

Children's Food Campaign response to Technical Consultation on Volume-based Price and Location Promotions.

Question 1: Does the legislation describe the volume price promotions accurately and clearly for both business and enforcement agencies to implement and enforce?

- Yes
- **No**
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe volume price promotions instead.

The Children's Food Campaign and Sustain welcome the introduction of volume-based price promotions. We agree with the majority of the description provided for the scope of the regulation. However, we disagree with the delayed introduction to the on-pack promotional offers until April 2023 as laid out in Regulation 55(5). The intention to regulate on price promotions was announced by Government in December 2020, following a lengthy delay since the full 12 week consultation in January-April 2019. Therefore we believe that industry has been given sufficient notice of the intention to regulate these types of multi-buy/extra volume price offers. We believe it would send a clearer, stronger and more consistent message to the food and drink industry to begin the process of transition immediately so as to come into line with new regulations in April 2022, simultaneously with all other forms of volume price promotions.

Question 2: Does the legislation describe the free refill restrictions accurately and clearly for both business and enforcement agencies to implement and enforce?

- **Yes**
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe free refill restrictions instead.

We agree with the proposed description of free refills, but oppose the exemption of out-of-home outlets below 50 employees from this regulation, and believe it should apply to all outlets regardless of the size of business.

Question 3: Does the legislation describe this exemption for stores below 185.8m² (2000 sq ft) accurately and clearly for both business and enforcement agencies?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed description, please outline how you would describe this exemption.

We support the clear designation of floor space below 185.8m²/2000 sq ft, and this is sufficient to provide exemptions for the convenience & small independent store sectors in relation to location based promotions. When calculating the floor size, we believe clear guidelines must be provided to ensure accuracy and consistency of what is included or excluded from calculations of the "store's

main shopping area” – the inclusion of the word “main” might be open to subjective interpretation. eg. Entrances, till and queue areas, kiosks, post office counters, additional in-store services might be argued as not being part of the shopping area etc.

Question 4: Will enforcement officers readily be able to access information regarding the size of a store?

- Yes
- No
- Don't know

Please explain your answer.

N/A – we defer knowledge on this question to those directly engaged with enforcement of trading standards.

Question 5: Do enforcement officers or retailers foresee any challenges with enforcing based on the size of a store?

- Yes
- No
- Don't know

Please explain your answer.

N/A

Question 6: Are there any operational implications of setting the size of the store at 185.8 square metres (2,000 square feet)?

- Yes
- No
- Don't know

Please explain your answer.

With regard to the scope of enforcement of the new regulations, whilst we accept that smaller businesses and premises should be provided with exemptions on location-based promotions due to the practical nature of store sizes, we would like to see proactive measures to engage the convenience and independent retail sector with adopting the spirit of the regulations to reduce prominent display of HFSS goods wherever possible and incentivise healthier product purchases. We note that children under 16 are more likely to shop directly in smaller convenience store formats eg. on the way to and from school or other activities. Evidence would also indicate that convenience and local stores are important outlets for low-income customers, due to cashflow, mobility and time factors affecting ability to shop in larger format, out-of-town centre supermarkets.

We continue to oppose the exemption of smaller businesses from volume based price-promotions, as there is no physical size rationale for such an exemption, and such offers are known to stimulate impulse purchasing that is often done in local, convenience stores. We would recommend that the words “price and” are struck out from Table 1e, and that Regulation 4(b) is amended to clarify that exemptions are provided for small businesses in relation to location but not price promotions.

Question 7: Which of these 2 options is most appropriate to describe the restricted store entrance area?

We understand that the proposed distances for the prohibited entrance zone relate to the entrance to the main shopping area of the store and are additional to any external covered area such as a foyer or lobby space, where the total space is prohibited for location displays of HFSS products in scope of the regulation.

Option 2 provides greater overall coverage than Option 1 – as a distance of 15m in any direction from the centre of the entrance is greater than drawing a 15m square. This is therefore our preferred option, if independent evidence (eg. from established local trading standards experts) indicate that there would be no significant enforcement difficulties with Option 2 compared to Option 1.

Question 8: Do the check-out, aisle end and store entrance definitions accurately and effectively capture these prominent in-store locations?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed descriptions, please outline how you would describe these locations.

We agree with the descriptions provided, and in particular welcome seeing explicit inclusion of the queuing areas for check outs.

The restricted store entrance area ought to be clearly defined as ANY area that the customer is required to pass through in order to access the shopping area, in addition to any foyer or lobby area that may exist.

In the original consultation, we argued that the rules on HFSS location promotions should cover all areas of the store, except for the primary category-based display/shelf space – that they should 'stay in their own aisle'. Whilst we welcome the inclusion of the three most prominent display locations in the regulation, we would recommend that the review process considers any new marketing tactics employed by retailers to give restricted prominence through new types of display via mobile display units, mid-aisle special feature displays, additional stacking of products on shelves in other categories, eg above or adjacent to store cupboard, fresh, chilled and frozen produce. We also believe that temporary & seasonal promotion aisles need to be carefully monitored in terms of their prominence in store.

Question 9: Are the definitions clear for both business and enforcement agencies to implement and enforce?

- Yes
- No
- Don't know

The business and enforcement agencies are best placed to advise, but we would like to see very clear and detailed guidance and training provided to businesses, including store managers, and to enforcement agencies as part of implementation of the new regulation.

Question 10: Do these definitions need any further clarity?

- Yes
- No
- Don't know

Please explain your answer.

Seasonal promotions, especially Christmas, Easter and Hallowe'en feature HFSS products heavily and, as well as the creation of seasonal aisles, often include prominent displays in other areas of stores eg. Easter Eggs in standalone displays in the middle of aisles, or stacked above store cupboard groceries, or middle of aisle dumpbins of family packets of seasonal crisp flavours. We hope that the review, monitoring, evaluation and enforcement process will be able to track and report any marketing display innovation developed by brands and retailers in order to achieve the stated overall aim of reducing impulse purchase of HFSS products.

ONLINE

Question 11: Does the legislation correctly capture the online equivalents to in-store locations described above?

- Yes
- No
- Don't know

Question 12: Does the legislation describe the locations accurately and clearly for both business and enforcement agencies to implement and enforce online?

- Yes
- No
- Don't know

The business and enforcement agencies are best placed to advise, but we would like to see very clear and detailed guidance and training provided to businesses, including store managers, and to enforcement agencies as part of implementation of the new regulation.

Question 13: Does the legislation describe the symbol groups accurately under franchises?

- Yes
- No
- Don't know

We found the description very clear, and we agree that stores that are franchised under these symbol groups should be in scope of these regulations and are pleased to see their inclusion as a reflection of their significant role in the marketing and sales of food and drink.

Question 14: Are there any implications to the businesses model in including symbol groups as part of this policy?

- Yes
- No

- Don't know

Please explain your answer.

We believe that a more level playing field for the individual business owners of smaller stores – whether independently owned or part of a franchise or symbol group - would be created if all types of smaller format stores were also in scope of the regulations on volume-based price promotions.

HFSS Products in Scope

Question 15: Does the legislation adequately capture the intended categories?

- Yes
- **No**
- Don't know

Please explain your answer.

Whilst the legislation captures the food and drink categories at a relatively high level, the details of specific products under some of the headings may require further detailed clarification in terms of specific sub-categories, in order to ensure businesses do not argue that certain types of HFSS products should be considered exempt because they are not explicitly named in the regulation. The regulation also ought to be future-proofed to allow for future product innovation, and therefore should include a reference to an up-to-date data set of detailed product categories in line with ongoing healthy product reformulation programmes, and HFSS product levies.

Question 16: Is it clear from the legislation which products are in scope? If not, how can this be clarified?

- Yes
- **No**
- Don't know

Please explain your answer.

We support the detailed comments on the details of product category descriptions in the response to this technical consultation by our member Action on Salt/Action on Sugar.

Some specific concerns we would particularly flag:

Category 2: the reference to 'individually portioned bags' – we assume that all formats of these products should be in scope of both regulations whether in individually sized portions or larger format 'grab bags', family sizes and multipacks (eg 6 individual portions sold as a single unit). We assume that all sizes of all types of product should be in scope in every category.

We would like to see more specific reference to child and toddler snacks within the description. We agree that plain nuts should be exempt, but coated nuts and nut/corn mixes can contain high levels of added salt and/or sugar and should be included in the restrictions.

Category 3: we would like to see inclusion of breakfast cereal bars specifically included in the description (either here or Category 6: biscuits).

Category 5: iced goods – we would like to see specific reference that ice cream means both dairy and lactose-free/non-dairy products.

Categories 6 & 7: we believe further elaboration of all the types of cakes and biscuits in scope might be required, if not in the regulation itself, then in detailed guidance provided to businesses and enforcement agencies. We would like to see cake-making/bake at home kits and cookie dough included in the description.

Category 9: this is quite a specific list but with some omissions eg. Mousses. We would like to see dessert toppings (including syrups and sprinkles) also included and referenced specifically in this category, as a distinct sub-category not clear in the description.

Category 10: yogurt –this should also include yogurt drinks and fermented yogurt drinks.

Question 17: Are there any products that are unclear as to whether they are in scope of the current categories?

- Yes
- No
- Don't know

Please explain your answer.

There are some omissions from the list in the proposed regulations that are included in the PHE sugar and calorie reduction programmes but which are omitted here, including:

- Sweet breads such as fruit tea loaves
- Sweet spreads and table sauces (in sugar reduction programme) such as jams, marmalades, ketchup and brown sauce etc.
- Garlic/cheesy bread (in calorie reduction programme)
- Children's meal bundles eg. Where sandwiches are often combined with a soft drink and snack
- Pastry products outside of the morning goods category eg ambient or chilled sausage rolls, pasties, lattices, pies etc.
- Sandwiches, including paninis, toasties, wraps

The inclusion of HFSS products as part of meal deals is not specifically covered, and as such it remains unclear whether adding a drink and crisps/snack or chocolate bar, incentivising additional purchase of additional calories, salt, fat and/or sugar is part of the proposed regulation. We would like to see this included.

ENFORCEMENT

Question 18: Are there any implications of the above approach to liability for non-compliance?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

We support the overall approach to enforcement of compliance by local authorities and trading standards, with key liability falling to the retailers for compliance and additional responsibilities on manufacturers to supply accurate information regarding the products and compliance with the NPM. In order to assess compliance and serve notice of breaches of regulations or issue penalties to offenders, there will need to be adequate funding of local authority trading standards and enforcement bodies. Local trading standards bodies have seen their budgets cut by up to 60% from 2010 to 2018 as part of wider cuts to local government, which have also affected funding levels for local public health. It is critical that these functions are properly resourced to undertake the role being asked of them.

Question 19: Are the proposed checks appropriate to assess compliance with promotion restrictions?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

The proposed process for conducting compliance checks appears adequate. As per our previous responses, we believe all stores must be included in the regulations regarding volume price promotions regardless of size, and smaller stores below 2000 sq ft should only be exempt from location promotions regulations.

Question 20: Are the proposed checks appropriate to assess compliance with free refill restrictions?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

The proposed process for conducting checks appears adequate. However, we oppose the exemption of smaller outlets from the volume based free refills regulation, and believe it should apply universally.

Question 21: Should local authorities issue improvement notices in cases of non-compliance with promotions restrictions as the first formal action?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

This is in line with normal trading standards compliance processes and provides an opportunity for business owners to address actions required. However, where non-compliance has been detected,

follow up inspections must ensure that the breach of regulations has been corrected within agreed time frames, and lead to further sanctions such as penalty fines if repeat offences are detected.

Question 22: Are there other circumstances where an improvement notice may not be appropriate?

- Yes
- No
- Don't know

Please explain your answer.

We believe that an improvement notice is not sufficient in the case of repeated offences/breaches. We would support the ability of local authorities to issue penalty fines for a second or further offences.

Question 23: Where a business fails to meet the terms of an improvement notice is a fixed monetary penalty of £2,500 appropriate?

- Yes
- No
- Don't know

Please explain your answer. If you disagree with the proposed approach, please outline what approach you would see instead.

We support the idea of a monetary penalty for failing to meet the terms of an improvement notice, and a minimum level sufficient to act as a lever for compliance and deterrent to breaching the regulations, as well as supporting the costs of compliance and inspection. However, a fixed notice of £2,500 may disproportionately penalise independent business owners involved in franchises compared to large multiple supermarkets, and so we believe there may be a need for a tiered/banded approach from the introduction of this regulation. Typically, supermarkets fall into the 20,000-60,000 sq feet range, with some out of town superstores extending up to 100,000 sq feet, so there is a big difference for a small to medium independent franchisee with a store of 2000-10,000 sq feet. A tiered approach may then be further developed should restrictions be extended to smaller size businesses in future, as proposed.

Question 24: Are there circumstances where a different approach might be more appropriate?

- Yes
- No
- Don't know

Please explain your answer. If answered yes, please explain the specific circumstance and preferred enforcement approach.

Question 25: Is 28 days an appropriate period to make representations and objections or to discharge liability for a Notice of Intent?

The RESA specifies that 28 days is the longest period that can be permitted therefore any alternative suggestions must be less than 28 days.

- Yes

- No
- Don't know

Please explain your answer.

It appears logical and coherent to base this proposal on the existing RESA.

Question 26: Where a fixed monetary penalty has been issued, for example, for failure to comply with an improvement notice, should a person be able to discharge liability upon being issued with a fixed monetary penalty at a rate of 50% of the penalty issued?

- Yes
- No
- Don't know

Please explain your answer.

It makes sense to follow existing practice in discharging liability when issued with a fixed penalty notice.

Question 27: Is 28 days an appropriate length of time to pay or appeal a final notice?

The RESA specifies that 28 days is the longest period that can be permitted therefore any alternative suggestions must be less than 28 days.

- Yes
- No
- Don't know

Please explain your answer

It makes sense for local authorities to follow the existing process outlined in RESA.

Question 28: Should failure to pay or appeal a penalty within 28 days result in the penalty being increased by 50%?

- Yes
- No
- Don't know

Please explain your answer.

Question 29: Are there any circumstances where it might be inappropriate for local authorities to publish details of cases where a civil sanction has been imposed?

Please explain your answer.

N/A

Question 30: Will the additional requirements place any additional costs on your local authority?

Please justify your answer including evidence where possible.

Local trading standards bodies have seen their budgets cut by up to 60% from 2010 to 2018 as part of wider cuts to local government, which have also affected funding levels for local public health. It is critical that these functions are properly resourced to undertake the role being asked of them, so that both the promotions restrictions can be properly enforced, and wider programming to create a healthier food environment for children can be nurtured at local level.

Question 31: Are there any comments on the draft of the regulations?

Please explain your answer.

Please refer to our responses to Q1, 2, 3, 6, 15, 16 & 17

Question 32: Are there any comments on the revised costs for enforcement in the impact assessments?

N/A

Question 33: Are there any areas that need to be specified in guidance to allow businesses to implement the policy successfully?

As per our answers in Q15-17, we believe that there will need to be very exacting and detailed guidance provided in relation to the product sub-categories under each heading that are in scope of the regulation for all eligible retail store owners and managers, as well as in terms of the exclusion zones around store entrances, covered entrance areas, till and queuing areas, to ensure compliance.

Question 34: Are there any areas that need to be specified in guidance to allow enforcement agencies to implement the policy successfully?

The guidance will need to include how to measure the exclusion zones for location promotions, as well as clarify the exact list of products no longer allowed to be put on volume price promotions or in prominent display areas.

Question 35: If there are any further matters that you would like to raise or any further information that you would like to provide in relation to this consultation, please give details here.

We disagree with the delayed introduction to the on-pack promotional offers until April 2023 as laid out in Regulation 55(5). The intention to regulate on price promotions was announced by Government in December 2020. Following a lengthy delay since the full 12-week consultation in January-April 2019. Therefore we believe that industry has been given sufficient notice of the intention to regulate these types of multi-buy/extra volume price offers. We believe it would send a clearer, stronger and more consistent message to the food and drink industry to begin the process of transition immediately so as to come into line with new regulations in April 2022, simultaneously with all other forms of volume price promotions.

Whilst remaining exempt from location promotions, we believe that smaller stores should also be included in the regulation regarding volume-based price promotions, including free refills in out of home outlets. We note that smaller stores and convenience stores are particularly frequented by children and young people themselves, and also are important retail outlets for low income families, who are disproportionately at risk of overweight and obesity and therefore a greater need to access healthier retail settings. We do not see any advantage from exempting these stores from this part of the new regulation, except for costs of enforcement.