests of the food and drink are being considered first and foremost above all other interests, with limited consideration of public health impacts. Whilst health impacts are addressed in the business and regulatory impact assessment, these are touched on very briefly and do not go into as much depth as would be the case in a health impact assessment. Additionally, the questions within the consultation are focused on the impact of the restrictions on businesses, with no specific questions in relation to health, equalities, consumer and wider population impacts.

About us

Obesity Action Scotland provide clinical leadership and independent advocacy on preventing and reducing overweight and obesity in Scotland.

⁵⁴ Food Standards Scotland (2024) Food in Scotland Consumer Tracking Survey Wave 16

https://www.foodstandards.gov.scot/downloads/Food_in_Scotland_Consumer_Tracker_Survey_Wave_16_report.pdf

⁵⁵ <https://www.obesityactionsotland.org/campaigns-and-policy/food-environment/public-support-for-healthy-weight-policies/>

⁵⁶ The Health Foundation (2023) Health Inequalities in Scotland: Public Engagement Research

<https://www.health.org.uk/sites/default/files/2022-12/health-inequalities-panel-report-diffley-nov2022.pdf>

⁵⁷ Diffley Partnership and NCD Alliance Scotland (2024) Commercial Determinants of Health and Public Attitudes: A deliberative Research Approach. <https://diffleypartnership.co.uk/wp-content/uploads/2024/05/NCD-Deliberative-Research-Diffley-Report.pdf>

⁵⁸ <https://consult.gov.scot/population-health/restriction-promotion-of-food-and-drink-proposed/>

We have facilitated public health and civil society engagement in this consultation process through a joint letter.

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