

ACS Submission: Restricting promotions of products high in fat, sugar and salt by location and by price: enforcement

ACS (the Association of Convenience Stores) welcomes the opportunity to respond to the Department of Health and Social Care’s enforcement consultation for Restricting promotions of products high in fat, sugar and salt by location and by price. ACS is a trade association, representing 33,500 convenience stores across the UK including Spar UK, Nisa Retail and thousands of independent retailers. Further information about ACS is available at Annex B.

ACS’ response should be read alongside the DHSC consultation document and draft regulations [here](#). You can navigate through the questions by using CTRL-click on the contents below.

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VOLUME PROMOTIONS

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

No.

The legislation does not describe the volume price promotions accurately and clearly. This will make it difficult for businesses to implement and enforcement officers to perform checks.

Retailers use a range of promotional techniques in stores. A clearer definition is required for 'Temporary price promotions' to determine precisely what promotions are in scope, and to make explicitly clear that price cut activity such as rollbacks and meal deals are out of scope. The regulations must also make clear that the definition for drinks products included under category one is intended to apply to free refills in the out of home sector and not customer operated drinks machines in convenience stores.

More clarity is needed on meal deals in particular to determine the requirements on products not included in the traditional sandwich, crisps and drink deal. Convenience stores offer meal deals for dinner items such as 'Dine In for £x?', Super Saver (e.g. 'pizza and beer for £x') and Freezer Filler (a selection of frozen products that wouldn't meet the definition of a healthy meal for fixed price point).

A key point of clarity is needed on the scope of promotions under section 55. 3(a) which refers to "more than one of the same item". We understand that this refers to products of the same category from the same brand but further clarity is needed on how this would apply to products of the same type from different brands offered for promotion by the same supplier.

FREE REFILLS

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

N/A

LOCATION

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?

No.

We do not agree with the assertion in the consultation that convenience retailers over 2,000sqft (185.8sqm) have "distinct checkout and front-of-store areas". We strongly urge the Government to reconsider its position on this threshold and instead exempt all businesses under 3,000sqft (280sqm).

The recommendation for a 3,000sqft exemption threshold for location restrictions is made based on the efficient application of the policy for both enforcement officers and retail businesses. The 3,000sqft (280sqm) threshold is a widely used industry definition for convenience store and exists in current statute; the Sunday Trading Act 1994¹.

¹ [Sunday trading Act 1994](#)

Floor space measurements in convenience sector, and other small retail premises, are calculated using the Sunday trading Act 1994 definitions and size threshold. It therefore makes sense for DHSC to align the thresholds in the new regulations with existing regulations that are widely understood by industry and the enforcement community.

In addition to the using the 3,000sqft (280sqm) threshold in the Sunday trading Act 1994, we also recommend DHSC use the same 'relevant floor area'² and 'sales of goods'³ definitions contain in the Sunday trading Act 1994, Schedule 1. The use of "Floor Area" and "main shopping area" in the existing regulations are too vague. This new definition does not account for sales space and that is not dedicated to the 'sale of goods' in retail premises.

The Sunday Trading Act 1994 definition of 'relevant floor area' allows retail sites to exclude any part of the shop that is neither for the serving of customers in connection with the sale of goods nor for the display of goods. This is important as it will allow convenience retailers that operate the following services to excluded them from their floor space calculations; food to go concessions (12%), food preparation areas/ kitchens (19%), serve over coffee machines (14%), Post Office counters (22%) and other areas of the store footprint that are not dedicated to the 'sale of goods'⁴.

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

No.

The use of a 2,000 sqft threshold instead of 3,000sqft threshold and the proposed 'main shopping area' definition means that retailers and enforcement officers will have to take a new approach to measuring internal store areas. As outlined in response to Question 3, all store floorplans are currently calculated based on the Sunday trading definition of 'relevant floor areas' and 'sale of goods'.

It will be difficult and costly for all convenience retailers to provide updated floorplans in the event of a spot check by enforcement officers. New procedures will have to be developed by retailers to ensure that store managers have access to floorplans that reflect the stores' floor area based on the new definitions. Retailers will incur additional costs by having to commissions technical drawing of their sites. This will be particularly challenging for independent symbol group retailers that do not have access to central administrative support.

We also believe that local authority enforcement teams will incur additional costs to ensure compliance with these regulations. We assume that even if a retailer can provide technical drawings of the relevant store areas that local authorities will have to check the measurements using their own equipment. Such checks would have to be completed to an accurate standard to confirm compliance or justify the levying of fines against retailers for noncompliance. (Please see our response to enforcement questions).

² "relevant floor area", in relation to a shop, means the internal floor area of so much of the shop as consists of or is comprised in a building, but excluding any part of the shop which, throughout the week ending with the Sunday in question, is used neither for the serving of customers in connection with the sale of goods nor for the display of goods

³ "sale of goods" does not include—

(a) the sale of meals, refreshments or alcohol for consumption on the premises on which they are sold, or
(b) the sale of meals or refreshments prepared to order for immediate consumption off those premises,

⁴ ACS Local Shop Report 2020

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

Yes.

We believe that floor space is the most appropriate methodology for determining the businesses that should be within scope of the location restriction regulations. We have consistently called for DHSC to use a 3,000sqft exemption threshold, not the 2,000sqft.

Both enforcement officers and retail premises are already using the existing 3,000 sqft threshold and associated definitions for calculating floorspace included in the Sunday Trading Act 1994. Therefore, we urge the Government to be consistent with existing thresholds and definitions in the Sunday Trading Act 1994.

Failure to be consistent with existing definition will place additional burdens on both retailers and enforcement officers.

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

Yes.

We do not agree with the assertion in the consultation that convenience retailers over 2,000sqft (185.8sqm) have “distinct checkout and front-of-store areas”. We strongly urge the government to reconsider its position on this threshold and instead exempt all businesses under 3,000sqft (280sqm).

We have communicated that retail premises within the convenience sector (defined as under 3,000 sqft) do not have uniform layouts where the store areas can be easily defined. Checkouts, store entrances, queuing areas and end of aisle overlap in smaller retail sites making compliance and enforcement more challenging.

There will be significant costs associated with refitting stores to comply with the regulations. As we have already set out in our evidence to DHSC original consultation⁵, we estimated a range of cost impacts for stores to comply from £1,600 per store to £12,600per store.

Stores in the 2,000sqft to 3,000sqft size bracket will have a wider range of products and services on offer making it more difficult to move products and refit stores, for example 19% have more that 15metres of refrigeration space⁶. As a result the majority of retailers in scope of the location restriction regulations will have compliance costs at the top end of the estimate that we have shared with DHSC.

We believe that at least 7,000 convenience stores in England will be impacted by the location restriction regulations. Based on a conservative estimate of £13,000 per site to refit stores and 20 hours merchandising time at £9.50 per hour, we believe that the total one-off compliance costs for the convenience sector could run over £92 million. £26 million of this will fall on 2,000 independent small retailers trading under symbol group brands.

Compliance with location restrictions is not simply a matter of getting store colleagues to move stock from one part of the store another. Convenience retailers will have to invest in refitting large parts of their stores; removing aisle ends, extending the length of aisles, removing refrigeration units and removing or retro fitting checkouts to no longer hold HFSS products. The compliance costs will increase significantly beyond the estimates outlined above, if food concessions in convenience stores are not excluded from the regulations. If

⁵ ACS Submission: Restricting Promotions of Products High in Fat, Sugar and Salt by Location and by Price

⁶ ACS Local Shop Report 2019

food concessions in convenience stores are included then there would be much large store refitting costs to account for as counters and equipment in these settings are more difficult to adjust and refit.

One convenience retailer indicated that as they would need to remove aisle-ends and replace these with a different fixture to promote items unaffected by the regulations, there would be significant additional cost. The estimated cost of refit per store given was £13,000, not including the staff costs required to implement the refits.

We strongly recommend that DHSC extends the threshold for exemptions to 3,000sqft (280sqm).

In-store

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

Option 1.

Both options set out in the consultation are workable for defining the prohibited entrance area. We favour option 1 based on a simpler measuring process.

The main challenge with both options is the requirement to understand the store's floor area using a new definition of 'main shopping area'. If the definition of main shopping area were aligned with the Sunday trading Act definition of 'relevant floor areas' and 'sale of goods' this would provide more certainty for retailers and enforcement officers when calculating prohibited entrance areas.

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

No.

Checkout

The definition of checkout area in the regulations is clear and DHSC have confirmed that enforcement officers should be able measure 2 metres from any external area of the checkout.

We would like to see the checkout area definition also benefit from an exemption from "where specified food is placed in a main shopping aisle". In smaller format convenience stores it is likely that the end or frontages of checkout areas will be within 2metres of main shopping aisles. We believe it is consistent to exclude products in main shopping aisles from location restrictions even where they are within 2metres of the checkouts.

End of Aisle Display

The inclusion of end of aisle displays, both at the front and/ or back of stores, has a much higher impact on small retailers. End of aisle displays make up a much higher percentage of store sales in a convenience store. Please see Annex A Figure 1 for an example store plan which demonstrates the importance of end of aisle sales space in a convenience store.

A definition of 'End of Aisle Display' is not currently included in the draft regulations. The current regulations state: "*end-of-aisle display*" includes a separate display unit located adjacent to the end of a main shopping aisle (such as an island bin display)".

The opening of the consultation document includes a more detailed definition of "end aisle display", stating: "*Ends of aisles: the point of purchase advertising of products placed at the ends (front and/or back) of shelf rows in stores, or on separate units adjacent to the ends of*

the shelf rows for example island bin displays". This definition is detailed enough for determining end of aisle displays but must be included in a revised draft of the regulations.

Designated Queuing Areas

The definition of 'designated queuing area' is problematic as convenience retailers do not always have designated spaces for customers to queue. In many instances queuing areas are often determined by customers.

We urge DHSC to recognise that queuing areas can fluctuate according to trading peaks in the day and can impact large areas of the store, this is especially problematic in petrol forecourts where customers are queuing for fuel as well as grocery. We also urge DHSC to acknowledge that queuing areas have expanded significantly with the introduction of social distancing measures under Covid-19 secure guidelines⁷. Social distancing measures are likely to have a long-lasting legacy across society and retail environments.

In Figure 2 at Annex A, we have used shaded store plans to demonstrate the affected spaces in store. As is typical of a convenience store, this example does not have a designated queuing area in terms of any physical barriers. The areas with dashed lines show where customers may queue in store. In convenience stores queuing areas will most likely be within the 2metre checkout restriction or continue down a main shopping aisle already defined in the regulations. As a result, we recommend that 'Designated queuing area' be removed from the regulations.

If the designated queuing area definition remains in the regulations, we anticipate this will result in wide range of interpretations by the enforcement community and be an issue of contention.

Food Concessions in Convenience Stores

DHSC Officials have confirmed that the out of home sector is not in scope of these regulations, such as coffee shops and food service operators. This needs to be clarified directly in the regulations or in supporting guidance.

Currently 12% of convenience stores include a serve over coffee machine and 14% of convenience stores have a food to go concession, such as a Subway or Greggs. Where such services are present in convenience stores, they should be exempt from the location restriction regulations. In addition, food concessions within convenience stores should not be included within the definition of main shopping area for the calculation of internal floorspace (2,000sqft).

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

No.

Designated Queuing Areas

As outlined in response to Question 8, we believe that designated queuing area is the most difficult definition for enforcement officers to enforce. We believe the designated queuing area definition should be removed from the regulations.

Food Concessions in Convenience Stores

⁷ [Shop and Branch Covid Secure Guidance](#)

As outlined in response to Question 8, we believe the regulations and guidance should make clear that food service operators are exempt from the location restriction regulations, including where food service concession operates within a convenience store.

Question 10: Do these definitions need any further clarity?

Yes.

See responses to questions 8 and 9.

[Online](#)

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

No.

We do not agree that direct comparisons can be made between online and in store environments.

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

No.

Entry Pages

We are unclear how entry pages can be defined in regulations. Customers can access retailers' website based on a number of different entry points. Through search engines, consumer can land on specific products and promotional offers on retailers' websites, which is extremely difficult for retailers to manage. We believe the regulations would be clearer if they include the term 'home page' rather than 'entry page'.

ACS endorses the points raised in the British Retail Consortium submission on definitions for the online locations and the changes they propose to the draft regulations.

[Businesses in scope](#)

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

No.

We fundamentally disagree with the assertion in the consultation document that symbol group retailers fit under the umbrella of franchise arrangements and should be considered medium or large businesses.

Symbol groups are not the same as franchise operators. In franchise models the retail offer is determined by the franchisor and the franchisee delivers the offer to this exact standard. Symbol group retailers have far more autonomy to operate their business as they see fit, making their own buying and operational decisions. Symbol group retailers are registered as limited companies and employ people based on their own employment contracts.

Each symbol group model in the convenience sector will work differently depending individually negotiated contracts. Some symbol groups charge fees to retailers, some do not. It is common for wholesalers to seek a minimum level of purchasing from their retail customers who use their symbol group services, which may be expressed in terms of actual spend or as a proportion of their overall shop sales.

Some symbol groups are based on delivered wholesale supply, some are based on cash and carry supply, and some use a combination of these supply methods. Some groups have indicated that while they may supply retailers as their main wholesalers these are legacy agreements and no formal contract for supply exists between the retail and wholesalers.

Some symbol groups are not run by wholesalers, but have formed as groups of retailers or through running a commercial model based on negotiating terms with suppliers. These groups will typically strike a supply agreement with one or more wholesalers in order to service their branded stores. The breadth and diversity of the partnerships between symbol retailers and symbol groups are completely distinct from franchise operations found in food service operations.

Symbol group members of ACS have indicated that they will share details with DHSC of the nature of their contracts with their retail partners.

ACS' Legal Advice

ACS' legal advice on the draft regulations has indicated that there is considerable ambiguity about how the definition for franchise arrangements may apply to symbol groups agreements. Symbol Groups and retailers trading under symbol group banners have also expressed similar concerns. They have shared with us a wide variety of contracts that are bespoke to individual retailers' needs.

Our legal advisers have indicated that 'franchising' is not a defined term in law. Franchising arrangements are entirely dependent on the contractual arrangement. We believe that the regulations seek to regulate 'business format franchising', whereby the franchisor sells the complete business format and system to a franchisee. This is commonplace in fast-food franchising but as we have argued throughout our submission this is not a reflection of the symbol group retailing models.

We believe that the most likely implications of the regulations in their current form is an increase in pressure on local authority enforcement officers. Enforcement officers will have to review individual contract terms to determine if a symbol group contract is deemed to be a franchise agreement. The enforcement community has indicated to us this will increase the pre-enforcement activity they will have to undertake, for example contacting symbol group head offices or individual retailers to secure copies of contracts and seeking legal advice.

DHSC Flexibility on Franchise Definitions

We note that DHSC has used differing interpretations for franchise models to define what businesses are in and out of scope of policies seeking to tackle obesity. In DHSC's response to their consultation on mandatory calorie labelling in the out-of-home sector⁸, DHSC acknowledged that there is discretion available to some pub chain franchisees to control their food offer.

As a result of the discretion available to franchisees DHSC stated it is appropriate for these franchisees to be treated as individual food businesses. The full extract states:

"we recognise that not all operating models are the same and will vary on an individual basis. Some franchising arrangements, most notably among pub chains, may only influence the drinks on offer across the franchise, with the provision of food at the discretion of individual franchisees. In such cases we believe it would be more appropriate for franchisees to be considered individual food businesses. Therefore, we intend for the above rule to apply

⁸ [Mandatory Calorie Labelling in the Out of Home Sector: Government Response](#)

where the terms of the franchise agreement determines the food that can be offered by franchisees.”

We hope that DHSC will also acknowledge that not all operating models are the same for symbol groups. There is strong evidence that symbol group retailers have ultimate control with complete discretion over the operation of their business. Therefore, they should be extended the same dispensation as pub chain franchises under the policy response to mandatory calorie labelling in the out of home sector.

This means recognising that symbol group retailers are small independent retailers with autonomy over the provision, display and promotion of product within their stores. Independent retailers trading under symbol group brands should be identified as an individual food business and their employee numbers calculated based on the number of people they directly employ.

Fascia Used in the Convenience Sector

There are an extensive range of brands present on a store fascia in the convenience sector. Based on the existing draft regulations, it is likely that there will be unintentional consequences for other brands present on convenience store facias.

Many brands appear on convenience store fascia because of historic sponsorship arrangement and supply agreements. Brands that can be regularly seen on convenience stores fascia include food service businesses operating concessions in convenience stores, soft drinks brands, newspaper providers, parcel delivery and collections services and frozen food providers.

This wide range of brands that appear on convenience store fascia will make it extremely difficult for both retailers and enforcement officers to understand what businesses are deemed to be subject to franchise agreements as currently defined in the regulations.

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

Yes.

Symbol Group Retailers Are Small Businesses

By enacting this policy in its current form DHSC will be passing over £26million in one off costs for 2,000 small businesses owners trading under symbol group brands. In all other policy contexts symbol group retailers are considered small businesses based on their employee numbers, turnover, store size or rateable value of their premises.

We urge DHSC to consult closely with the BEIS retail team on the types of small business support provided to retailers trading under symbol group brands. For example, small business rates relief, plastic bag charge reporting, small business VAT deferrals, Making Tax Digital & Auto Enrolment pensions take up thresholds, Companies House reporting periods and many more.

We believe that supply agreements between retailers and wholesaler is not an appropriate way to determine employee numbers or the capacity to comply with the new regulations. The number of employees at a symbol group headquarters or depot has no bearing on a symbol group retailer's ability or resources to comply with regulations in their retail premises.

Unlike franchisees, symbol group retailers will not be issued with new shelving units or have contractors dispatched to refit stores. Instead, they will have to make their own

arrangements and raise funds to change their stores within the 8 months of publication of the regulations.

Symbol Group Competition Concerns

Symbol groups are concerned that the promotional and locational restrictions will be anti-competitive and negatively impact their business model.

Symbol groups are naturally concerned that the new regulation could lead to an exodus of symbol group retailers from their existing supply partnerships. Retailers between 2,000sqft and 2,500sqft and those competing in close vicinity to unaffiliated independent retailers with fewer than 50 employees are most likely to review their supply agreements with symbol groups.

For convenience retailers around 2,000sqft to 2,500sqft space is at a premium and compliance with the new regulations is especially difficult. They will have to make an individual assessment about the refit costs versus the benefit of being able to run promotions and place products in any part of their stores. For some this could result in moving to a non-brand convenience store model with new supply agreement.

Where symbol group retailers are in close vicinity and competition with independent retailers trading from sites over 2,000sqft they may also consider reviewing their membership of the symbol groups. A symbol group retailer will be trading at significant disadvantage to a retailer with fewer than 50 employees is trading from similar sized site close by. The independent retailer with fewer than 50 employees will be able place products in any area of the store and continue to offer volume promotions on HFSS products to customers.

Negative Impact on Fresh in Symbol Retail Stores

The inclusions of independent retailers trading under symbol group brands being included in the location restriction regulations will have a negative impact on the provisions of healthy and fresh food offer.

ACS' polling of retailers demonstrates that all types of convenience stores are doing more to stock and promote a range of fresh and healthy options in their businesses. Retailers trading under symbol groups are often at the forefront of this trend as their relationship with symbol groups enables them to access a wider range of products, including fresh and healthy products.

Our latest polling of 1,210 convenience retailers showed that 41% of symbol group retailers had increased their sales of fruit and vegetables compared to 25% of independent retailers⁹. In addition, only 10% of symbol group retailers do not sell fruit and vegetables versus 33% of independent retailers¹⁰. Forcing symbol group retailers to refit stores will divert investment and sales space dedicated to the provision of healthy produce.

HFSS Products

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

No.

⁹ ACS Voice of Local Shops Survey August 2020

¹⁰ ACS Voice of Local Shops Survey August 2020

The products in scope are too broad and some products are difficult for retailers to identify as HFSS, for example the consultation is suggesting that oats and potatoes are included in scope. The legislation captures significantly more products than the Scottish definition of 'discretionary foods' which refers to confectionery, sweet biscuits, crisps, savoury snacks, cakes, sweet pastries, puddings and sugar containing soft drinks.

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

No.

As referenced in answer to question one, further clarity is needed to show that category one of the regulations is intended to apply to free refills in the out of home sector and not products that are not prepacked in a retail setting.

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

The draft legislation does not make clear that customer operated coffee machines with added syrup, milkshake machines, ice-slushe machines and donuts served in boxes are not included, as they do not arrive at the store as prepacked products.

Enforcement

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

Yes.

Supplier Information

There are thousands product lines stocked in convenience stores that will make it extremely challenging to keep track of new products and their NPM score. Retailers will rely heavily on suppliers to provide information on the NPM score of their products.

There should be more clarity in the regulations or supporting guidance on the content and clarity of information that suppliers are expected to provide alongside their products. Where suppliers have provided inaccurate information and retailers have acted in good faith based on this information, retailers should not be subject to fines or prosecutions.

Supporting guidance must set out what information retailers will have to show to enforcement officers about NPM scores and how long this information has to be retained by a retailer.

Compliance Liability Under Symbol Groups

DHSC are currently identifying symbol group retailers as medium or large businesses by calculating their employee numbers based on agreements with symbol groups. For the purposes of enforcement liability, we seek clarification on whether individual symbol group retailers, which own and operate the retail premises, will be liable for compliance or if the symbol group that supply them will be responsible for compliance?

If it is the independent retailer trading under a symbol group brand that has liability for compliance, then the regulations are defining these businesses in two different ways. They are defining independent symbol group retailers first as medium or large sized business to bring them in scope of the regulations, but also recognising their operational independence

by suggesting they have the autonomy to determine their compliance with promotional and location restrictions.

This approach is deeply inconsistent and demonstrates that that symbol group retailers cannot be considered medium or large businesses because of their agreements with symbol group suppliers.

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

No.

We have provided comments on the relevant checks below:

- *“whether the store is part of a medium or large business (where the total number of employees operating under that business name is 50 or more).”*

Identifying Symbol Group Retailers

We would like to understand how enforcement officers will assess a retailers’ participation in symbol group supply agreements. Based on the current regulations we assume that enforcement officers visiting stores will have to request and review contracts between symbol groups and retailers to check fascia and supply agreements.

For local authority enforcement teams this may require legal advice and support. For retailers, if checks of supplier contracts are necessary then this will need to be made clear in supporting guidance as supply contracts are not current readily available in stores. Many of these supply agreements will be commercially sensitive and need to be treated in the strictest confidence by enforcement officers.

Symbol Group Retailer Employee Numbers

We also assume that enforcement officers will have to check the number of people employed by a symbol group. Symbol group retailers will not be aware of the number of people employed by their symbol group partners and should not be expected to share this information with enforcement officers.

Brands on Facias

Where other brands are present on convenience store facias will enforcement officers also need to see copies of their supply contracts? For example, enforcement officers may see the following types of brands on convenience store fascia: food concessions operators, soft drinks brands, newspaper providers, parcel delivery & collections service brands and frozen food providers.

Based on the current regulations, we assume that enforcement officers would need to check fascia agreements and clauses in contracts to determine if the business has entered into a ‘franchise agreement’ with these alternative brands.

- *“whether the internal store size is less than 185.8 square metres (2,000 square feet) 185.8 (exempt from location restrictions).”*

As we have indicated in response to Question 3, 4, 5 and 6 we believe that checking the internal store sizes will be much easier if the regulations are consistent with the definitions of ‘relevant floor area’ and ‘sale of goods’ included in the Sunday trading Act, Schedule 1.

- *“if there are products in these categories on volume or location promotions, to ascertain from the retailer how they have ensured that these are not HFSS, as defined by the 2004/5 NPM score.”*

Retailers will rely heavily on suppliers to provide information on the NPM score of their products. There should be more clarity in the regulations or supporting guidance on the content and clarity of information that suppliers are expected to provide. Where suppliers have provided inaccurate information and retailers have acted in good faith based on this information, they should not be subject to fines or prosecutions.

Supporting guidance must set out what information that retailers will have to show to enforcement officers about NPM scores and how long this information has to be retained by a retailer.

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

N/A

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

Yes.

Given the short timeframes for implementing these regulations, the complex nature of determining products in scope and the potential for 2,000 small independent retailers trading under symbol group brands to be impacted we urge local authorities to take light touch approach to enforcement activity.

We would like to see local authorities offer advice and guidance to retail business before they engage in any enforcement activity, including improvement notices. However, we do agree that where enforcement action does need to be taken issuing an improvement notice is a proportionate first response.

We ask that local authorities count repeat offence based on the premises not meeting part of the regulations as oppose to the overall retail business. For large multiple site retailers operating thousands of stores it would not be proportionate to escalate enforcement activity across the whole business where one premises is falling short.

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

Yes.

Given the short timeframes for implementing these regulations, the complex nature of determining products in scope and the potential for 2,000 small independent retailers trading under symbol group brands to be impact we urge local authorities to take a pragmatic approach to enforcement activity.

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

No.

We believe that a £2,500 start point for fines for promotional activity is disproportionately high. We recommend reducing the starting points for fines and reviewing the number of fines issued after 3 years of the implementation of the policy.

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

N/A

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

Yes.

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.

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

Yes.

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

Yes.

[Additional Requirements](#)

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?

N/A

Review

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

N/A

[Further Feedback](#)

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

We believe that delivering the new regulations by 6th April 2022 will be extremely challenging for the convenience retailers. As we have outlined throughout our consultation response, small format retailers will have to physically change large areas of their stores and this will require big investments at short notice.

We are concerned that there are not enough shop fitters operating in the markets to support the refurbishment of stores at short notice. For these reasons we recommend that DHSC consider extending the implementation period for at least 18 months after the final regulations are published.

DHSC should also consider extending the implementation date of the regulations for small store under 3,000sqft. Given the disproportionate impact that location restrictions have on small stores an extension for stores under 3,000sqft will allow more time to refit stores and spread out the operational impacts.

There is precedent for this approach based on the implementation period of the tobacco display in 2012¹¹. Large retail premises, over 3,000sqft, had to comply with the tobacco display ban regulations after a short implementation period. However, small retailers were given a 3-year extension period to comply with the regulations. This extension period was issued in acknowledgement of the bigger impact and disruption on their businesses.

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

Yes.

To support the Government understand the implications of proposals on the enforcement community have secured feedback from ACS' Primary Authority Partners Bucks and Surrey Trading Standards:

Comments from Buckinghamshire and Surrey Trading Standards:

In the context of our Primary Authority Partnership we would make the comments below. The ACS and this service will potentially be looking to provide advice to members and the contributions below are made with a view to achieving as much clarity and certainty as we can to ensure the guidance is as supportive as it can be to enable compliance with the new requirements.

Q3/4/5/and 6

We would generally agree with the ACS issues raised. The introduction of a new floor space size for the application of the Regulations will produce new challenges for both regulators and businesses. It is also of note that the relevant floor space for the exemption from unit pricing is also 280 sqm. Whilst appreciating there may well be a rationale behind the new space definition it will mean increased costs for all parties to produce and consider the evidence needed.

Q7

We can appreciate the issues raised by the ACS relating to the definition of "designated queuing area".

In bigger retail premises this definition may be easier to manage, for smaller premises the issues outlined in the ACS response highlight the difficulties both business and regulator will face when attempting to produce a pragmatic solution to achieve compliance.

There may be other solutions which could be considered to tackle the issue being addressed by the definition of the queuing area, for instance the affected points of sale for HFSS foods may be caught by the other definitions relating to the till area and store entrance.

Q13

The diversity of trading arrangements for symbol groups highlighted by the ACS response will create potential difficulties for regulators. They will need to examine and understand the legal arrangements in the relationship.

Generally as regulators we would look to the relevant legal entity to take responsibility for achieving compliance by taking appropriate steps to do so. The symbol group scenario

¹¹ [DHSC 2012: Tobacco Display Ban Ends in Shops from Today](#)

presents challenges to obtain clarity about which legal entity should be expected to take this responsibility.

We would suggest that more work should be done on this issue to seek ways to achieve the outcome the DOHCS want to obtain whilst being flexible enough to accommodate the differing arrangements within symbol groups.

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

Designated queuing areas

If 'designated queuing area' is to remain in the regulations, guidance must make absolutely clear to businesses and to enforcement officers what is meant by this. For example, if this is to only refer to where a premises has installed permanent fixtures such as barriers, bollards or railings.

We are concerned that without this clarity, where a retailer has not implemented a designated queuing area, but where customers choose to queue or where stock is placed to utilise store space, that this could be interpreted as a designated queuing area by enforcement officers.

How to calculate the nutritional profiling model

Retailers do not have experience in calculating NPM and will rely on suppliers to provide information. We welcome the suggestion that DHSC will provide guidance to help retailers calculate NPM scores, this can only be calculated with specific information about product ingredient that are not always clear on packaging.

What information to expect from suppliers on NPM

The guidance must be specific on what suppliers responsibilities are in relation to NPM. As manufacturers of product will have greater knowledge about ingredients, retailers will rely on suppliers to provide enough information for them to determine whether products are in scope.

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

See answer to question 33.

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.

ACS would like to engage in continued discussion with DHSC officials post the closure of the consultation. There are number of changes to regulations that must take account of operational realities in stores. It is important that DHSC continues to engage with industry and other stakeholders as the regulations are redrafted. Furthermore, we support the overall policy being reviewed after two to three years to review its effectiveness.

Annex A

Figure 1 The red shading demonstrates affected areas in store.



Annex B

ABOUT ACS

The Association of Convenience Stores lobbies on behalf of over 46,000 convenience stores across mainland UK on public policy issues that affect their businesses. ACS' membership is comprised of a diverse group of retailers, from small independent family businesses running a single store to large multiple convenience retailers running thousands of stores.

Convenience stores trade in a wide variety of locations, meeting the needs of customers from all backgrounds. These locations range from city centres and high streets, suburban areas such as estates and secondary parades, rural villages and isolated areas, as well as on petrol forecourts and at travel points such as airports and train stations.



WHO WE REPRESENT

INDEPENDENT RETAILERS



ACS represents almost 19,000 independent retailers, polling them quarterly to hear their views and experiences which are used to feed in to Government policy discussions.

These stores are not affiliated to any group, and are often family businesses with low staff and property costs. Independent forecourt operators are included in this category.

SYMBOL GROUPS AND FRANCHISES



ACS represents over 14,000 retailers affiliated with symbol groups. Symbol groups like SPAR, Nisa, Costcutter, Londis, Premier and others provide independent retailers with stock agreements, wholesale deliveries, logistical support and marketing benefits.

Symbol group forecourt operators and franchise providers like One Stop are also included in this category.

MULTIPLE AND CO-OPERATIVE BUSINESSES



ACS represents over 13,000 stores that are owned by multiple and co-operative retailers. These businesses include the Co-Operative, regional co-operative societies, McColls and others.

Unlike symbol group stores, these stores are owned and run centrally by the business. Forecourt multiples and commission operated stores are included in this category.

THE CONVENIENCE SECTOR



In 2020, the total value of sales in the convenience sector was £44.7bn.

The average spend in a typical convenience store transaction is £7.46.



There are 46,955 convenience stores in mainland UK. 72% of stores are operated by independent retailers, either unaffiliated or as part of a symbol group.



The convenience sector provides flexible employment for around 412,000 people.

13% of independent/symbol stores employ family members only.



22% of shop owners work more than 60 hours per week, while 24% take no holiday throughout the year.

72% of business owners are first time investors in the sector.



Convenience stores and Post Offices poll as the two services that have the most positive impact on their local area according to consumers and local councillors.

80% of independent/symbol retailers have engaged in some form of community activity over the last year.



Between August 2019 and May 2020, the convenience sector invested over £585m in stores.

The most popular form of investment in stores is refrigeration.

OUR RESEARCH

ACS polls the views and experiences of the convenience sector regularly to provide up-to-date, robust information on the pressures being faced by retailers of all sizes and ownership types. Our research includes the following regular surveys:

ACS VOICE OF LOCAL SHOPS SURVEY

Regular quarterly survey of over 1,200 retailers, split evenly between independent retailers, symbol group retailers and forecourt retailers. The survey consists of tracker questions and a number of questions that differ each time to help inform ACS' policy work.

ACS INVESTMENT TRACKER

Regular quarterly survey of over 1,200 independent and symbol retailers which is combined with responses from multiple businesses representing over 3,000 stores.

ACS LOCAL SHOP REPORT

Annual survey of around 2,400 independent, symbol and forecourt retailers combined with responses from multiple businesses representing 6,700 stores. The Local Shop Report also draws on data from Lumina Intelligence, IGD, Nielsen and William Reed.

BESPOKE POLLING ON POLICY ISSUES

ACS conducts bespoke polling of its members on a range of policy issues, from crime and responsible retailing to low pay and taxation. This polling is conducted with retailers from all areas of the convenience sector.

For more information and data sources, visit www.acs.org.uk