

# Regulating food marketing: France as a disappointing example<sup>1</sup>

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In France, a third of the population are overweight or obese,<sup>2</sup> and there exist significant social disparities: 7.2% of children from higher socio-economic backgrounds are overweight and 1.3% are obese, compared with 15.6% and 5.8% respectively of children from lower socio-economic backgrounds. The economic and social costs of obesity are significant and have been estimated at EUR 20.4 million per annum, including both direct health costs and indirect costs, such as production losses connected to absenteeism.<sup>3</sup>

To prevent obesity and related diseases, France has adopted a National Programme on Health and Nutrition (Programme national nutrition santé or PNNS). The first version of the PNNS took effect in 2001, and the fourth version is currently under discussion. To date this programme has tended to favour the adoption of incentive rather than legally binding measures. However, the Director of the PNNS himself, Professor Serge Hercberg, does not consider that incentive measures are sufficient to effectively prevent obesity. He has therefore called for a 'new momentum' in French nutrition policy. In a report for the Ministry of Health, which was published on 28 January 2014, he argued:

'Incentive measures have allowed some [policy] developments, but have shown their limits by only affecting a small number of the issues relating to food supplies. It is necessary to find other ways to speed up the improvement of the nutritional quality of the food supplied to consumers, and to make the physical and economic accessibility of healthier foods easier, especially for the most vulnerable populations.'<sup>4</sup>

In line with the overall approach of the PNNS, which has arguably lacked ambition to date, France has not regulated the marketing of unhealthy food to protect children from its detrimental health effects in line with the WHO Recommendations. This policy choice must be assessed in its historical context. Two main instruments purport to regulate the marketing of unhealthy food to children. However, neither of them can be seen as amounting to an implementation of the WHO Recommendations (I). However, there are some signs that suggest that France might, in the not too distant future, finally implement the WHO Recommendations as part of its childhood obesity prevention strategy (II).

## I. A regulatory framework demonstrating very limited ambitions

The French case study is characterised by the expression of highly polarised views reflecting the strong and often opposed interests at stake. The economic interests of the agrifood sector, the first economic sector in France, are very strong. As a result, attempts to provide a legal

<sup>1</sup> We are grateful to Nikhil Gokani for his comments on an earlier draft.

<sup>2</sup> 32.3% according to the Obepi study 2012, INSERM, Kantar Health, Roche (2012), « Enquête épidémiologique sur le surpoids et l'obésité ».

<sup>3</sup> Obésité : quelles conséquences pour l'économie et comment les limiter?, lettre du Trésor-Eco n°179, September 2016.

<sup>4</sup> S. Hercberg, Propositions pour un nouvel élan de la politique nutritionnelle française de santé publique dans le cadre de la Stratégie nationale de santé - 1ère partie : mesures concernant la prévention nutritionnelle, 28 January 2014, La Documentation française.

framework restricting unhealthy food marketing have given rise to vocal opposition. This, in turn, has limited the opportunities for consumer organisations and learned societies of nutrition and public health experts to find sufficient support within government to restrict the marketing of unhealthy food, particularly to children. These antagonistic positions are reflected within government departments themselves. For example, despite the assertion of the existence of a National Food Policy in Article 230-2 of the French Rural Code, the measures aiming to tackle obesity and overweight nonetheless seem to originate from two main sources: some have been initiated and promoted by the Ministry of Health on the basis of the PNNS; whilst others have originated from the Ministry for Agriculture on the basis of the Programme National pour l'Alimentation (PNA, National Food Programme).<sup>5</sup> These difficulties are compounded at a regional level, insofar as the concerted actions between the Offices of the Regional Departments for Food, Agriculture and the Forest (DRAAF, Directions Régionales de l'Alimentation, de l'Agriculture et de la Forêt), and the Regional Health Agencies (ARS, Agences Régionales de la Santé) have not been implemented evenly across the country. The lack of a coherent multisectorial government policy has hindered the implementation of an effective, evidence-based nutritional policy, and it is arguable that the failure of France to regulate unhealthy food marketing to children and implement the WHO Recommendations is both an illustration and the outcome of these tensions.

The only legally binding measure adopted in France which relates specifically to the impact of food marketing on health is a requirement that food advertisers should insert health warnings in their advertisements (A). This measure is complemented by a self-regulatory initiative: a voluntary charter on nutrition and physical activity which commits private stakeholders, with the support of various Government ministries and public agencies, to improve the quality of food marketing broadcasted on French television and other audiovisual media services. This compromise was established between 2007 and 2009 after the failure of the proposal put forward by the Ministry of Health to ban unhealthy food advertising during television programmes aimed at children (B).

#### **A. The 2004 Public Health Act and the imposition of compulsory health warnings in food adverts**

Even though several legislative proposals have been made to this effect, France has not restricted the marketing of unhealthy food to children: instead, it has limited itself – with the adoption of the Public Health Act of 9 August 2004 – to mandate the insertion of health messages in all advertisements promoting processed food or non-alcoholic beverages with added sugar, salt or artificial sweeteners.<sup>6</sup>

The parliamentary debates that led to the adoption of the Act illustrate existing tensions. During the first reading in Senate (the second chamber of the French Parliament), advertisers were offered an alternative: they could either decide to include a health message in their food

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<sup>5</sup> CGAAER n°12150, Rapport de mission d'expertise et d'appui. Premier bilan du Programme national pour l'alimentation, décembre 2013.

<sup>6</sup> M. Friant-Perrot et A. Garde, La publicité alimentaire et la lutte contre l'obésité infantile en droit français et en droit anglais, in *Actualités de droit économique : aspects de droit de la concurrence et de la consommation et de droit de l'agroalimentaire*, Petites Affiches, Numéro spécial – Actes de colloque, 6 octobre 2011, 199, pp 27-39 ; *Agir sur les comportements nutritionnels. Réglementation, marketing et influence des communications de santé*, INSERM, 2017 (see in particular the first chapter of this report, as well as the additional contribution by M. Friant-Perrot, *Les enjeux juridiques de la promotion d'une alimentation saine: messages sanitaires et marketing alimentaire en France*).

adverts broadcasted during children's programmes, or if they decided not to broadcast this information themselves, they could instead finance a health message that would be broadcasted on the same channel and would last for the same amount of time. During the second reading in the National Assembly (the first chamber of the French Parliament), the text was modified, stating that 'television advertising for food products whose composition may be harmful for children or teenagers if consumed in excess should finance the realization and broadcast of a nutritional information message'. The novelty resided in the introduction of the notion of nutrient profiles: the measure was intended to require the insertion of health messages in adverts promoting unhealthy food only. Finally, in the second reading in Senate, the advertisers were offered a choice: they could opt for the insertion of a health warning in their advert, or pay a contribution to the budget of the INPES (Institut National de Prévention et d'Education pour la Santé, the French National Institute for Health Education and Prevention) which will have to develop and broadcast appropriate health messages. This amounts to an implicit recognition of advertisers' responsibility and can thus be compared to the application of the 'polluter pays' principle often used in environmental law and policy. However, the food industry has overwhelmingly opted in favour of inserting the health message, rather than the alternative solution of making a financial contribution to the health prevention budget of the INPES.

The measure finally adopted, which the Governments supported, was codified in Article L 2133-1 of the Public Health Code. However, it was strongly criticised by the members of parliament who were hoping for the introduction of unhealthy food marketing restrictions in youth-oriented television programmes.<sup>7</sup>

Article L 2133-1 of the Public Health Code mandates that 'commercial communications for drinks with added sugar, salt or sweeteners, or for processed food, must contain a health message. For commercial communications on the Internet, on television or on the radio, this obligation only applies to messages broadcasted from the French territory and received on this territory. The same obligation of information imposes itself to any promotion, aimed at the public, by print copies and publications edited by the producers or distributors of these products.' The aim of this provision is to limit the influence of commercial advertising by reminding consumers of the importance of a healthy diet and physical activity for their health.<sup>8</sup>

The 2004 Public Health Act was made operational with the adoption of delegated legislation laying down the specific requirements pertaining to the health messages and their use. Article L 2133-1 of the Public Health Code took effect as of 1<sup>st</sup> March 2007.<sup>9</sup>

The notion of 'processed food' has not been defined in law, but it is accepted that it should be interpreted broadly to cover all food which have undergone a process of transformation.<sup>10</sup> The

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<sup>7</sup> See Amendement Proposal n° 250 and rejected on 8 April 2004. <http://www.assemblee-nationale.fr/12/cr/2003-2004/20040191.asp>. Martine Billard MP then stated: 'The Government proposes to require that the advertiser of a commercial likely to harm children's health shall finance another commercial aimed at counteracting this first message. This amounts to presenting an argument against another, as if both were equivalent, and by expecting the public to be able to understand. This cannot be serious.'

<sup>8</sup> As the Senate's Social Affairs Commission noted, 'this measure is based on the idea that a nutritional information independent from the advertisement will be at least as effective as if it was contained in the commercial itself': <http://www.senat.fr/rap/103-372/103-3728.html#toc60>.

<sup>9</sup> The relevant delegated legislation should have been adopted 'by the 1<sup>st</sup> January 2006 at the latest' but was only adopted on 27 February 2007: JORF n°50 of 28 February 2007, page 3716 (décret), and JORF n°50 of 28 February 2007, page 3725 (arrêté).

provision does not apply to infant food, the marketing of which is prohibited except in printed publications specifically designed for health professionals.<sup>11</sup> It does not apply to alcoholic beverages either which are subject to specific rules.<sup>12</sup>

Four main health messages are listed:

- 'For your health, eat at least five portions of fruit and vegetables a day'<sup>13</sup>
- 'For your health, engage in regular physical activity'<sup>14</sup>
- 'For your health, avoid eating too much added fat, sugar or salt'<sup>15</sup>
- 'For your health, avoid snacking between meals'<sup>16</sup>

However, these messages may vary slightly depending on the food, the media and the audience concerned. For example, they can be shortened on the radio; or they can be more informal if they are intended for a child audience (using 'tu' rather than the more formal 'vous' form).

Advertisers must ensure that the four main health messages rotate: they must use them all equally in each of their campaigns so that one message – for example the message relating to physical activity which may be seen as preferable from the point of view of food manufacturers – does not appear disproportionality to the detriment of the other three. Advertisers must also ensure that the health messages appear clearly and can easily be distinguished from the commercial message they accompany, and that they cover at least 7% of the advertising surface covered or – for radio advertising – they must be broadcasted immediately after the advert.

The scope of application of Article L 2133-1 of the Public Health Code is relatively wide. It applies to television, cinema, radio, print and internet advertising, including both third-party websites and the websites of food business actors themselves. However, it does not extend to all forms of marketing. In particular, in the absence of advertising campaigns falling within the scope of Article L 2133-1, it does not apply to packaging, which means that consumers are not exposed to the message at point of sale. It also does not apply to brand advertising and sponsorship arrangements, even though such arrangements are popular with food advertisers which have been associated with major international and national sports events over the years (e.g. the Olympic Games, international and national football and rugby tournaments, the 'Tour de France' ...).<sup>17</sup>

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<sup>10</sup> The definition would be similar to the definition contained in Article 2(1)(o) of Regulation 852/2004, OJ 30 April 2004, L139/1. As such, it would not extend to non-processed food such as fruit, vegetables or spices; to food that has merely been cut (e.g. fresh meat or fish), packaged (e.g. eggs, honey), frozen or canned if nothing (water aside) has been added. Similarly for non-alcoholic beverages: adverts for teas, coffee, milk and fruit juices to which no salt, sugar or sweeteners have been added are exempted from the obligation to affix a health message.

<sup>11</sup> See Articles L121-50 to L121-53 of the Consumer Code.

<sup>12</sup> See in particular Article L3323-4 of the Public Health Code.

<sup>13</sup> 'Pour votre santé, mangez au moins cinq fruits et légumes par jour'.

<sup>14</sup> 'Pour votre santé, pratiquez une activité physique régulière'.

<sup>15</sup> 'Pour votre santé, pratiquez une activité physique régulière'.

<sup>16</sup> 'Pour votre santé, évitez de grignoter entre les repas'.

<sup>17</sup> On the absence of coverage of Article L 2133-1 of sponsorship arrangements, see *Agir sur les comportements nutritionnels. Réglementation, marketing et influence des communications de santé*, INSERM, 2017. On the sponsorship of major sports events by the food industry, see A. Garde and N. Rigby, 'Going for Gold – Should Responsible Governments Raise the Bar on Sponsorship of the Olympic Games and Other Sporting Events by Food and Beverage Companies?', *Communications Law* 17 (2012) 42.

Requiring that consumers be provided with specific information is a regulatory technique that has enjoyed considerable popularity in the development of EU and French consumer and health policies, not least because the ‘information paradigm’ places the onus on consumers to decide what is good for them and their families, expecting them to read the information and process it whilst taking their personal circumstances into account. Applying this rationale to food choices, the assumption is that if consumers are aware of the health risks involved in adopting unhealthy diets or in being physically inactive, they should be trusted to apply their knowledge and make appropriate choices.<sup>18</sup> Such rationale, which assumes that consumers see, understand and act upon the information conveyed to them,<sup>19</sup> differs from the rationale underpinning the imposition of marketing restrictions designed to protect children from the exposure to such marketing.

### **B. The Nutrition and Physical Activity Charter: a very limited voluntary initiative**

In 2009, the food and advertising industries signed this Charter and undertook to facilitate the promotion of a healthy diet and physical activity in the programmes and advertisements broadcasted on television. In particular, they agreed:

- to offer preferential rates for the broadcast of public health prevention campaigns;
- to increase the space available for nutrition and physical activity education;
- to develop short programmes promoting the objectives of the PNNS and referring to its ‘manger et bouger’ (‘eat and move’) website;<sup>20</sup> and
- more importantly for our purpose, to improve the ‘quality’ of the content of food adverts.

The debates that led to the adoption of the Charter are also symptomatic of the profound divisions that exist both within and beyond government on how food marketing should be regulated in France. Following years of campaigning by *l’UFC Que Choisir*, France’s main consumer organization,<sup>21</sup> then Secretary of State for Public Health and Sport, Roselyne Bachelot, announced on 4 February 2008 that she would lead discussions with a view to eliminating the marketing of unhealthy food aimed at children on French television.<sup>22</sup> She indicated that she would start by promoting self-regulatory measures, and if the food and advertising industries failed to make meaningful commitments by May 2008, she would propose legislation. In the first instance, the food and advertising industries boycotted the discussions by adopting an ‘empty chair’ policy. However, the food industry became less antagonistic. This caused major concern for the French audiovisual industry which vigorously lobbied the Ministry for Culture and Communication, Christine Albanel, against the adoption

<sup>18</sup> M. Friant-Perrot and A. Garde, ‘From BSE to Obesity – EFSA’s Growing Role in the EU’s Nutrition Policy’, in A. Alemanno and S. Gabbi, *New Directions of EU Law – EFSA @10* (Ashgate Publishing, 2014).

<sup>19</sup> Whether the health messages are effective is doubtful, as discussed in below.

<sup>20</sup> <http://www.mangerbouger.fr/>.

<sup>21</sup> UFC Que Choisir, study on the influence of television advertising on children’s food preferences and eating behaviours, Etude sur l’influence de la publicité télévisée sur les préférences et les comportements alimentaires des enfants, September 2006 and September 2007: <http://www.quechoisir.org/alimentation/nutrition/etude-obesite-infantile-et-publicites-televisees-bilan-2006-2007>.

<sup>22</sup> <http://www.lefigaro.fr/actualites/2008/02/04/01001-20080204ARTFIG00546-les-sucreries-bientot-interdites-de-publicite.php>.

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of a food marketing ban.<sup>23</sup> The basis of their argument was the economic loss they would suffer if unhealthy food marketing was banned.<sup>24</sup> The public and acrimonious clash between the Health Secretary of State and the Cultural and Communication Minister resulted in an unsatisfactory compromise: the adoption of the Charter,<sup>25</sup> notwithstanding the clear support that health and nutrition learned societies had expressed in favour of more robust and meaningful regulatory restrictions.<sup>26</sup>

The Charter's primary objective is the promotion of a healthy diet and physical activity. To fulfil this objective, the Charter insists in particular on the necessity to 'strengthen responsible food marketing practices'. The Charter therefore recognises that food marketing has an influence on food choices, and in particular children's choices – as described in the earlier contribution in this Special Issue on the evidence base justifying the imposition of unhealthy food marketing restrictions. However, the commitments that the French food industry has been prepared to make to protect children from its harmful impact falls short of existing evidence.

The Charter was subsequently revised in November 2013, and renewed for a five-year period.<sup>27</sup> The 2009 version was originally signed by two government departments: the Ministry of Health and the Ministry of Communications. Four have been added to the list: the Ministry of Agriculture, the Ministry of National Education, the Ministry of Overseas Territories (to reflect the fact that the scope of application of the Charter has been extended to these territories), and the Ministry of Sports and Youth. The Charter now applies to 36 channels, as opposed to 19 in 2009, including digital terrestrial, overseas territories and local channels. The material scope of the Charter has also been broadened to cover not only linear television programmes but also Internet and on-demand television programmes, and the total volume devoted to the promotion of a healthy diet and physical activity has increased from between 340 and 470 hours to a minimum volume of between 587 and 753 hours. The revised Charter has also entrusted the CSA (Conseil Supérieur de l'Audiovisuel, the French Audio-Visual Authority), which is one of its signatories, with the monitoring and the evaluation of the pledges it contains.

However, as far as the marketing of unhealthy food to children is concerned, the Charter is neither binding nor innovative and clearly falls short of the WHO Recommendations. Firstly, the Charter rests on a voluntary approach which, as argued in another contribution in this Special Issue focusing specifically on conflicts of interest, is most unlikely to effectively

<sup>23</sup> [http://www.lemonde.fr/actualite-medias/article/2009/02/19/loi-ou-accord-le-difficile-encadrement-de-la-publicite-alimentaire-a-la-television\\_1157530\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2009/02/19/loi-ou-accord-le-difficile-encadrement-de-la-publicite-alimentaire-a-la-television_1157530_3236.html).

<sup>24</sup> Indeed, in France, EUR 1.4 billion are invested in food marketing – 80% of which are for unhealthy food: <http://services.poissonbouge.net/clients/448a3090-076f-e862-84e2adf718984d17/docs/ddab729b-9013-97b9-80097db644cc16e8.pdf>. However, as discussed below, these figures neither took into account the societal costs of childhood overweight and obesity, nor did they recognize that a ban on unhealthy food marketing did not constitute a ban on the marketing of all foods. See CSA, Contribution au débat sur la publicité pour certains produits alimentaires, 13 May 2008: <http://www.csa.fr/es/Etudes-et-publications/Les-dossiers-d-actualite/Contribution-au-debat-sur-la-publicite-pour-certains-produits-alimentaires>.

<sup>25</sup> The 2009 Charter is available at: <http://www.csa.fr/es/Media/Files/Espace-Juridique/Chartes/Charte-alimentaire>.

<sup>26</sup> See in particular the open letter to Mrs Albanel, 25 April 2008: <https://www.quechoisir.org/action-ufc-que-choisir-publicites-telivisees-pour-les-produits-alimentaires-le-collectif-obesite-protegeons-nos-enfants-salue-l-appel-des-150-scientifiques-n13323/>.

<sup>27</sup> The 2013 Charter is available at: <http://www.csa.fr/Espace-juridique/Chartes/Charte-visant-a-promouvoir-une-alimentation-et-une-activite-physique-favorables-a-la-sante-dans-les-programmes-et-les-publicites-diffuses-a-la-television-1er-janvier-2014>. The revised version entered into effect in January 2014.

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address the harmful impact of unhealthy food marketing on children. The Charter involves the industry as a health policy actor. In particular, it refers to the codes of conduct of the ARPP (Autorité de Régulation Professionnelle de la Publicité, the French Advertising Self-Regulatory Association). In 2013, advertisers pledged to update, within six months, the code of conduct the ARPP had adopted in 2010 on Food Behaviour with a view to better delineating the general principles it laid down on: the need for a healthy diet, excessive consumption, snacking, nutritional comparisons, societal values relating specifically to food waste, diversity and physical activity, advertising involving children and/or directly targeting children.<sup>28</sup> One cannot help but notice how general these rules are, and how little they add to what already existed.<sup>29</sup> It is very clear that the pledges are not intended to reduce the exposure of children to unhealthy food marketing or the power that such marketing has on them. Even though signatories have pledged to promote healthy diets, the fact remains that in terms of concrete commitments, little meaningful progress has been achieved since the Charter was first signed in 2009. The renewed Charter insists on the fact that waste and unsustainable developments should be avoided. It also raises the question of the use of equity brand characters and licenced cartoon characters often accompanying the marketing of unhealthy food, for instance cartoon characters included in fast food children's menus; but it does not propose to ban their use. However, the ARPP codes of conduct do not ban such techniques, even though research has established that, if associated with unhealthy food, they contribute to increased intake and preference of such food, as discussed in the chapter reviewing the relationship between unhealthy food marketing and childhood obesity. Rather, the ARPP's Food Behaviour code of conduct requires that advertising using imaginary characters known by children and inciting them to eat a food should never promote food behaviour which would be contrary healthy food habits. In other words, licensed or equity brands characters can be used to promote unhealthy food, provided that such marketing does not condone excessive consumption – whatever the notion of 'excessive consumption' means in practice. In case the reader would have any doubt as to the leeway the ARPP Food Behaviour code grants advertisers, it adds: 'The use in advertising of humour, the use of exaggerated statements, or the reference to fantasy worlds is allowed provided that it may not mislead children into believing that the consumption of the food in question could lead to certain achievements'.

The contrast with the WHO Recommendations could not be starker, and we would argue that the Charter cannot, and should not, be seen as an implementation of the WHO Recommendations.

Interestingly, the discussions surrounding the regulation of food marketing in France do not refer at all to the WHO Recommendations. Yet, as it is argued throughout this Special Issue, the WHO Recommendations should provide the yardstick against which national policies should be developed, implemented, monitored and evaluated.

As discussed in the first contribution to this Special Issue, the objective of the WHO Recommendations is to alleviate the commercial pressure on children, in two ways that should be combined to ensure the maximum effectiveness of the national policies implementing them:

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<sup>28</sup> The Code is available in its original French version at: <http://www.arpp.org/nous-consulter/regles/regles-de-deontologie/comportements-alimentaires/>. For an English translation of the Code, see <http://www.arpp.org/nous-consulter/regles/regles-de-deontologie/food-behaviors-code/>.

<sup>29</sup> For example, the AVMS Directive prohibits the direct targeting of children in advertising; the ARPP merely applies this principle to food advertising.

- Reducing children's exposure to food marketing (how much advertising do children watch? Quantitative assessment): the broader the coverage of the rules, the more likely they are to protect children. They should not only cover television advertising, but other advertising in other traditional media (e.g. radio, print, billboards), advertising in digital media (not least the Internet, smartphones and tablets), and other forms, as well as other forms of marketing, beyond advertising to include sponsorship, product placement, advergames... The scope of application of the Charter, even though it has been somewhat extended, remains particularly narrow, and only calls on advertisers to improve the quality of their unhealthy food advertising campaigns, without restricting their use, even in children's programmes.
- Reducing the power of particularly effective marketing techniques in all media (what are the techniques that are more likely to encourage children consumption of unhealthy food? Qualitative assessment): the aim is to restrict the use of these powerful techniques rather than make their use conditional on ensuring that they are not used to promote excessive consumption.

One can only hope that scholarly societies, consumer associations, other civil society actors, and of course parliamentarians will be able to reclaim some control over the debate.

The concerns are all the more acute as the limited pledges contained in the Charter are explicitly subject to the Government's commitment that the legislative and regulatory framework relating to the marketing of unhealthy food to children will remain unchanged as of the day the Charter was signed and throughout its duration (until 2014 for the first version of the Charter, and until 2019 for the second one). In other words, the pledges would become obsolete in their entirety if the French Parliament legislated with a view to implementing the WHO Recommendations and thus decided to protect children from the negative impact that unhealthy food marketing has on their health. By promising to improve the quality of unhealthy food marketing to children – as opposed to suppressing it altogether – the French advertising and food industries have succeeded in obtaining guarantees that amendments to the existing regulatory framework would not be readily forthcoming.

The question remains why the CSA (Conseil Supérieur de l'Audiovisuel, the French Audio-Visual Authority) has consistently failed to support the effective implementation of the WHO Recommendations, even though the WHO Recommendations are based on robust evidence. It seems to have invoked two main arguments against the regulation of unhealthy food marketing in France.

Firstly, the CSA has argued that a ban on the advertising of unhealthy food would have damaging effects on the French audio-visual sector, and could negatively affect the sustainability of many television networks. The basis for such an argument is unclear: unlike what happens in the United Kingdom, for instance, it is extremely difficult in France to have access to impact assessments. As a result, the lack of transparency is notorious, and the opportunities to have an informed public debate necessarily more limited. When Ofcom (the Office of Communications in the UK) banned the marketing of unhealthy food to children,<sup>30</sup> it relied on an impact assessment and a public consultation, as a basis for its decision,<sup>31</sup> whose

<sup>30</sup> Television Advertising of Food and Drink Products to Children, 22 February 2007, Ofcom. See the contribution in this Special Issue, discussing specifically the regulation of unhealthy food marketing in the UK.

<sup>31</sup> In March 2006 Ofcom proceeded to consult on a range of different options for new restrictions on television advertising to children. On 9 May 2006 Ofcom announced that it would be publishing an update to its Impact



results are publicly available on its website. It is indeed remarkable that the CSA does not feel the need to specify the sources it has used to conclude that the regulation of unhealthy food marketing would endanger French television networks. It is all the more staggering that the CSA does not seem to have considered in its assessment the significant costs of overweight and obesity for the French national health service and French society more generally. The CSA did not address either what would be in the best interests of the child, notwithstanding the fact that one of its main roles is to ensure that these interests are effectively protected and, in line with the UN Convention on the Rights of the Child, 'upheld as a primary consideration'. It is of course necessary to take economic issues into account in an overall assessment of existing policy options. Nevertheless, the sustainability of the French audiovisual model would arguably be protected by the fact that the marketing of other products could replace food marketing; or that healthy food could replace the marketing of unhealthy food. The introduction of unhealthy food marketing restrictions could provide an incentive for the industry to reformulate the food they offer so that they have a healthier nutrient profile and can in turn be promoted. At no point does the CSA mention existing studies which establish a direct relationship between unhealthy food marketing and childhood obesity. The fact that more and more United Nations institutions invoke the necessity to regulate food marketing to children, in order to protect their fundamental rights (in particular right to food and right to health), does not seem to be a concern for the CSA.<sup>32</sup>

The second reason that the CSA has given to dismiss the prospect of adopting a marketing ban on unhealthy food to children rests on the fact that the examples of countries which have implemented such a ban would be 'inconclusive'. The CSA has not identified any specific country, and it is therefore difficult to assess its sweeping claim. However, in a document originating from the CNA (Conseil National de l'Alimentation, the French National Food Council), one can find some indications of what the CSA may have had in mind. The fact remains that the references lack precision.<sup>33</sup> A closer look at the CSA's proposed 'analysis' raises concerns. Indeed, in order to dismiss these 'inconclusive' examples, the CSA invokes the multi-factorial nature of overweight and obesity ('knowing that overweight and obesity have multifactorial causes'). It is clearly established that overweight and obesity are the outcome of the complex interaction of a wide range of factors (genetic, cultural, social, environmental...)<sup>34</sup> No intervention alone can be sufficient to effectively solve this problem.

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Assessment intended to make it more straightforward to replicate the analysis undertaken by Ofcom, in particular by using the most up to date information for calendar year 2005. In order to provide consultees with an opportunity to consider the revised data and take it into account in their responses to the consultation, Ofcom announced that it would be extending the consultation period until 30 June 2006. This update to the consultation was published on 8 June 2006.

<sup>32</sup> On the impact of unhealthy food marketing on the rights of the child, see the last contribution to this Special Issue.

<sup>33</sup> Avis n°64 on food education, food marketing, food information and the evolution of food behaviours ('avis sur l'éducation alimentaire, la publicité alimentaire, l'information nutritionnelle et l'évolution des comportements alimentaires'), 8 April 2009. In one paragraph on page 19, the CNA referred as follows to the regulatory frameworks of Quebec, Sweden, Norway and the United Kingdom (which – in passing – it grossly over simplified): 'However, one should note that in Quebec, despite the fact that all television advertising to children has been prohibited since 1980, the rate of obesity has increased from 11.5% of the population to 29.4% from 1981 to 1991. In Sweden, a country where advertising to children of less than 12 years of age has never been allowed, the rate of overweight in children amounts to 18% - a rate similar to the one observed in France. The same conclusion should be made about Norway too, where 21% of the population is overweight despite the prohibition since 1990 on television advertising (on all products) to children before 9pm. Finally, let's mention that, in the United Kingdom, restrictions on the advertising for certain foods was adopted 2006 and took effect in 2008.'

<sup>34</sup> See, for example, the final report of the WHO Commission on Ending Childhood Obesity (Geneva, 2016): [http://apps.who.int/iris/bitstream/10665/204176/1/9789241510066\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/204176/1/9789241510066_eng.pdf?ua=1).

One should not conclude that countries suffering from high levels of childhood overweight and obesity have developed ineffective policies on the marketing of unhealthy food to children specifically. The CSA's approach is deeply flawed, and it seems rather paradoxical that it would have reached this grossly over simplistic conclusion by asserting the complex nature of obesity.

The Charter is not a fatality. The adoption of a more robust, evidence-based regulatory framework is still possible, despite the standstill clause inserted in the Charter to protect private sector operators from regulatory change. Recently, there have been encouraging signs suggesting that France may not be as categorically opposed to the regulation of television advertising as the discussions and reforms discussed above suggest.

## **II. Towards some acknowledgement that France should regulate unhealthy food marketing to children?**

Despite these very slow developments and France's failure to implement the WHO Recommendations, there are signs which suggest that the idea of regulating the marketing of unhealthy food to children is still alive in some circles. France has recently introduced a prohibition on commercial advertising in children's programmes on public television channels which – even though it does not apply specifically to unhealthy food marketing – could play a role in protecting children from its harmful effects (A). Furthermore, there is an ongoing debate, with some voices strongly criticising the lack of sufficient consideration in France for the harmful impact on children's health of unhealthy food marketing and its failure to pay due regard for its international commitments (B).

### **A. Towards the regulation of television advertising to children?**

Notwithstanding the lack of meaningful progress on the implementation of the WHO Recommendations since 2009, André Gattolin MP submitted a legislative proposal in July 2015 on the reduction of the exposure of children to television advertising for consideration by the French Parliament. This proposal was presented without government support and resulted in an alliance of convenience between the Green Party, sponsors of the draft, and the right-wing Republican Party. The Socialist government's opposition to this proposal derived from the fact that the advertising ban was designed to apply exclusively to public television channels. It therefore feared the risk of revenue loss for France Télévisions<sup>35</sup> and the consequences that such loss would have on the French animation industry. Indeed, France Télévisions is the main funder of animation programmes in Europe: it invests an average of EUR 30 million per year in the production of (often high quality and diverse) films and series.<sup>36</sup> In 2015, the share of French production in the total supply of animation broadcasted on television was of 45%. Another argument which the Government put forward related to the voluntary commitment of France Télévisions not to broadcast advertising during television programmes for children aged between three and six years old, including programmes available on the Internet.<sup>37</sup> However, at the second reading stage in Senate, the socialist members of Parliament had abandoned the idea of voting against the text and merely abstained. The Government had anticipated the adoption of André Gattolin's legislative

<sup>35</sup> France Télévisions is the French state-owned public national broadcaster.

<sup>36</sup> Report of the National Assembly n°3360 of 16 December 2015 on behalf the Committee on Culture and Education, page 47.

<sup>37</sup> *Ibid*, page 52.

proposal and signed an agreement with France Télévisions with a view to off-setting the cost of the foreseeable loss of advertising revenue of EUR 20 million for 2016-2020.

Act 2016-1771 which was finally adopted on 20 December 2016 requires, in particular, that programmes from public television produced primarily for children under 12 years of age shall not contain commercial advertising messages.<sup>38</sup> Health education and promotion messages do not fall within the scope of the prohibition, as they are not regarded as commercial advertising. The ban targets both television advertising and advertising in programmes available on the website of public channels. Furthermore, the Act also requires that the CSA shall submit a yearly report to the Parliament, which shall assess the commitments taken by the editors and advertisers to protect young children and teenagers and make recommendations to improve the self-regulatory commitments of the advertising industry. Bearing in mind that the CSA has not issued any report on the application of the Charter since 2012,<sup>39</sup> the Parliament will therefore be in a position to monitor and evaluate the effectiveness of voluntary commitments – though the question remains whether it will actually and effectively do so.<sup>40</sup>

Despite its limited scope, this text is significant in light of the fact that France had up to this point consistently refused to ban television advertising, even in children's programmes. By legislating in this area, it allows for a partial implementation of the WHO Recommendations, in that the advertising ban it imposes applies to all goods and services, including unhealthy food.<sup>41</sup> It is particularly noteworthy as it was adopted despite the vocal opposition of the ANIA (Association Nationale des Industries Alimentaires, the French Food Industry Association).<sup>42</sup>

If that reform is a first step towards a limitation of the exposure of children to unhealthy food marketing, the fact remains that its impact is likely to be very limited. First of all, it only concerns television advertising (including on demand television) on public channels. How could we therefore speak of a 'ring-fenced' restriction whilst the restriction does not apply to private channels, irrespective of whether they are general or children's channels? If we consider the ranking of channels in terms of audience share of children aged between 4 and 10 years old, the first public channel is only in fifth position, the first four being private channels.<sup>43</sup> In reality, public channels have less than 15% of audience share, which will

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<sup>38</sup> Act of 20 December 2016 relating to the prohibition of commercial advertising in children's programmes broadcasted on public television, JORF n°0296 of 21 December 2016.

<sup>39</sup> Report on the application on the Charter, « Rapport d'application de la Charte visant à promouvoir une alimentation et une activité physique favorables à la santé dans les programmes et les publicités diffusés à la télévision, Exercice 2011 », 26 June 2012

<sup>40</sup> Even though the Act explicitly mentions the possibility of regulating private channels by delegated legislation this reference does not allow for an extension of the advertising ban on public channels to private channels, as such a reform would have to be adopted by an Act of Parliament rather than by delegated legislation.

<sup>41</sup> in the Senate report on the legislative, Mrs Bouchoux stated: '*Our proposal focuses on the most vulnerable public, children, who are not able to make a difference between a character from a cartoon and the same character which appears a few moments later to promote a sugary drink or a processed chocolate bar*': Rapport n°162 du 30 novembre 2016 fait au nom de la commission de la culture, de l'éducation et de la communication (1) sur la proposition de loi, modifiée par l'assemblée nationale, relative à la suppression de la publicité commerciale dans les programmes jeunesse de la télévision publique.

<sup>42</sup> The ANIA believes that 'restrictive measures have no proven effect on overweight and obesity', lettre nutrition n° 25 – November/December 2009.

<sup>43</sup> Rapport « Publicités alimentaires à destination des enfants et des adolescents », Inpes, 22 mai 2014, Hélène Escalon, p 8.

unavoidably and significantly lessen the impact of the new law.<sup>44</sup> Furthermore, advertising investments made by advertisers on the websites of eight television channels aimed at children<sup>45</sup> were estimated at EUR 3.4 million in 2012, representing 32% of all-sector investments on these channels' websites, which shows the importance of on demand television as a medium for food marketing. Secondly, it is legitimate to ask whether it is efficient to regulate television without restricting all other media (internet, VoD, Youtube...) marketing unhealthy food, despite the fact that such media increasingly affect children. Thirdly, by only targeting programmes aimed at children under 12, the regulatory framework excludes family oriented programmes from the scope of the prohibition and does not effectively protect children, both under 12 and teenagers, from the harmful effects unhealthy food marketing has on them, notwithstanding the fact that an increasing number of actors have argued for more far-reaching restrictions.

### **B. Ongoing voices arguing in favour of robust unhealthy food marketing restrictions**

Voices have begun to call for France to finally take into consideration the impact of food marketing on children's eating behaviour, and to meet its international commitments.

Firstly, in a report to the State Secretary for Health published in January 2014, Serge Hercberg argued for the regulation of unhealthy food marketing, emphasising the international consensus on the matter.<sup>46</sup> In his report, Serge Hercberg suggests, among others, that France should regulate food marketing on the basis of the nutritional quality. As the objective is to reduce marketing pressures which encourage children (including teenagers), as particularly vulnerable consumers, to eat food of lesser nutritional quality, and to promote the consumption of healthier foods, he urges industry to reformulate its products. In stark contrast with the CSA, the report highlights that the experience of other countries which have regulated food marketing have been useful as part of national obesity prevention strategies. In particular, the arguments often raised to challenge the effects of unhealthy food marketing restrictions are discussed to demonstrate that the problem is not so much the regulation of such marketing, but rather the scope (which media...) and content of the restrictions thus adopted. In this context, Serge Hercberg recommends not to rely exclusively on self-regulatory measures (such as the Charter) which are insufficient to reduce the impact of unhealthy food marketing.<sup>47</sup> He suggests instead the imposition of a watershed on the marketing of all food with an unhealthy nutritional profile on television and the internet between 7am and 10 pm. He also recommends that advertising on radio and in print (posters, newspapers) should be accompanied by information on the food's nutrient profile.<sup>48</sup>

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<sup>44</sup> A channel like Gulli is not targeted by the law, but concentrates 13,4% of the audience share of 4-10 year old (Source : Médiamétrie/Médiamat 2012).

<sup>45</sup> Boomerang, Canal J, Gulli TV, M6 Kid, Monludo, Tiji, Cartoon Network, Nickelodeon.

<sup>46</sup> S. Hercberg, Propositions pour un nouvel élan de la politique nutritionnelle française de santé publique dans le cadre de la Stratégie nationale de santé - 1ère partie : mesures concernant la prévention nutritionnelle, 28 janvier 2014, La Documentation française. In particular, he noted both the consensus regarding the scientific evidence on the influence of marketing on eating behaviours and the political consensus which led to the adoption of the WHO recommendations by the then 193 States of the World Health Assembly in May 2010.

<sup>47</sup> *Ibid*, page 25.

<sup>48</sup> More generally, the Hercberg report proposes to regulate food marketing to children on the basis of nutrient profiling (at page 62), as the WHO itself has recommended.

The INPES also commissioned a report, completed in September 2014, which summarised the state of scientific evidence on the impact of marketing on children's food preferences, purchase requests and eating behaviours and argued that France should implement the WHO Recommendations.<sup>49</sup> This report showed in particular the existence of extensive literature written in English, and the paucity of research in French on the matter. This can probably be explained by the less noticeable presence in France of academic research on social marketing and, more generally, by the limited funding available for social sciences research on public health. The INPES itself carried out some research on how food was marketed to children (including teenagers), which looked at the media and the marketing techniques used, marketing investments, the food categories promoted, the impact on children's food preferences and purchase requests, and parents' perception of regulating food marketing.<sup>50</sup> This report established that three quarters of food advertising investment (72%) in children's programmes, representing EUR 29.7 million, were for unhealthy food.<sup>51</sup> The study also showed that among the food advertising investments (including drinks and catering) on the websites of the eight children's channels studied, 'those for [unhealthy] food amounted to EUR 2.8 million in 2012, representing 82% of food investments in total by advertisers on the websites of these channels[...] The high pressure for fast food should be noted, with Mc Donald's in the first position as advertiser for this type of products on children's channels, with an investment of EUR 1.43 million.<sup>52</sup> Facing this abundance of advertising for products with a lesser nutritional quality, the INPES sought the views of 934 parents of children aged between 4 and 17 on the possible introduction of restrictions or even a total ban on unhealthy food marketing. The results showed that 74% would support a law banning unhealthy food marketing to children.<sup>53</sup>

Finally, and more recently, an interdisciplinary expert group undertook a collective study led by the INSERM (Institut national de la santé et de la recherche médicale, the French National Institute for Health and Medical Research), which assessed the decision of France to impose health message rather than restrict unhealthy food marketing, particularly to children.<sup>54</sup> The study clearly and convincingly demonstrates that the health messages introduced in 2007 are ineffective. The expert group argued that, even though the messages are generally known by French consumers, they may nonetheless lead to a saturation effect. Furthermore, an exploratory study using eye trackers was carried out in parallel with the expert group study on a sample of 51 participants. It showed that the participants exposed to the health messages inserted in television food adverts paid hardly any attention to these messages.<sup>55</sup> Demonstrating the inefficiency of the mechanism set up by the 2004 Public Health Act, the expert group have recommenced to refocus the debate on the role that nutrition information can play in French nutrition policy, as well as its limits. The group argues that only a multisectoral policy, designed to improve the food environment, as opposed to a policy based

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<sup>49</sup> M. Friant-Perrot et A. Garde, Impact du marketing sur les préférences alimentaires des enfants, INPES, 2014: <http://inpes.santepubliquefrance.fr/30000/pdf/marketing-alimentaire-des-enfants.pdf>.

<sup>50</sup> H. Escalon, Publicités alimentaires à destination des enfants et des adolescents- Canaux utilisés, investissements et ressorts publicitaires, aliments promus, impact sur les préférences alimentaires et les requêtes d'achats des enfants, perception d'une réglementation par les parents, INPES, 2014.

<sup>51</sup> Page 12.

<sup>52</sup> Page 14.

<sup>53</sup> Page 27.

<sup>54</sup> Inserm, Expertise collective- Agir sur les comportements nutritionnels. Réglementation, marketing et influence des communications de santé, EDP INSERM, 2017 : <http://www.inserm.fr/index.php/thematiques/sante-publique/expertises-collectives>.

<sup>55</sup> During the 20 seconds of the ad duration, the health messages were looked at for an average of barely half a second, whilst a quarter of the participants did not even see the message.

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exclusively on the individual responsibility of consumers can effectively improve eating behaviours in the long term. In particular, they argue that the improvement of the health messages should not preclude France from adopting a legally binding framework banning the marketing of unhealthy food, particularly to children, in line with the international commitments that France has undertaken. They also emphasise the weaknesses of the self-regulatory mechanisms intended to limit the impact of unhealthy food marketing (Charter from 2009), giving further weight to the similar recommendations contained in the Hercberg and INPES reports.

### **Conclusion:**

#### **A regulatory model relying far too heavily on the personal responsibility of consumers**

The nutrition policy which France has adopted shows that, despite the early implementation of the PNNS, the focus has tended to be placed on consumer information and education. If the objective of making individual consumers more responsible for their food choices and those of their families is necessary, it is not sufficient. It is also important to ensure that the food environment is durably changed. In particular, it is necessary to ensure that the positive outcomes of the French nutrition policy are more fairly distributed amongst individuals: it is only then that the strong health inequalities noted above can be reduced.<sup>56</sup> In this regard, France's lack of ambition is symptomatic of a timid policy which is characterised by its limited scope.

The recent debate on the implementation of nutrition logos shows, however, that the implementation of a simplified system of nutrition labelling could empower consumers to make healthier food choices raises controversies. Only unbiased, non-misleading information available through the nutritional declaration mandated by Regulation 1169/2011 on the provision of food information to consumers has received the approval of the French food industry. However, using the possibility offered by Article 35 of the Food Information Regulation, France provided in its Act no. 2016-41 of 26 January 2016 on the modernisation of the health sector, the implementation of a simplified nutritional information in order to 'facilitate consumer choice in the light of the energy and nutrient content to their diet'.<sup>57</sup> However, a vivid debate arose regarding which system should be chosen to enable consumers to distinguish food on the basis of its nutritional profile.<sup>58</sup> The Minister of Health therefore decided to nominate a Commission in February 2016 to experiment under real-world purchase conditions the four systems existing in France (Nutri-Score, SENS, Nutri-Repère and Nutri-Couleurs). The Minister presented the Commission's comparative study results on 15 March

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<sup>56</sup> On health inequalities and non-communicable diseases, see in particular: N. Gokani, 'Regulation for Health Inequalities and Non-Communicable Diseases: in Want of (Effective) Behavioural Insights' (2007) 23(2) *European Law Journal* (forthcoming); A. Beauchamp et al, 'The effect of obesity prevention interventions according to socioeconomic position: a systematic review' (2014) 15 *Obesity Reviews* 541; R. McGill et al, 'Are interventions to promote healthy eating equally effective for all? Systematic review of socioeconomic inequalities in impact' (2015) 15 *BMC Public Health* 457; B. Loring and A. Robertson, *Obesity and inequities: Guidance for addressing inequities in overweight and obesity* (WHO Regional Office for Europe 2014).

<sup>57</sup> Article L3232-9 of the Public Health Code.

<sup>58</sup> The controversy exists in many EU Member States: in the absence of a mandatory designated nutrition logo, it is feared that Member States and business actors could develop their own systems of information, running the risk that they may hinder the free movement of goods in violation of the Food Information Regulation and the general Treaty provisions on the free movement of goods. This is why the Food Information Regulation provides that the European Commission shall present to the Parliament and the Council, at the latest on 13 December 2017, a report on the use of forms of expression and complementary presentation of food information, to determine whether it is appropriate and feasible to propose harmonizing legislation.

2017 and announced that it would adopt a ministerial order implementing the ‘Nutri-Score’ logo. This interpretative system of information called ‘5C’ was recommended by the research team directed by Professor Serge Hercberg and has received the support of the French consumer organisation UFC Que Choisir, which urges food manufacturers and distributors to implement it.<sup>59</sup> A letter and a colour are assigned to each food (on a scale from A, green, to E, red) depending on criteria based on food composition. This system is considered to be easily understandable, whilst relatively easy to implement.<sup>60</sup> Even though the Secretary of State for Health has undertaken to implement this system, it could meet further opposition from business actors: the ANIA does not support its application, despite the results of the comparative study.<sup>61</sup>

The point remains: if it is indeed important for France to support consumers in their food choices through simplified food information, the national obesity prevention strategy could not be complete without the implementation of the WHO Recommendations and the imposition of effective unhealthy food marketing restrictions. The 2009 Charter, renewed in 2013, does not protect children from the harmful impact that unhealthy food marketing has on children. Evidence supporting a robust regulatory response is becoming ever more compelling, not only in English-speaking countries, but increasingly in France too.

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<sup>59</sup> UFC Que choisir, Etiquetage nutritionnel, les surprises du code couleur, 24 February 2015.

<sup>60</sup> ANSES, Faisabilité de la classification des aliments selon l’algorithme proposé par la FCD. Comparaison des résultats obtenus à ceux du système 5-C intégrant les ajustements du HCSP, March 2016: <https://www.anses.fr/fr/system/files/AUTRE2015SA0253.pdf>.

<sup>61</sup> On 24 April 2017, France notified the proposal to the European Commission under Directive 2015/1535 to ensure its compatibility with EU internal market law (2017/159/F).

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