



RESPONSE TO THE SCOTTISH GOVERNMENT CONSULTATION ON RESTRICTING PROMOTIONS OF FOOD AND DRINK HIGH IN FAT, SUGAR, OR SALT

Section 1: Foods subject to restriction

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

We recognise the desire for the categories outlined to be consistent with England. However, our preference would be for the updated NPM model to be used, rather than the 2004/05 version as currently proposed in the consultation, as this applies more stringent criteria.

We are disappointed that alcoholic drinks are not included in the food categories within the scope of the proposed restrictions on in-store location and price promotions. The inclusion of alcohol would help support the aims of the restrictions to improve diet and help create a food environment which better supports healthier choices, with a view to reducing diet-related public health harms.

Alcohol is a discretionary food, providing no nutritional benefit and not necessary for a healthy diet.¹ Alcohol is high in calories, at 7 calories per gram, which is almost as many as a gram of fat. One unit of alcohol (8g or 10ml of alcohol) provides 56kcal. Other ingredients in alcoholic drinks, such as sugar, cream and fruit juice, can add further calories. A pint of 5% lager can contain up to 222kcal, equivalent to 1 standard Mars Bar. A 175ml glass of 12% wine is up to 158 kcal, equivalent to around three Jaffa cake biscuits.²

Alcoholic drinks make a considerable contribution to our diet. Alcoholic drinks were in the top ten foods and drinks categories for calorie purchase into the home in 2021 in Scotland, making up 4.4% of the total calorie purchase.³ When calorie intake is considered for only adults who drink, the contribution of alcohol to calorie intake consumed is estimated to rise to 9.1%.⁴

It is reasonable to say that alcohol intake may be a risk factor for obesity in some individuals. According to a 2015 study on the link between alcohol and body weight⁵:

- The effects of alcohol on body weight may be more pronounced in overweight and obese people
- Alcohol consumption can lead to an increase in food intake
- Heavy and binge drinkers seem to be at higher risk of obesity than moderate drinkers
- Adolescents and older people's alcohol intake is more likely to promote overweight and obesity

Despite this, alcoholic drinks over 1.2% ABV are excluded from the restrictions because of their exclusion from the Nutrient Profiling Model. We believe this is due to historically different regulatory regimes being applied to alcoholic drinks. This will result in an anomaly whereby alcohol substitute products, often referred to as no- and low-alcoholic drinks, of less than 1.2% ABV will be subject to these restrictions, while alcoholic drinks of more than 1.2% ABV, often with double the energy content, will not be.

We do however appreciate that restrictions on alcohol promotions are being actively considered by the Scottish Government, with a second consultation on alcohol advertising and promotion planned for later this year. We urge the Scottish Government to introduce similar restrictions on alcoholic drinks as proposed for HFSS products as soon as possible.

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

- ☐ Yes
☒ No
☐ Don't know

Please explain your answer.

Whilst the categories are generally clear, with regards to what would be in scope, there is some uncertainty/some products not sufficiently defined. Some of the terms seem open to interpretation, which may create potential loopholes in terms of which products are to be restricted.

We would also encourage a distinction to be made between soft drinks and alcohol substitute products (no- and low-alcohol products of below 1.2% ABV). The proposed definition of "soft drink" in Annex D includes alcoholic drinks "of an alcoholic strength not exceeding 1.2%". However, these products are not described as soft drinks in any other regulations or guidance. The UK Government has produced guidance (previously in regulation) for the description of alcohol substitute products of below 1.2% ABV⁶; this guidance only applies to product marketed as an alcohol substitute drink and not soft beverages.

It is important to maintain a clear distinction between soft drinks and adult drinks designed to mimic the look and taste of alcohol. For example, such alcohol substitute products have the potential to act as "gateway products" to alcohol, particularly for young people.⁷ There

is also a concern that alcohol substitute products may trigger relapse or pose a risk to recovery from an alcohol problem. Distinguishing between soft drinks and alcohol substitute products would provide a consistent approach to their descriptions across regulations, for the benefit of the public, retailers and regulators.

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

Alcohol Focus Scotland strongly disagrees with the proposal that non-pre-packed foods will be out with scope of the regulations. 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 outlines that the reason for this is that businesses may not be able to determine where loose or non-pre-packed products can or cannot be promoted due to relevant nutritional information not being available. However, it is a legal requirement that businesses have full knowledge of the nutritional composition and full list of ingredients in the products they are selling for the purposes of allergy information. Therefore, it is reasonable to expect a business to be able to provide a list of the full ingredients and nutritional composition and be able to calculate the NPM score as a result.

Secondly, in a previous Scottish Government consultation on the introduction of legislation on mandatory calorie labelling in the Out of Home (OOH) sector⁸, it was proposed that businesses would be required to calculate the number of calories in the products/items they sell, using the ingredients and nutritional composition of the product(s) to calculate calorie content. Therefore, if there is an expectation that retailers have the relevant nutritional information of products to be able to calculate calories, then this information is known and so 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 not valid and is not an acceptable reason for excluding non-pre-packed products.

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, that 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.

Significantly, excluding non-pre-packed items doesn't create a level playing field for food and drink businesses. It disadvantages retailers, as the out of home sector tends to provide more non-pre-packed foods, and so with this rule in place, many of their products would be out with scope, which wouldn't be the case for retailers selling predominantly pre-packed products.

Section 2: Price promotions

4. Is the proposed description of the following sufficiently clear for the purpose of implementation and enforcement:

a. multibuy?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

b. extra free?

- ☐ Yes
☒ No
☐ Don't know

Please explain your answer.

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 multibuy and extra free and provide individual definitions for each.

5. Is the proposed timescale of 12 months at paragraph **Error! Reference source not found.** sufficient to allow price promotions on packaging to be phased out?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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

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

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).⁹

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 purchases.¹⁰

Including meal deals within the regulations offers businesses the opportunity to provide healthier options to consumers. 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 main component without the additional item¹¹ – 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.

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 is important to stress that the proposals in the consultation would not ban meal deals and they would still be able to be sold in Scotland.

7. If meal deals are included within 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 - Meals deals cannot contain targeted HFSS discretionary foods.
- ☐ Don't know

Please explain your answer, including any alternative suggestions for how promotion regulations could help improve meal deals to better support a healthy diet.

Our preferred option would be option 3. Whilst option 1 is more comprehensive, we recognise that option 3 is easier to implement and is focused on discretionary foods which are the most harmful to health. This is also consistent with applying a whole category based on discretionary foods. Over time, the foods included within the scope of the regulations could be extended to move towards option 1.

We would not support option 2. This option would significantly undermine the primary aim of the policy and would impact the creation of a level playing field for businesses by creating administrative burden to enforce this policy in practice.

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

Alcohol Focus Scotland welcomes the definition and believes it is sufficient for implementation and enforcement. We would also support not including a definition or outline of 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.

9. What, if any, implications do you expect there would be for businesses if TPRs are included within 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.

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 achieved.¹² This highlights the major impact that TPRs have on overall calorie consumption.

The experience of restricting multi-buy promotions on alcoholic drinks further illustrates this. The multi-buy discount ban implemented in Scotland in 2011 was more limited in scope and did not prevent straight discounting; nevertheless, research undertaken as part of the Monitoring and Evaluating Scotland's Alcohol Strategy (MESAS) programme found it had delivered a reduction in off-sales purchases of 2.6%.¹³ However, retailers responded to the multi-buy discount by enhancing other promotions; on average, 50% of all off-trade alcohol sales in Scotland in the year after the ban was introduced were on promotion. The researchers concluded "that the estimated impact of the [Alcohol Etc. (Scotland) Act 2010] may have been larger if a total ban on off-trade discounting was introduced."

Data from Food Standards Scotland shows that TPRs account for 72% of the calories purchased on promotion, and 14.4% of all calories purchased in Scotland between 2019 and 2022.¹⁴ TPRs are primarily used to encourage brand shifting and increase brand share, rather than to support consumers to access healthier products or save money. In fact, research shows that promotions such as 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 buy.¹⁵

Additionally, excluding TPRs from this legislation may have the impact of further undermining the proposed policy as doing so would incentivise businesses to shift their practices further towards using TPRs. It is important to note that the proposed policy would not prevent the use of TPRs on healthier items, and would therefore enable retailers to support people to obtain a healthier diet at a reduced price.

Section 3: Location restrictions

10. Are the proposed descriptions of the following prominent in-store locations sufficiently clear for implementation and enforcement?:

a. checkout

- ☐ Yes
☒ No
☐ Don't know

b. end of aisle

- ☒ Yes
☐ No
☐ Don't know

c. store entrances

- ☒ Yes
☐ No
☐ Don't know

d. covered external area

- ☐ Yes
☐ No
☒ Don't know

e. free standing displays

- ☒ Yes
☐ No
☐ Don't know

Please explain your answers.

a. Checkout - 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.

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 week.¹⁶

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 ones which sit just inside an aisle i.e. 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 categories¹⁷, and just under a third of people have reported that end of aisle displays led them to buy unhealthy food or drink on impulse.¹⁸ End-of-aisle promotions for alcoholic drinks have been shown to uplift sales in supermarkets by up to 46%.¹⁹

c. Store Entrances - The definition provided is largely sufficient and we note that it is based on a floor space calculation which 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 confectioner.²⁰

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.²¹

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 - 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.

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.

11. Do you agree with the proposed approach to applying store entrance criteria to dedicated food areas within stores, as described at paragraphs **Error! Reference source not found.-Error! Reference source not found.?**

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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.

12. Do you agree with the proposed description for relevant floor area?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

Whilst we agree with the proposed description, 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.

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

It is vital that in-store location restrictions are as comprehensive as possible. This is to ensure that the restrictions are not undermined by stores shifting the products to locations that are not covered to continue to promote their sale and consumption, as has occurred in England.

To maximise the effectiveness of the regulations, the following important promotional activities should also be included in the restrictions: shelf edge labels, upselling, loyalty pricing, seasonal or promotional aisles, designated queuing areas, in-store advertising and branded chillers and floor displays. We discuss some of these below. As noted in our answer to the question on temporary price reductions, the experience of restricting promotional deals on alcoholic drinks shows how promotions will shift to those that unrestricted.

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 extras.²²

Loyalty pricing

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 now only available via the Clubcard Prices mechanism,²³ 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 reporting that loyalty pricing resulted in them impulse buying.²⁴

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 snacks.²⁵ 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.

Online

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

a. home page

- ☒ Yes
☐ No
☐ Don't know

b. favourites page

- ☐ Yes
☒ No
☐ Don't know

c. pages not opened intentionally by the consumer

- ☒ Yes
☐ No
☐ Don't know

d. checkout pages

- ☒ Yes
☐ No
☐ Don't know

Please explain your answers

a. **Home page**

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

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.

d. Checkout pages

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.

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer

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. 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 users.²⁶

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 calories.²⁷ 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.

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

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 TPRs²⁸, 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' promotions.²⁹

Section 4: Businesses in scope

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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 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 them.³⁰ 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 childhood.³¹ 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.

18. Is the proposed extension of restrictions to online sales, including through online aggregator sites and apps, (see paragraph **Error! Reference source not found.**) sufficiently described for the purpose of implementation and enforcement?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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.

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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 show that symbol 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 groups.³² 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.

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?

- ☐ Yes
☐ No
☒ Don't know

Please explain your answer.

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

Section 5: Exemptions from location restrictions

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

The proposals state that specialist shops, such as confectioners, should be exempt from location restrictions – we support and welcome this proposal. 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.

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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. These would have the potential to create loopholes for businesses.

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.

We understand from seeking clarification that in the above instance, stores with a floor space less than that detailed in the consultation would be required to comply with price promotion restrictions but not location promotion restrictions. This is currently unclear in the consultation and should be clarified for any future regulations, guidance, and communication.

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

Section 6: Enforcement and implementation

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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.

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

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer

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.

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. 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 identified.³³ 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.

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

a. Implementation?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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.

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.

b. Enforcement?

- ☒ Yes
☐ No
☐ Don't know

Please explain your answer.

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.

Section 7. Other comments

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

Alcohol Focus Scotland welcomes the recognition within this consultation that to deliver real impact on harm to public health, the environment within which people live, buy, and consume harmful products must be transformed. This is in keeping with international evidence that whole population measures that influence this environment are most effective at reducing consumption and associated harm.³⁴

Tackling the marketing of health-harming products (HFSS foods, alcohol and tobacco-related products) - including the proposals as set out in this consultation on price and location promotions of HFSS food and drink – is a key way to limit the commercial influences that drive consumption of these products, and in turn, reduce and prevent the significant health and social harm experienced as a result. These restrictions should be implemented at pace and across all health-harming products, bringing regulation on the commercial determinants of health into better alignment.

Restrictions on in-store and online price and location promotions that are being proposed for HFSS products should be introduced as quickly as possible for alcohol. This would be in line with recommendations of the Alcohol Marketing Expert Network, i.e. that the Scottish Government should introduce restrictions to ensure that alcohol display and promotion is only visible to those intending to browse or purchase alcohol and should restrict the use of price as a promotional tool.³⁵

Although Scotland introduced a ban on multi-buy discount alcohol promotions (such as ‘3 for 2’ offers) in 2011, and a minimum unit price (MUP) for alcohol in 2018, price remains a common marketing tool with straight discounting still possible, above the MUP. Price promotions also happen through marking of the price on the packaging itself, or visual cues such as brightly coloured or differently-sized labels or shelf markers which draw attention to a low or reduced price. A third of products in a study of small retailers in Scotland were on some form of price promotion; price marking was most common and was found on around a quarter (24%) of products.³⁶ In 2022, 21.6% of all alcoholic drinks purchased from retail in Scotland were done so on price promotion.³⁷ Modelling undertaken prior to the implementation of the multi-buy discount ban in Scotland estimated that banning all off-trade price promotions (both quantity discounts and other price-based promotions) could deliver a reduction in alcohol consumption of 3.1% and would complement minimum unit pricing.³⁸

Scottish licensing laws currently restrict the display and promotion of alcohol in shops to a single display area, in an attempt to ensure that shoppers only encounter alcohol displays or promotions when they have a conscious intention to browse or select an alcohol product.³⁹ However, retailers often place alcohol strategically throughout a store to increase its visibility. These restrictions still allow for alcohol to be located in highly visible parts of a

store: at the ends of aisles; in the middle aisle; beside tills and packing areas; and, in smaller shops, behind the till or visible in or from the window. Evidence suggests that when single display areas are located near high-traffic areas, this results in frequent exposure of shoppers, including children, to alcohol products and marketing messages.^{40 41}

Although it is positive that the Scottish Government is progressing with restrictions on the location and price promotions of HFSS products, a much more comprehensive approach to tackling the marketing of health-harming products is required. Restrictions on other key marketing activities, such as advertising in outdoor and public spaces, and sponsorship of sports and events, should be introduced as soon as possible (in line with recommendations of the Alcohol Marketing Expert Network and the NCD Alliance Scotland). The more comprehensive the measures used to tackle the marketing of health-harming products, the more effective they will be. This is illustrated in the difference in calorie reduction estimated for restricting all types of promotions rather than just multi-buy promotions in Scottish Government commissioned modelling (600 calories per person per week compared to only 115 calories per person per week),⁴² and the shift to straight discounting following the multi-buy discount ban on alcohol.⁴³

We note public support for tackling promotions and wider marketing activities for both alcohol and HFSS products. For example:

- 57% of people support restricting price promotions of unhealthy foods in shops and online.⁴⁴
- 60% of people support ensuring that alcohol display and promotion in shops and supermarkets is only visible to people intending to browse or purchase alcohol.⁴⁵
- In deliberative research by NCD Alliance Scotland and Diffley Partnership, published in May 2024, there was support from participants for restricting alcohol and HFSS food and drink advertising and promotion to children; separation and reduced visibility of alcohol products in retail premises; and restricting price and location promotions on HFSS products.⁴⁶
- The number of participants supporting restrictions on price promotions of HFSS products grew from around 50% to 75%, showing how public opinion grows for a policy when given the opportunity to discuss its impacts.⁴⁷

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